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Articles

***301 PITCHESS V. BRADY: THE NEED FOR LEGISLATIVE REFORM OF CALIFORNIA'S
CONFIDENTIALITY PROTECTION FOR PEACE-OFFICER PERSONNEL INFORMATION**

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In *Brady v. Maryland*, the United States Supreme Court held that the federal Constitution's Due Process Clause prohibits prosecutors from failing to disclose evidence favorable to a criminal defendant if the evidence is material either to the guilt or punishment of the accused. [FN1] The Court explained that the Brady rule was a natural extension of earlier rulings prohibiting prosecutors from using perjured testimony and intentionally suppressing evidence to obtain convictions. [FN2] Brady is premised on the idea that “society wins not only when the guilty are convicted but when criminal trials are fair; our . . . system of justice . . . suffers when any accused is treated unfairly.” [FN3] The Brady ruling is also a pragmatic decision that recognizes a failure to disclose exculpatory evidence alone is pernicious to fair trials because it often leads to the unfair presentation of skewed or incomplete evidence, even if unaccompanied by perjured prosecution testimony or other deliberate misconduct. [FN4]

The Court has consistently affirmed and strengthened the Brady rule since its introduction in 1963. Under current federal law, the Brady rule is self-executing and not contingent on a specific defense request for exculpatory evidence. [FN5] Nor is it subject to any good-faith exception. [FN6] A prosecutor violates the rule by failing to disclose Brady material, regardless of the prosecutor's motivation or lack of actual knowledge. [FN7] The disclosure requirement is also ongoing, which means it can first arise at any stage of criminal proceedings, even after trial. [FN8] A *302 prosecutor's Brady duty also extends to information in the possession of the entire “prosecution team,” which includes investigating officers and law-enforcement agencies. [FN9] Therefore, failure to disclose Brady material within the possession or knowledge of police officers and law-enforcement agencies, but not the prosecution, violates the Constitution. [FN10]

The Court has also extended the definition of Brady exculpatory material to include evidence that shows bias on the part of government witnesses or that might unfavorably impact their credibility. [FN11] This includes impeachment evidence that can be used against police officers who investigate crimes or make arrests in a case. [FN12] Such officers are often the only witnesses to criminal acts or incriminating statements or conduct, and criminal defendants often dispute officers' accounts of events. [FN13] Information regarding complaints about an officer, whether by the public, supervisors, or coworkers, can reveal dishonesty, incompetence, or bias that can be material to criminal proceedings. [FN14] Likewise, information in job applications about an officer's past misconduct, whether or not charged, might be material to assessing the officer's credibility in certain prosecutions. Such complaints and information are often found in personnel files maintained by the officers' current or former employers. [FN15] The importance of *303 such Brady impeachment evidence has increased

in recent years; whether due to a lack of qualified replacement employees or protections afforded by collective bargaining and the civil-service system, law-enforcement agencies find themselves employing officers with questionable backgrounds whose problematic behavior often continues throughout their careers. [FN16]

California courts have readily incorporated federal Brady requirements into the state's jurisprudence, requiring prosecutors to fully comply with due process requirements, except with regard to peace-officer personnel records. [FN17] This reluctance seems to arise from long-standing state statutory protection of such records. Since 1978, California has accorded peace officers strong confidentiality protection for their personnel files. [FN18] This protective measure was a direct response by the legislature to the California Supreme Court's 1974 decision in *Pitchess v. Superior Court*. [FN19] The legislature determined that decision too easily allowed criminal defendants to obtain peace-officer personnel information. [FN20] The resulting *Pitchess* laws have since become a well-established and hallowed part of California jurisprudence, both because they constitute a legislative overruling of judicial disclosure rulings and because the laws seemingly resolved a sensitive debate over peace-officer privacy rights. The end result has been substantial judicial deference to the *Pitchess* peace-officer privacy protections, accompanied by a judicial reluctance to upset the politically acceptable balance the laws *304 represent between the fair-trial rights of the criminally accused and privacy rights of peace officers. [FN21]

Over the years, it has become increasingly clear that a conflict exists between the Brady doctrine and California's *Pitchess* laws. The *Pitchess* laws were neither designed to facilitate, nor do they mention, prosecutors' Brady duties. Instead, they address only state-law issues regarding criminal discovery and officer privacy rights. The *Pitchess* laws impose numerous conditions and restrictions on a criminal litigant's right to obtain information from a peace officer's personnel files. Generally, a party seeking such information must file a *Pitchess* motion showing good cause and identifying officers suspected of wrongdoing. [FN22] State courts have consistently strengthened *Pitchess* protections and even extended the *Pitchess* laws to state prosecutors. [FN23] As criminal defendants have begun to assert that the *Pitchess* laws impermissibly undermine Brady, California courts have responded by denying that any conflict exists; remarkably, some courts have even used state law to redefine Brady and to excuse prosecutors altogether from accounting for exculpatory material in peace-officer personnel files. [FN24]

This article examines current California law regarding prosecutors' Brady duty to review peace-officer personnel records. It concludes that the *Pitchess* laws, as written and interpreted by California courts, impede and undermine state prosecutors' Brady duty to examine and disclose material exculpatory information from California peace-officer personnel files. It rejects those state-court decisions that hold that the *Pitchess* laws implement Brady's disclosure mandate and that *Pitchess* motions are adequate vehicles to vindicate Brady rights. Finally, this article urges changes to California law that will unequivocally allow prosecutors to review peace-officer personnel files informally, outside the *Pitchess* law process, and that will promote cooperation and communication between law enforcement and prosecutors. California must take action to ensure that state prosecutors regularly examine and account for Brady material in peace-officer personnel records without regard to state-law restrictions that are impermissible under federal Brady law. Unless the legislature undertakes such *305 changes, California prosecutors face potential litigation and intrusive federal-court intervention to vindicate defendants' due process rights.

I. *Pitchess v. Superior Court*

The current troubled state of California law regarding Brady review of peace-officer personnel records is the direct result of a legislative response to a 1974 California Supreme Court ruling granting criminal defendants the right to access officer personnel information. In *Pitchess v. Superior Court*, the California Supreme Court ruled that defendants were entitled to an in camera review of peace-officer personnel files upon a showing of good cause. [FN25] The case arose after the defendant, charged with battery against peace-officers, successfully moved in the trial court to obtain evidence from law-enforcement personnel files to establish that the Los Angeles Sheriff's deputies who arrested him had a propensity for violence. [FN26] The defendant sought this evidence to support his claim that the deputies used excessive force against him, prompting him to act in self-defense. [FN27]

On review, the court explained that criminal defendants were entitled to discovery when they could demonstrate, through “general allegations,” that the requested information would “facilitate the ascertainment of the facts and a fair trial.” [FN28] The court further found that the defendant's affidavits were adequate to justify discovery because they demonstrated the defense either was having trouble locating complaining witnesses against the deputies or had located witnesses who could not recall the details of their complaints against the officers. [FN29]

The California Supreme Court rejected the Sheriff's Department's claim of a privilege for the records. [FN30] The court explained that, after 1966, California's privileges were purely statutory and the courts were “no longer free to to modify existing privileges or to create new privileges.” [FN31] The court held that the only applicable privilege was [section 1040 of the California Evidence Code](#), which provided public entities with a formal but conditional privilege to refuse to disclose “official information” when the need for secrecy was “greater than the need for disclosure.” [FN32] The court noted, however, that the Sheriff's Department had expressly declined to invoke that conditional privilege to avoid “the potentially adverse consequences” of successfully asserting the privilege under ***306** section 1042. [FN33] Under that statute, an exercise of the privilege could lead to “dismissal of the charges or a directed verdict against the prosecution on the issue to which the excluded material relates.” [FN34] Instead, the Sheriff's Department sought to rely on a common law privilege to preclude disclosure “when the public interest so requires.” [FN35] However, because such common law privileges were abolished after 1966, the court ruled the Sheriff's Department had no basis for opposing disclosure. [FN36]

It bears noting that the 1974 *Pitchess* ruling nowhere mentions the Brady decision. The court decided the matter based solely on state-law grounds, limiting its discussion to criminal discovery standards [FN37] and statutory privileges. [FN38] Because the criminal defendant in *Pitchess* already had the benefit of a trial court order and subpoena, the burden was on the Sheriff to justify nondisclosure of the personnel information by the time the matter reached the appellate courts. Although the United States Supreme Court had earlier extended the Brady duty to include impeachment evidence in its 1972 *Giglio v. United States* ruling, the California Supreme Court was able to resolve the *Pitchess* case solely on state-law grounds. The court did so without addressing whether the Sheriff or prosecutor had an independent duty under the Federal Constitution to disclose material information to the defense regarding the deputies' propensity for violence. [FN39]

II. The 1978 *Pitchess* Laws

Nearly four years after the *Pitchess* ruling, the California Senate introduced legislation to codify the process for obtaining access to information in peace-officer personnel records. [FN40] The legislation was drafted by the

California Attorney General and carried by Senator Dennis Carpenter of Orange County, a former agent for the Federal Bureau of Investigation. [FN41] The history of the legislation *307 shows the proposal was enacted in direct response to perceived problems flowing from the Pitchess decision. [FN42]

The California Attorney General noted that the proposed legislation would establish procedures to prevent “unreasonable and bad faith efforts to obtain access to a peace officer's personnel file.” [FN43] The Attorney General explained that under “existing case law, defendants in criminal cases are authorized to have access to such records, and have repeatedly misused this authority to engage in harassment of peace-officers involved in their cases.” [FN44] The legislative history also indicates that there were concerns that some officers were shredding records to prevent discovery pursuant to the Pitchess decision. [FN45] Additionally, law enforcement expressed concern that assertions of privilege under the conditional privilege of [section 1040 of the California Evidence Code](#) could lead to the dismissal of criminal charges against some accused. [FN46]

The legislation was enacted in 1978, thereby superseding the California Supreme Court's 1974 Pitchess ruling, and resulted in California's modern Pitchess laws. [FN47] At its core, the legislation includes California Penal Code provisions making peace-officer personnel information confidential, including information relating to third-party complaints and resulting investigation reports. [FN48] [Section 832.7 of the California Penal Code](#), which establishes the confidentiality of police personnel records, provides limited exceptions to confidentiality, including an exception for “investigations . . . concerning the conduct of police . . . officers conducted by . . . a district attorney” [FN49] However, the California Supreme Court has noted that “the law is unsettled as to whether prosecuting authorities can access the [officer personnel] records for purposes of meeting their Brady obligation” under that law. [FN50] This uncertainty *308 arises from the fact that a Brady inquiry is rarely an investigation targeting an officer for criminal prosecution; instead, the inquiry usually focuses on settled disciplinary history. [FN51] A California Attorney General opinion further complicates matters by indicating that a willful disclosure by an officer of a law-enforcement agency in violation of [section 832.7](#) might constitute a crime. [FN52] Given the uncertain state of the law and the potential penalties for violating [section 832.7](#), the role of the exception and its relationship to Brady remain uncertain.

The legislation established a formal procedure for obtaining information from peace-officer personnel records. Under this procedure, information from officer personnel records can be obtained only through a so-called Pitchess motion upon a showing of good cause “setting forth the materiality” of the information sought to “the subject matter involved in the pending litigation” [FN53] The party making the Pitchess motion must serve it on the law-enforcement agency having custody of the personnel records sixteen court days before the motion hearing date and must supply a declaration explaining the good cause supporting the request. [FN54] The statutory scheme requires that the custodial agency notify the subject officer of the motion to afford the officer an opportunity to intervene. [FN55] The process is intended to interpose a neutral judge into the disclosure process and to require the party seeking the information to make a showing that the information sought is material to the litigation. [FN56] If good cause is shown, the judge must then examine the materials in camera outside the presence of the litigating parties and determine what, if any, material is to be disclosed by the custodial agency to the moving party. [FN57] The Pitchess procedure applies to all parties in a criminal proceeding, including the prosecution, which must make its own motion to obtain Pitchess information secured by the defense. [FN58]

*309 By enacting the Pitchess laws, the California Legislature provided strong protection to police personnel records. By shifting the disclosure burden to criminal defendants, the statutory Pitchess process also eliminated the risk of dismissal inherent in law-enforcement agencies asserting the conditional official-information

privilege of [section 1040 of the California Evidence Code](#). Under current law, if a court does not find grounds to conduct an in camera review of officer personnel records, the blame falls only on the moving party for failing to show the requisite statutory good cause. Neither the officers nor the custodial public entities need to assert any privilege that might trigger the dismissal provision of section 1042. In this sense, the Pitchess laws removed any incentive on the part of law enforcement to limit confidentiality claims, and allowed officers to advocate for maximum confidentiality in every case without penalty.

III. The Negative Impact of Pitchess Laws on Brady Disclosures

Outside the narrow context of officer personnel records, California courts have traditionally adopted a robust view of Brady, readily extending the rule to prosecution team members, including impeachment evidence within Brady's scope, and recognizing that Brady applies without the need for any request or participation by the defense. [FN59] However, California courts have been reluctant to apply these same Brady principles to require prosecutor review of peace-officer personnel records. This seems to arise from the peculiar history of the Pitchess laws. California's legislature did not take Brady into account when drafting the Pitchess legislation and, consequently, did not design the legal provisions to facilitate or encourage compliance with Brady by prosecutors, law-enforcement agencies, or officers. In fact, since the laws were drafted to protect officer confidentiality to a greater degree than had been done by the judiciary following the Pitchess decision, the laws work against Brady's mandate and thus are properly viewed as designed to make nondisclosure of peace-officer records the norm and disclosure the exception. [FN60] The Pitchess laws were also a political resolution of sensitive issues involving the clash between the due process rights of criminal defendants and the privacy rights of officers. It appears that, for all these reasons, California courts have adopted a very deferential, and even protective, approach to the Pitchess laws.

***310** This substantial deference to the Pitchess laws has led state courts to adopt positions that seemingly undermine federal law. The clearest example is the ruling in *People v. Gutierrez*. [FN61] In *Gutierrez*, the court of appeal rejected a criminal defendant's contention that Brady obligated the prosecutors to examine the personnel records of significant officer witnesses. [FN62] The court held that such review was not "tenable" because the Pitchess laws did not give prosecutors automatic access to information obtained by criminal defendants in Pitchess proceedings, and in the absence of a successful Pitchess motion based on good cause by the prosecution, the personnel records "retained their confidentiality vis-à-vis the prosecution." [FN63] The court reasoned that Brady required prosecutors to account for personnel information only if the prosecution had a "right to possess" the officer information or the officers' personnel files were "accessible to it." [FN64] The court concluded that testifying officers' personnel records were not accessible to the prosecution because of the state's Pitchess laws, and hence prosecutors had no duty to review such files under Brady. [FN65]

The *Gutierrez* ruling is problematic because it holds that, under state law, prosecutors have no right to access officer files outside of the Pitchess process, despite the exception for district attorney investigations in [section 832.7\(a\) of the California Penal Code](#). [FN66] However, *Gutierrez*'s major shortcoming is that it absolves prosecutors from any duty to account for and disclose Brady material in officer personnel files. Furthermore, it reaches this conclusion by holding that Brady does not reach officer personnel files because state Pitchess laws exempt such files from Brady's reach. [FN67] This ruling violates the federal Supremacy Clause by redefining prosecutors' federal Brady duty to exclude peace-officer personnel files, and is an improper attempt to subordinate a federal constitutional right to state privacy interests. [FN68]

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 ***311** 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 authorizing such reviews in criminal cases. [FN69] In so doing, the Court rejected Pennsylvania's arguments that such a disclosure rule "would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file 'might' have been useful to the defense." [FN70] The United States Supreme Court has regularly rejected efforts by states to limit or define federal rights by the exercise of otherwise valid state power to control state courts and legal processes. [FN71] The Gutierrez ruling, therefore, cannot circumscribe or define a prosecutor's federal Brady duty based on a state discovery statute.

Other state-court rulings have adopted subtler approaches to protecting Pitchess in the face of Brady challenges. Courts often attempt to validate Pitchess limits on Brady by simply comparing the standards for production under Pitchess and Brady. Under this approach, courts contend there is no conflict between Pitchess and Brady because evidence that meets the higher Brady materiality standard will necessarily meet the lower Pitchess discovery standard. [FN72] This approach has some appeal because the Brady standard is in fact more stringent than the Pitchess standard.

A moving party is entitled to relief in a Pitchess motion by showing good cause. [FN73] A moving criminal defendant may make this showing through a declaration from defense counsel that is not based on personal knowledge. [FN74] Courts have interpreted the Pitchess laws to require criminal defendants to ***312** present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent available documents." [FN75] A defendant must also articulate how the discovery being sought would support a defense to criminal charges or "how it would impeach the officer's version of events." [FN76] The California Supreme Court has described this standard as being "relatively low." [FN77] Under Brady, exculpatory information is material only if there is a "reasonable probability" that it would change the outcome of a verdict or result in a different sentence. [FN78] This is a much higher standard that requires showing a high degree of prejudice, rather than simply relevance to a claim or defense.

However, courts' reliance on the difference in production standards ultimately fails to harmonize Pitchess and Brady because the different standards do not address the same evidence. A criminal defendant's Pitchess motion can only reach evidence that a defendant can plausibly relate to a specific defense contention or theory. [FN79] Hence, Pitchess motions by defendants are necessarily limited to officer misconduct the defendant already knows or suspects to exist and that support an articulable defense theory. Defense Pitchess motions are denied when a defendant cannot make the requisite showing. [FN80] Under the Pitchess laws, a defendant cannot make a nonspecific Pitchess motion to enforce a prosecutor's broad Brady duty with regard to unsuspected exculpatory information, and courts have refused to allow criminal defendants to use other procedures to enforce Brady that bypass Pitchess requirements. [FN81] Pitchess laws are not designed to allow a defendant to conduct a fishing expedition for all unknown material exculpatory evidence. [FN82]

***313** In contrast, the Brady duty requires a prosecutor to engage in just such a search. A prosecutor cannot limit a Brady search to information already known or suspected to exist by the prosecutor's office and must take good-faith steps to actively and effectively learn about the existence of Brady evidence known only to others acting on behalf of the government. [FN83] Furthermore, evidence falls within the scope of Brady only if it is unknown to a defendant; this means such evidence is unlikely to ever be the subject of a pre-existing defense

theory supporting a pretrial Pitchess motion. [FN84] Thus, Brady encompasses more exculpatory information than is reachable through a defense Pitchess motion, which must necessarily be limited to a specific defense contention and plausible factual scenario based on suspected misconduct. Brady requires the production of otherwise unknown and unanticipated evidence that provides new defenses to a criminal prosecution. No California process, including a Pitchess motion, allows a party to check for the existence of unknown and unsuspected exculpatory information.

A defense Pitchess motion is additionally limited because a defendant must identify each officer from whose records information is sought. Pitchess would not entitle a defendant to exculpatory evidence, even if extremely material, if the defendant failed to make a Pitchess motion regarding the correct officer. In contrast, under Brady, a prosecutor has an obligation to learn about exculpatory information in the possession of the entire prosecution team. [FN85] A prosecutor must therefore produce the prosecution team's Brady information regarding officers about whom the defendant may know nothing. This would include, for example, non-arresting law-enforcement employees whose misconduct might affect the integrity of evidence against the accused.

There are also some unique structural limitations in the Pitchess laws that further restrict the scope of information that may be disclosed to a defendant. In ***314** response to a Pitchess motion, a law-enforcement agency's records custodian is obligated to bring to court only those records that potentially fall within the scope of the defendant's specific Pitchess request. [FN86] This makes it unlikely that a court will ever see Brady material unrelated to a defendant's specific request or scenario. If a defendant's Pitchess request deals only with dishonesty issues, the court, and hence the defendant, will likely never see exculpatory evidence relating to racism or excessive force.

In addition, a Pitchess motion does not reach complaints against an officer's conduct that predate the alleged crime by more than five years. [FN87] The California Supreme Court has expressly declined to require that trial courts "routinely review" information in peace-officer personnel files that is more than five years old to comply with Brady. [FN88] The Pitchess law also precludes disclosures of investigators' conclusions relating to such complaints. [FN89] Likewise, since 1985, no Pitchess disclosure may be made pertaining to officers, including supervisors, who were not present at the arrest or who had no contact with the defendant through booking, regardless of the egregiousness of the misconduct described in the personnel file. [FN90] Therefore, the court would not be able to review the file of a desk-bound police supervisor previously disciplined for altering police reports after the fact at a police station. Furthermore, even when a court orders disclosure, it will not ordinarily permit the production of verbatim reports or records; instead, that court will limit discovery to the names, addresses, and telephone numbers of complainants and witnesses, and dates of alleged incidents. [FN91] These state-law Pitchess restrictions do not exist under Brady and raise genuine concerns about the ability of exculpatory evidence to reach defendants. [FN92]

A prosecutor may also bring a Pitchess motion; in fact, a prosecutor must do so to obtain the fruits of a defense motion. [FN93] Presumably, a prosecutor may bring ***315** a Pitchess motion on any ground, including the need to conduct a Brady review in compliance with federal law. [FN94] Moreover, although no case has explained how such a prosecution motion would operate, it is likely that a records custodian for a law-enforcement employer would be required to bring all potentially exculpatory evidence to court for an in camera review. [FN95] If so, such a motion would operate under different disclosure standards than a typical defense Pitchess motion, as defense contentions and theories would not be relevant limitations on the scope of the prosecutor's motion. However, a prosecutor would still have the burden of naming all officers whose files needed to be reviewed and it is likely that the Pitchess structural limitations, including the five-year limit, would

continue to apply. Therefore, even assuming a prosecutor need not tie a Pitchess motion to specific litigation theories and can generally base the motion on Brady, statutory constraints that generally apply to defense Pitchess motions would still limit the prosecutor. As such, a prosecutor's Pitchess motion could still result in restricted production and fail to comply with Brady's mandate.

The efforts of lower California courts to protect the Pitchess laws at all costs are peculiar given that the California Supreme Court recognizes the tension between Pitchess and Brady. The court has noted that the Pitchess laws may raise constitutional problems if they preclude prosecutor access to Brady material in officer personnel files. [FN96] Nevertheless, lower courts have gone out of their way to ignore that tension, even when directly raised by litigants, primarily through the use of the unsatisfactory analyses discussed above.

*316 IV. Federal Liability For California Prosecutors and

Agencies For Brady Violations

California is within the territorial jurisdiction of the United States Court of Appeals for the Ninth Circuit. [FN97] This is significant because any federal claim asserting that Pitchess limitations on California prosecutors are unconstitutional would arise in a California federal court and eventually be governed by the Ninth Circuit's interpretation of Brady law. Such a claim might arise in either a criminal defendant's habeas matter or in a former defendant's suit under 42 U.S.C. § 1983 for violation of Brady rights. [FN98] The most likely scenario to succeed would involve a prosecutor who followed Gutierrez and, as a result, had a policy or custom of not obtaining exculpatory evidence in officer personnel files. If brought as a § 1983 claim, a plaintiff would likely include declaratory and injunctive relief claims against prosecutors, officers, and agency heads in their official capacities to avoid prosecutorial and state sovereign immunities and to obtain wide-ranging relief. [FN99]

Ninth Circuit law dictates that the duty to review officer personnel files is triggered by a defendant's pretrial request for production of Brady material and that the defendant does not have the burden of making an initial showing of materiality to trigger a Brady review. [FN100] Once the government review is complete, the prosecution need only turn over items that are material to the defendant's case. [FN101] If unsure of the materiality of information, the government can submit it *317 to the court for in camera review. [FN102] Brady evidence must be disclosed to the accused early enough to be of value to the defense. [FN103]

The Ninth Circuit has made clear that prosecutors are responsible for Brady compliance, stating that “this personal responsibility cannot be evaded by claiming lack of control over the files or procedures” of agencies. [FN104] However, the Ninth Circuit allows prosecutors to rely on agency counsel and staff in the first instance to locate “potential Brady material” for the prosecution, as long as the prosecutor ultimately determines whether disclosure or in camera review is necessary. [FN105] The court recently stated that “Brady requires both prosecutors and police investigators to disclose exculpatory evidence to criminal defendants.” [FN106] Therefore, while the prosecutor is ultimately responsible for the government's compliance with Brady, the duty to disclose extends to other members of the prosecution team.

The Ninth Circuit's approach will likely be further refined to protect Brady rights. For example, given the Ninth Circuit's holding that the defense need not show materiality at the pretrial stage and Supreme Court rulings that Brady does not depend on a specific defense request, it is unclear why a defendant currently needs to make a specific request for Brady material from officer personnel files. [FN107] It is likely that some future

Ninth Circuit decision will dispense with this requirement if the facts so require. In addition, the Ninth Circuit has described the prosecution's duty to review the documents of law-enforcement officers only in regard to those officers who will testify at trial. [FN108] However, as exculpatory evidence might easily exist in the files of nontestifying officers (or perhaps officers whom the prosecution does not wish to testify), it appears that this limitation is also likely to be discarded over time. Likewise, although the court has yet to address the specific Brady obligation of law-enforcement agencies *318 employing investigating officers, existing law indicates it is likely to eventually impose an independent duty directly on such employers to cooperate with and produce suspected Brady information to their prosecution teams. [FN109]

Ultimately, the central question in any federal lawsuit over Brady rights brought in California will be the extent to which application of California statutes and judicial decisions impedes prosecutors from fulfilling their federal Brady duties. In and of itself, the Gutierrez ruling may be sufficient to establish a constitutional violation with regard to prosecutors who are relying on the ruling to avoid reviewing any officers' personnel records on a regular basis.

However, California law may be deficient under Ninth Circuit standards, even with regard to prosecutors who are willing to ignore Gutierrez and review officer personnel records regularly. Because it is arguably a crime under [section 832.7 of the California Penal Code](#) for a prosecutor to review such records informally when not investigating the conduct of an officer, the only legal recourse for a prosecutor is to file a Brady-based Pitchess motion in every case regarding every significantly involved officer (at least when the prosecutor does not already have current Brady information about that officer). [FN110] Presumably, the Pitchess laws should enable a prosecutor to obtain nearly automatic in camera review of officers' personnel files based on the "good cause" of complying with Brady, unless a court believes that Gutierrez and officers' privacy interests do not require or allow a prosecutor to bring such a Brady-based motion in the first place. However, if a prosecutor is found to have a policy of not filing such motions in certain cases (for example, misdemeanor matters) or filing such motions late if at all, a federal court might find that such practices violate Brady. [FN111] Moreover, even assuming prosecutors successfully bring Pitchess motions based on Brady, constitutional problems could still exist if state courts insist on imposing state-law Pitchess restrictions on the information that will be examined by or produced to prosecutors.

It is unlikely that a prosecutor or agency can escape liability by pointing to the fact that California law permits criminal defendants to bring Pitchess motions. Given the Ninth Circuit's clear holding that defendants need not make an initial showing of Brady materiality to trigger review of officer personnel files, it is unlikely that the current Pitchess process passes constitutional muster, as it requires a moving defendant to identify a problem officer and to establish *319 "good cause" for an examination of personnel records based on a plausible factual scenario. [FN112] Moreover, the Ninth Circuit is unlikely to find the statutory restrictions on Pitchess disclosures satisfactory under federal law, which does not impose similar barriers to disclosure.

Ordinarily, courts assume that prosecutors will carry out their Brady duties and will not micromanage that function. [FN113] Nor will they allow criminal defendants to force in camera reviews of potential Brady material when there is no evidence prosecutors are violating Brady's mandate. [FN114] In California, this deference may no longer be justified if prosecutors do not universally accept an obligation to account fully for Brady material in officer personnel records in every case without regard to state Pitchess law restrictions. The temptation for prosecutors to cut corners undermines confidence in the fairness of the process. In the right case, a federal court could find California's Brady system fundamentally flawed, and order broad relief that may affect prosecutor and agency duties, as well as the privacy rights of officers. [FN115] Rather than wait for that day, it

makes sense for California lawmakers to address the issues now in a way that ensures at least minimal compliance with federal law.

V. A California Legislative Solution

Courts have long held that the prosecutor must be the main gatekeeper for Brady material and speak on behalf of the entire government regarding exculpatory evidence in a criminal case. [FN116] This makes sense, as the prosecutor must determine whether evidence is sufficiently exculpatory to affect the outcome of the case and merit disclosure under Brady. In making that decision, *320 the prosecutor must undertake a purely hypothetical analysis and decide whether there would be a “reasonable probability” of a different result in the criminal proceeding if the evidence were disclosed. [FN117] This calculation will often turn on the strength of the remaining evidence in the case, and requires application of the unique legal skills and factual knowledge possessed by prosecutors in specific cases. [FN118] A prosecutor is also well-suited to make such a call based on the prosecutor's unique ethical constraints. [FN119]

Although a prosecutor should make the ultimate Brady disclosure decision, the prosecutor's ability to fulfill the Brady duty effectively with regard to impeachment of police officers depends on the active cooperation of the officers and their agencies. A district attorney can directly ask investigating officers about their backgrounds and can rely on such information if trustworthy. However, if an officer will not talk to a prosecutor, the prosecutor suspects the officer is not being honest, or if the prosecutor simply wants the certainty that comes with a thorough review of employment histories, a prosecutor must turn to the officer's employer, who is the custodian of the officer's personnel records.

How a prosecutor actually accomplishes a Brady review of officer personnel files solely in the hands of a law-enforcement agency is unresolved. The United States Supreme Court has placed the duty to design an effective Brady system squarely on prosecutors, finding that they are in the best position to implement *321 “procedures and regulations” to meet this burden and “insure communication of all relevant information on each case to every lawyer who deals with it.” [FN120] However, the Court's reliance on prosecutors to create Brady systems that apply to allied law-enforcement agencies is not easily justified in states such as California, where state Pitchess laws limit the ability of prosecutors to access agency personnel records and information.

To avoid the possibility of federal-court intervention, the State of California should consider changing existing laws to avoid conflicts with the Ninth Circuit's Brady mandate. To that end, the California Legislature should reject Gutierrez's holding that prosecutors are exempt from Brady obligations with regard to officer personnel files. [FN121] This can be done by amending [section 832.7 of the California Penal Code](#) to expressly permit prosecutors to examine and obtain information from officer personnel files in furtherance of Brady without having to proceed through the Pitchess-motion process. [FN122] That statute could also be amended to provide that law-enforcement agencies and their employees are required to produce information to prosecutors from officer personnel records upon an official Brady request. In addition, the legislature should amend the Pitchess statutes to expressly provide that the Pitchess laws' limitations on production of personnel information, such as the five-year restriction, are not applicable to prosecutor requests for Brady material from law-enforcement agencies. The legislature should also expressly make it permissible for prosecutors to create and *322 maintain Brady systems that record current information about officers' negative employment history and other potential exculpatory material. [FN123] Such actions would immediately remove the most significant legal obstacles to Brady in California.

To further promote adequate compliance with Brady, especially by employees at prosecution-team agencies, the legislature should also expand the absolute immunity from civil liability in [section 47\(b\) of the California Civil Code](#), commonly known as the litigation privilege, to all communications relating in any way to a prosecutor's Brady request. By removing the threat of litigation against agency employees and officers' coworkers, California will make it easier for prosecutors to obtain the law-enforcement agency cooperation necessary to collect Brady information. Finally, the legislature should consider creating a special Brady motion procedure for prosecutors to use as a last resort when seeking officer personnel information from recalcitrant agencies. Such a procedure could operate without the Pitchess restrictions on disclosure but could otherwise restrict how the information could be maintained internally by prosecutors to ensure maximum officer privacy.

Using and expanding existing California laws would provide a platform for developing a uniform procedure to facilitate Brady compliance with less disruption than a federal court order resulting from litigation. Because a uniform Brady policy would simply make it easier for prosecutors to review officer personnel files, it would not undermine the goal of state Pitchess laws to prevent misuse of officer information by criminal defendants. The Pitchess laws would continue to govern normal criminal discovery requests relating to officer personnel information. Officer information disclosed to prosecutors through the Brady process would not be disclosed to defendants unless a prosecutor determined it was constitutionally required under Brady's higher materiality standard. To be sure, peace officers would have to cope with a new system where their personnel information would be subject to easier Brady review by prosecutors. However, a legislative approach will give all interested parties an opportunity to participate in crafting Brady procedures carefully and with due regard to the interests of prosecutors, defendants, officers, and law-enforcement agencies. If the current Pitchess laws are left unchanged, California risks abrupt federal intervention and perhaps greater and less-desirable changes to its peace-officer confidentiality laws.

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[FN1]. 373 U.S. 83, 87 (1963).

[FN2]. *Id.* at 86 (referencing [Mooney v. Holohan](#), 294 U.S. 103, 112 (1935), and [Pyle v. Kansas](#), 317 U.S. 213, 215-16 (1942)).

[FN3]. *Id.* at 87.

[FN4]. *Id.* In Brady, the Court expressly noted that a prosecutor who withholds exculpatory evidence is the “architect of a proceeding” that undermines justice even if the suppression is not “the result of guile.” *Id.* at 88.

[FN5]. [United States v. Agurs](#), 427 U.S. 97, 110-11 (1976).

[FN6]. 373 U.S. at 87 (Brady operates “irrespective of the good faith or bad faith of the prosecution”).

[FN7]. *Id.*; [Kyles v. Whitley](#), 514 U.S. 419, 438 (1995) (holding no exception where Brady information was known only to the police and not to the prosecutor).

[FN8]. See [Pennsylvania v. Ritchie](#), 480 U.S. 39, 60 (1987) (“[T]he duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress....”);

[Broam v. Bogan](#), 320 F.3d 1023, 1030 (9th Cir. 2003) (“A prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process under [Brady].”).

[FN9]. [People v. Jordan](#), 133 Cal. Rptr. 2d 434, 440 (Ct. App. 2003) (“A prosecutor's duty under Brady to disclose material exculpatory evidence 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.”).

[FN10]. [Kyles](#), 514 U.S. at 438.

[FN11]. See [Giglio v. United States](#), 405 U.S. 150, 154-55 (1972) (reversing the conviction and ordering re-trial based on the prosecution's failure to disclose a promise of leniency made to its key witness in exchange for testimony).

[FN12]. [People v. Gaines](#), 205 P.3d 1074, 1083 (Cal. 2009) (Brady extends to evidence used for “impeachment of peace officers”).

[FN13]. [United States v. Robinson](#), 583 F.3d 1265, 1271 (10th Cir. 2009) (noting that “impeachment evidence has been found to be material where the witness at issue ‘supplied the only evidence linking the defendant(s) to the crime.’”) (quoting [United States v. Payne](#), 63 F.3d 1200, 1210 (2d Cir. 1995)).

[FN14]. See, e.g., [Eulloqui v. Superior Court](#), 105 Cal. Rptr. 3d 248, 258 (Ct. App. 2010) (“Prior complaints that [an officer] had concealed payments or incentives to an informant would be relevant to impeach [the officer's] declaration and probable testimony [And they] would, in theory, be used to prove petitioner's Brady claim, which would undermine confidence in the outcome of the trial.”).

[FN15]. See, e.g., [Abatti v. Superior Court](#), 4 Cal. Rptr. 3d 767, 782-83 (Ct. App. 2003). In [Abatti](#), the prosecution intended to call Mr. Torres, a former Calexico police officer, who witnessed a crime. *Id.* The court found that defense counsel was entitled to a review of the former officer's personnel file because

counsel had information from various current Calexico police officers, who did not want their identities disclosed for fear of retribution, that the counseling memos will show Torres was asked to resign from his employment with the Calexico PD for accusations of acts of moral turpitude rather than face disciplinary proceedings or charges of misconduct. The unnamed police officers had also told counsel that Torres had deliberately embellished and or fabricated facts and circumstances surrounding his arrests with the Calexico PD, that none of the other officers wanted anything to do with Torres, and Torres had brought many problems to the Calexico PD that could cause potential liability claims as a result of his conduct. Counsel averred such information in the counseling memos of prior acts of dishonesty involved in falsely reporting or embellishing the facts and circumstances surrounding his arrests for the Calexico PD would show Torres's character, habit and custom of dishonesty and bear on his credibility which was relevant to whether Torres had made a false report or embellished his conversation with Abatti to the police or prosecution investigators regarding the instant crime.

Id.

[FN16]. See John Middleton-Hope, [Misconduct Among Previously Experienced Officers: Issues in the Recruitment and Hiring of “Gypsy Cops,”](#) 22 St. Louis U. Pub. L. Rev. 173, 173 (2003) (noting that, due to a competitive recruiting market, agencies are turning to previously experienced officers who tend to be involved in a disproportionate number of public complaints); see also Roger L. Goldman & Steven Puro, [Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?](#), 45 St. Louis U. L.J. 541, 559 (2001)

(noting that, in practice, police chiefs may prefer to settle disciplinary cases against police officers “rather than terminate an officer and risk having a [union-controlled civil-service board] reverse the action”).

[FN17]. See *infra* notes 59-61 and accompanying text.

[FN18]. See *Cal. Evid. Code* §§ 1043-47 (West 2009) (evidence statutes relating to Pitchess issues); *Cal. Penal Code* §§ 832.5, 832.7-32.8 (West 2008) (penal statutes relating to Pitchess issues). Specifically, [section 832.7 of the Penal Code](#) makes personnel information confidential; section 832.8e of the Penal Code includes complaints and investigation in the definition of personnel information covered by [section 832.7](#); and [sections 830 through 831.7 of the penal code](#) define the terms “peace officer” and “custodial officer.” As used in this article, however, “peace officer” and “police officer” are used broadly to describe all law-enforcement personnel covered by [section 832.7 of the California Penal Code](#).

[FN19]. [Pitchess v. Superior Court](#), 522 P.2d 305 (Cal. 1974).

[FN20]. See *infra* part II.

[FN21]. See [City of Santa Cruz v. Municipal Court](#) 49 Cal. 3d 74, 83-84 (1989) (noting that Pitchess legislation “carefully balances two directly conflicting interests” and includes a “forceful directive” to courts to consider officer privacy).

[FN22]. See *Cal. Evid. Code* § 1043 (West 2009) (describing Pitchess motion requirements).

[FN23]. [Alford v. Superior Court](#), 63 P.3d 228, 236 (Cal. 2003) (noting that, absent a Pitchess law exception, “peace officer personnel records retain their confidentiality vis-à-vis the prosecution”).

[FN24]. [Eulloqui v. Superior Court](#), 105 Cal. Rptr. 3d 248, 255 (Ct. App. 2010) (noting no conflict because “any citizen complaint that meets Brady's test of materiality necessarily meets the [lower] relevance standard for disclosure under Pitchess.”); [People v. Gutierrez](#), 6 Cal. Rptr. 3d 138, 146-47 (Ct. App. 2004) (no Brady duty to review personnel records because Pitchess laws “generally” preclude prosecutors from freely accessing information); [People v. Escobar](#), No. B200626, 2008 WL 3877700, (L.A. Super. Ct. 2008) (“Brady does not require the prosecution to seek out and review such files.”).

[FN25]. [Pitchess](#), 522 P.2d at 307-10.

[FN26]. *Id.* at 307.

[FN27]. *Id.*

[FN28]. *Id.* at 309.

[FN29]. *Id.*

[FN30]. *Id.* at 310-11.

[FN31]. *Id.*

[FN32]. *Id.* at 310.

[FN33]. Id.

[FN34]. Id. at 311 (describing [section 1042\(a\) of the California Evidence Code](#) as a codification of the due process demand, recognized by the United States Supreme Court, that the prosecution cannot commence criminal proceedings and then invoke privileges to deny the defendant information material to the defense).

[FN35]. Id.

[FN36]. Id. at 311.

[FN37]. Id. at 307-10.

[FN38]. Id. at 310-11.

[FN39]. See *Giglio v. United States*, 405 U.S. 154, 154-55 (1971) (Brady requires prosecutors to disclose material impeachment evidence).

[FN40]. See 1978 Cal. Stat. 2081 (enacting SB 1436, codified as amended at [Cal. Evid. Code §§ 1043-47](#), and [Cal. Penal Code § 832.5](#), [§ 832.7](#), [§ 832.8](#)).

[FN41]. See Letter from Evell Younger, Cal. Att'y Gen., to Gov. Edmund G. Brown, Jr. (undated) (urging approval of SB 1436 and noting it was “drafted by my office”) [hereinafter Younger Letter] (on file with the *McGeorge Law Review*); Jean O. Pasco, Dennis Carpenter, 75: GOP State Senator Turned Lobbyist, *L.A. Times*, Dec. 25, 2003, <http://articles.latimes.com/2003/dec/25/local/me-carpenter25> (on file with the *McGeorge Law Review*).

[FN42]. Younger Letter, *supra* note 41.

[FN43]. Id.

[FN44]. Id.

[FN45]. See Cal. Sen. Judiciary Comm., Rep. on SB 1436, 1978 Reg. Sess., at 7 (April 3, 1978) (“This bill is an attempt to cope with alleged law enforcement reaction (of shredding records to prevent discovery)”; [Berkeley Police Ass'n v. City of Berkeley](#) 167 Cal. App. 4th 385, 393 (2008) (noting that the Senate Committee on the Judiciary reported that “the main purposes of the 1978 legislation were to curtail deliberate record-shredding practices by police agencies and to end discovery abuses”).

[FN46]. Cal. Sen. Judiciary Comm., Rep. on SB 1436, 1978 Reg. Sess., at 7 (April 3, 1978). Supporters of the legislation claimed that dismissals were occurring because of overzealous enforcement of discovery orders in criminal cases. See Letter from Michael Franchetti, Cal. Deputy Att'y Gen., to Alfred Song, California State Senator, (Mar. 8, 1978) (on file with the *McGeorge Law Review*) (claiming that “motions to dismiss have been granted” as a result of “a single complaint” being destroyed “as permitted by statute”).

[FN47]. [Cal. Evid. Code §§ 1043-47](#) (West 2009); [Cal. Penal Code §§ 832.5, 832.7-32.8](#) (West 2008).

[FN48]. See [Penal § 832.7](#) (making personnel information confidential); [Penal § 832.8\(e\)](#) (including complaints and investigation reports in the definition of personnel information covered by [section 832.7](#)).

[FN49]. Penal § 832.7(a).

[FN50]. *City of L.A. v. Superior Court (Brandon)*, 52 P.3d 129, 139 (Cal. 2002) (Brown, J., concurring). As if to further emphasize the ambiguous state of the law, the court noted sua sponte that it has yet to address whether section 832.7 of the California Penal Code “would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with Brady.” *Id.* at 136 n.2.

[FN51]. *Id.* at 136.

[FN52]. California Attorney General Opinion, 82 Ops. Cal. Att’y. Gen. 246, 248-49 (1999) (noting that disclosure in violation of the Pitchess confidentiality provision found in section 832.7 of the California Penal Code could constitute a crime).

[FN53]. Cal. Evid. Code § 1043(b)(3) (West 2009).

[FN54]. *Id.* § 1043 (section 1005 of the California Code of Civil Procedure).

[FN55]. *Id.* § 1043(a); see also *id.* § 1045(d) (giving officer standing to seek protective order).

[FN56]. *Haggerty v. Superior Court*, 12 Cal. Rptr. 3d 467, 471 (Ct. App. 2004).

[FN57]. See *People v. White*, 120 Cal. Rptr. 3d 332 (Ct. App. 2011), (“The defining hallmark of the process is an in camera hearing in which the trial court reviews the files at issue outside the presence of the defendant and his or her counsel.”). The attorney for the custodial agency normally accompanies the custodian into chambers and conducts the examination regarding the collection and production of personnel documents. See *City of Santa Cruz v. Municipal Court (Kennedy)*, 776 P.2d 222, 226-27 (Cal. 1989) (“Once good cause for discovery has been established, section 1045 provides that the court shall then examine the information ‘in chambers’... (i.e., out of the presence of all persons except the person authorized to claim the privilege and such other persons as he or she is willing to have present).”).

[FN58]. *Alford v. Superior Court*, 63 P.3d 228, 236 (Cal. 2003) (“Absent such compliance...peace officer personnel records retain their confidentiality vis-à-vis the prosecution.”).

[FN59]. *People v. Salazar*, 112 P.3d 14, 20 (Cal. 2005) (“[T]he duty to disclose [Brady] evidence exists even though there has been no request by the accused... the duty encompasses impeachment evidence as well as exculpatory evidence, and the duty extends even to evidence known only to police investigators and not to the prosecutor.” (citations omitted)); *People v. Jordan*, 133 Cal. Rptr. 2d 434, 440 (Ct. App. 2003) (“[A] prosecutor’s duty under Brady to disclose material exculpatory evidence 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.”).

[FN60]. See *Kennedy*, 776 P.2d at 234 (noting that Pitches legislation is “clearly intended to place specific limitations and procedural safeguards on the disclosure of peace officer personnel files which had not previously been found in judicial decisions”).

[FN61]. *People v. Gutierrez*, 6 Cal. Rptr. 3d 138 (Ct. App. 2004). See also *People v. Northup*, 119 Cal. Rptr. 2d 811, 823 (Ct. App. 2002) (noting that the sheriff was acting in his administrative capacity and not as part of the prosecution team).

[FN62]. [Gutierrez](#), 6 Cal. Rptr. 3d at 146-47.

[FN63]. *Id.* at 146 (citing [Alford](#), 63 P.3d at 236); see also [People v. Hall](#), No. B157003, 2003 WL 21235440, *4 (Cal. Ct. App. 2003) (“Brady does not stand for the proposition that the prosecutor must undertake the duty to investigate, compile, and inspect the private personnel files of all law enforcement personnel involved in the criminal charges even if the prosecutor is precluded from obtaining access to such files without a court order.”).

[FN64]. [Gutierrez](#), 6 Cal. Rptr. 3d at 146-47 (citing [Jordan](#), 133 Cal. Rptr. 2d at 440).

[FN65]. *Id.* at 147 (concluding that defendant’s contention “necessarily fails” because the prosecution “does not generally have the right to possess and does not have access to confidential peace officer files ...”).

[FN66]. *Id.*

[FN67]. *Id.*

[FN68]. U.S. Const. art. VI, cl. 2 (“This Constitution ... shall be the supreme law of the land.”).

[FN69]. [Pennsylvania v. Ritchie](#), 480 U.S. 39, 58 (1987). As in the Pitchess process, the Ritchie ruling found that defense counsel was not entitled to review the confidential documents; instead, the review would be conducted in camera by the court. *Id.* at 59-60.

[FN70]. *Id.* at 57.

[FN71]. See [Haywood v. Drown](#), 556 U.S. 729, 129 S. Ct. 2108, 2117 (2009) (providing that a state may not use its legislative power to channel certain federal litigation into special state courts and, thereby, extinguish federal money-damages remedy); see also [Felder v. Casey](#), 487 U.S. 131, 147 (1988) (stating that a state may not use its procedural notice-of-claim rules to burden or condition federal rights in state courts); [Dice v. Akron, Canton & Youngstown R. Co.](#), 342 U.S. 361 (1952) (“State laws are not controlling in determining what [the] incidents of federal rights” shall be.).

[FN72]. [Eulloqui v. Superior Court](#), 105 Cal. Rptr. 3d 248, 255 (Ct. App. 2010) (“[A]ny citizen complaint that meets Brady’s test of materiality necessarily meets the relevance standard for disclosure under Pitchess.”); [People v. Gutierrez](#), 6 Cal. Rptr. 3d 138, 146 (Ct. App. 2004). (Pitchess implements Brady because of the different standards). These cases improperly rely on language in the California Supreme Court’s Brandon decision in which the court makes the unremarkable observation that a citizen complaint that met the Brady standard would also meet the Pitchess standard assuming there was already a Pitchess motion directed at the same complaint. [City of Los Angeles v. Superior Court \(Brandon\)](#), 52 P.3d 129, 134 (Cal. 2002). The court nowhere holds that the higher Brady standard, standing alone, means federal due process is satisfied with regard to defendants who do not know about the citizen complaint in the first place and, hence, are unable to make a “good cause” showing in a Pitchess motion to obtain the complaint evidence. *Id.*

[FN73]. [City of Santa Cruz v. Municipal Court \(Kennedy\)](#), 776 P.2d 222, 228-30 (Cal. 1989) (noting that a supporting declaration may be based on information and belief).

[FN74]. *Id.*

[FN75]. [Warrick v. Superior Court](#), 112 P.3d 2, 12 (Cal. 2005).

[FN76]. *Id.* at 9.

[FN77]. *Id.* at 7.

[FN78]. *Brady v Maryland*, 373 U.S. 83, 87 (evidence is material if it affects either guilt or punishment); *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (“evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”) (internal quotations omitted).

[FN79]. *Kennedy*, 776 P.2d at 232-34.

[FN80]. See, e.g., *People v. Sanderson*, 105 Cal. Rptr. 3d 326, 331 (Ct. App. 2010) (denying Pitchess motion because defendant merely denied statements attributed to him by officer and did not present a specific factual scenario that was plausible); *People v. Thompson* 46 Cal. Rptr.3d 884, 887 (Ct. App. 2006) (holding that the Pitchess motion was properly denied because defendant did not present a factual account of the scope of the alleged police misconduct and did not explain his own actions in a manner that adequately supports his defense).

[FN81]. *Garden Grove Police Dep't v. Superior Court*, 107 Cal. Rptr. 2d 642 (Ct. App. 2001). In this case, a state appellate court reversed an order granting a defense request for three officers to disclose their birth dates so that the prosecutor could conduct a criminal-records check for Brady and state-discovery material. *Id.* at 642-43. The appellate court concluded it could not allow defendant to make “an end run on the Pitchess process by requesting the officers' personnel records under the guise of a ... Brady motion.” *Id.* at 434-45.

[FN82]. *Kennedy*, 776 P.2d at 228 (“The information sought must ... be requested with adequate specificity to preclude the possibility that defendant is engaging in a fishing expedition.”) (internal citations and quotations omitted).

[FN83]. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (Brady duty extends to evidence known only to police investigators and not to the prosecutor); *United States v. Risha* 445 F.3d 298, 306 (3d Cir. 2006) (noting that federal prosecutor's Brady duty may even extend to state actors when the withheld evidence is under the control of a state instrumentality closely aligned with the prosecution); *United States v. Perdomo* 929 F.2d 967, 970 (3d Cir. 1991) (noting that the prosecution must seek out Brady information and cannot limit itself to “token” ineffective efforts); *People v. Salazar*, 112 P.3d 14, 24 (Cal. 2005) (“In order to comply with Brady, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf....’” (citation omitted)).

[FN84]. *United States v. Bagley*, 473 U.S. 667, 678 (1985) (Brady is violated “only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial”); *United States v. Barraza Cazares*, 465 F.3d 327, 334 (8th Cir. 2006) (finding no Brady violation because evidence was available to defense and therefore not suppressed).

[FN85]. *City of Los Angeles v. Superior Court (Brandon)*, 52 P.3d 129, 133 (Cal. 2002) (acknowledging that, under Brady, it is incumbent upon the prosecutor to learn of any favorable evidence known to the others acting on the government's behalf including the police); *People v. Jordan*, 133 Cal. Rptr. 2d 434, 440 (Ct. App. 2003) (“A prosecutor's duty under Brady to disclose material exculpatory evidence 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.”).

[FN86]. *People v. Guevara*, 55 Cal. Rptr. 3d 581, 584 (Ct. App. 2007) (“[C]ustodian of records was required to provide only those documents that were potentially relevant to [defendant's] specific discovery request.”).

[FN87]. Cal. Evid. Code § 1045(b)(1) (West 2009).

[FN88]. *Brandon*, 52 P.3d at 138 n.3 (noting that a trial court does not act improperly if it does review such older material).

[FN89]. Evid. § 1045(b)(2).

[FN90]. *Id.* § 1047.

[FN91]. *City of Santa Cruz v. Municipal Court (Kennedy)* 776 P.2d 222, 227 (Cal. 1989).

[FN92]. The impact of these restrictions is evident in the *Brandon* case. *City of Los Angeles v. Superior Court (Brandon)* 52 P.3d 129 (Cal. 2002). There, the trial court found a ten-year-old citizen complaint in the course of a Pitchess review and ordered it disclosed. *Id.* at 129. As the California Supreme Court does not require trial courts examining Pitchess files to do Brady reviews automatically, the trial judge could have simply ignored the complaint, and it is likely that the defense would never have known of the complaint's existence. *Id.* at 129-30. Although the California Supreme Court ultimately found the complaint did not meet the Brady materiality standard, the trial court could have suppressed it based on its age alone, even if material, given the Supreme Court's failure to require a Brady review of older complaints in the first place. *Id.* at 138-139.

[FN93]. *Alford v. Superior Court*, 63 P.3d 228, 236 (“Absent such compliance ... peace officer personnel records retain their confidentially vis-à-vis the prosecution.”).

[FN94]. At least one California court has impliedly approved the use of a hybrid Brady-Pitchess motion without describing how such a motion would operate in the routine criminal case. *Abatti v. Superior Court*, 4 Cal. Rptr. 3d 767, 784 (Ct. App. 2003) (granting such a motion where a defendant already knew about the contents of the former officer's personnel record).

[FN95]. In practice, this may mean that a custodian would simply bring all negative information about an officer to the motion hearing, regardless of whether it is technically “material” under Brady in terms of affecting the outcome of a criminal proceeding or sentence. This is because law-enforcement agencies are not in the same position as trained prosecutors to parse out the evidence as required by Brady to determine whether “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). To avoid problems and responsibility, a law-enforcement agency is likely to produce all negative material about an officer for inspection and thereby shift the burden to the prosecutor and court to decide what, if anything, to disclose to the accused. Thus, forcing prosecutors to use the Pitchess process for Brady purposes may ultimately undermine officer privacy because officers' employers are likely to over-disclose personnel information in the process.

[FN96]. *Brandon*, 52 P.3d at 136 n.2 (noting that the California Supreme Court has yet to decide if [section 832.7 of the California Penal 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”).

[FN97]. 28 U.S.C. § 41 (2006).

[FN98]. 42 U.S.C. § 1983 (2006). See also [Maxwell v. Roe](#), 628 F.3d 486, 512 (9th Cir. 2010) (holding, on habeas review, that “the California Supreme Court’s decision ... was an unreasonable application of Brady”); [Tennison v. City & County of San Francisco](#), 570 F.3d 1078, 1088 (9th Cir. 2009) (allowing former prisoner’s §1983 claim to proceed against officer for Brady violation).

[FN99]. See [Frew v. Hawkins](#), 540 U.S. 431, 437 (2004) (“[T]he Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.”); [Mitchum v. Foster](#), 407 U.S. 225, 242 (1972) (remedies under § 1983 can include injunctions against unconstitutional state judicial, executive, and legislative action); [Burge v. Parish of St. Tammany](#), 187 F.3d 452, 467 (5th Cir. 1999) (prosecutor not entitled to absolute immunity in § 1983 suit for Brady violations when sued in official capacity regarding “adequate policies, procedures or regulations to ensure adequate training and supervision of employees with respect to the government’s Brady responsibility.”); [Vargas v. Earl](#), No. CV-06-146-JLQ, 2008 WL 5119282 (E.D. Wash 2008) (denying county’s motion for summary judgment of § 1983 Brady-based claim because of a triable issue regarding county’s training and supervision of prosecutorial staff). The United States Supreme Court ruled in [Connick v. Thompson](#) that § 1983 imposes liability on a municipality for a failure to train employees only if a challenged policy amounts to deliberate indifference to the rights of persons with whom the untrained persons will come into contact. No. 09-571, slip op. at 9 (March 29, 2011); see also [Los Angeles Cnty. v. Humphries](#), 131 S. Ct. 447, 453-54 (2010) (holding that “policy or custom” requirement applies in § 1983 cases for prospective equitable relief).

[FN100]. [United States v. Henthorn](#), 931 F.2d 29, 30-31 (9th Cir. 1991) (“The government is incorrect in its assertion that it is the defendant’s burden to make an initial showing of materiality.”).

[FN101]. *Id.* at 31.

[FN102]. *Id.* (stating that if prosecution is uncertain about the materiality of information, it may submit it to the trial court for an in camera inspection); see also [United States v. Dent](#), 149 F.3d 180, 191 (3d Cir. 1998) (asserting that the government may “direct the custodian ... to inspect [files] for exculpatory evidence and inform the prosecution of the results of that inspection, or, alternatively, submit the files to the trial court for in camera review.”).

[FN103]. [Tennison](#), 570 F.3d at 1093.

[FN104]. [United States v. Jennings](#), 960 F.2d 1488, 1490-91 (9th Cir. 1992); see also [United States v. Herring](#), 83 F.3d 1120, 1122 (9th Cir. 1996) (holding that the Jennings rule, allowing initial reliance on agencies, survived the Supreme Court’s subsequent ruling in [Kyles v. Whitley](#), 514 U.S. 419 (1995)).

[FN105]. [Jennings](#), 960 F.2d at 1491-92 n.3.

[FN106]. [Smith v. Almada](#), 640 F.3d 931 (9th Cir. 2011); see also [Tennison](#), 570 F.3d at 1087 (allowing former prisoner’s § 1983 claim to proceed against police officer for Brady violation and rejecting argument that duty applies only to prosecutors).

[FN107]. [Kyles](#), 514 U.S. at 433-34 (noting that the Court has abandoned the distinction between a defendant’s “specific” request and “no” request for Brady materials); [Bailey v. Rae](#), 339 F.3d 1107, 1113 (9th Cir. 2003) (noting that in a nonpersonnel case, the prosecution’s duty to disclose Brady evidence “is not dependent upon a request from the accused”).

[FN108]. [United States v. Henthorn](#), 931 F.2d 29, 30-31 (9th Cir. 1991) (noting procedure for “the personnel files of testifying officers”).

[FN109]. See [United States v. Blanco](#), 392 F.3d 382, 388 (9th Cir. 2004) (“A prosecutor's duty under Brady necessarily requires the cooperation of other government agents who might possess Brady material.”).

[FN110]. Disclosure of Police Officer Personnel Records, 82 Ops. Cal. Att'y Gen. 246, 248-49 (1999) (noting that disclosure in violation of Pitchess confidentiality provision in [section 832.7 of the California Penal Code](#) could constitute a crime).

[FN111]. See [Tennison](#), 570 F.2d at 1093 (stating that disclosure must be made in time to be of value to accused); [United States v. Devin](#), 918 F.2d 280, 290 (1st Cir. 1990) (a Brady violation would occur if delayed disclosure altered defense strategy and timely disclosure would likely have resulted in a more effective strategy).

[FN112]. [Henthorn](#), 931 F.2d at 30-31 (“The government is incorrect in its assertion that it is the defendant's burden to make an initial showing of materiality.”).

[FN113]. [United States v. Jennings](#), 960 F.2d 1488, 1492 (9th Cir. 1992) (noting that the court should presume that the government will obey Brady and not interfere if there is “no indication that the government has not or will not comply with its duty faithfully to conduct review of the agents' personnel files”); [United States v. Prochilo](#), 629 F.3d 264, 268 (1st Cir. 2011) (“[G]overnment's decision about disclosure is ordinarily final—unless it emerges later that exculpatory evidence was not disclosed.”); [United States v. Herring](#), 83 F.3d 1120, 122 (9th Cir. 1996) (stating that the district court erred by requiring prosecutor to personally review testifying officers' personnel files).

[FN114]. [Prochilo](#), 629 F.3d at 269 (“Where, as here, however, the government maintains that it has turned over all material impeachment evidence, speculation is insufficient to permit even an in camera review of the requested materials.”).

[FN115]. See Daniel S. Medwed, [Brady's Bunch of Flaws](#), 67 Wash. & Lee L. Rev. 1533, 1557-66 (2010) (discussing the option of open-file discovery where prosecutors must turn over all evidence known to the government, exculpatory and inculpatory alike). If adopted as a judicial remedy to remedy systemic Brady violations, an open-file system would make peace-officer personnel information freely available to criminal defendants in the first instance. See [Rose v. Johnson](#), 141 F. Supp. 2d 661, 684 (S.D. Tex. 2001) (stating that a prosecutor's use of open-file policy obviates need for Brady request).

[FN116]. [Giglio v. United States](#), 405 U.S. 150, 154 (1972) (“[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government.”).

[FN117]. [Kyles v. Whitley](#), 514 U.S. 419, 434 (1995).

[FN118]. [Strickler v. Greene](#), 527 U.S. 263, 294-95 (1999) (noting that accused failed to show likelihood of a different outcome based on the nature of other prosecution evidence at trial); [People v. Gaines](#), 205 P.3d 1074, 1083 (Cal. 2009) (the determination of Brady materiality is “necessarily fact specific”).

[FN119]. Rule 3.8(d) of the ABA Model Rules of Professional Conduct requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of

the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.” In July 2009, the American Bar Association's Standing Committee on Legal Ethics and Professional Responsibility issued Formal Opinion 09-454, which states that a prosecutor's ethical duty to disclose under Model Rule 3.8(d) is broader in scope than the duty under Brady. According to the Committee, Rule 3.8(d) “requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on the trial's outcome.” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009). California currently has no ethical rule directly addressing prosecutors' Brady obligation. The Board of Governors of the State Bar of California adopted a total of sixty-seven new and amended proposed rules on July 24, 2010, and September 22, 2010 that are awaiting California Supreme Court review. See [Cal. Bus. & Prof. Code §§ 6076 and 6077](#) (stating that the Supreme Court must approve ethical rules). Proposed rule 3.8(d) states that a prosecutor “shall... comply with all constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” Proposed Rule of Conduct 3.8, available online from the Board's [Web Site. http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx](http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx) (on file with the McGeorge Law Review). The proposed California rule is narrower than the ABA model rule, as it limits disclosure only to material that meets Brady materiality standards. Nevertheless, if adopted, it would make willful violations of the rule subject to the attorney-discipline process. See Proposed Rule of Conduct 1.0(b)(2) (only “willful violations” may be basis for discipline).

[FN120]. [Kyles, 514 U.S. at 438 \(quoting Giglio, 405 U.S. at 154\).](#)

[FN121]. Reform could also be implemented through the state judicial process. For example, the California Supreme Court could clarify that the Pitchess laws may not be used to limit prosecutors' federal Brady obligation and that law-enforcement officers and agencies have a duty under the Federal Constitution to cooperate in the disclosure process without regard to state-law restrictions. The state judiciary could achieve common law reform relatively quickly, perhaps by imposing a Brady process on the state criminal process in a manner similar to what the United States Supreme Court did in the Ritchie case. See *supra* note 69. However, the courts have avoided clarifying the Pitchess-Brady conflict for over three decades and there is no reason to believe they will act in the near future. Accordingly, the best, and perhaps only, realistic avenue for reform at this point is through California's legislative process.

[FN122]. This would require California's legislature to diverge from its traditional pattern of providing especially strong protection to peace-officer privacy rights in criminal proceedings, a practice that continues to the present. See SB 573, 2011-2012 Sess. (Cal. 2011) (as introduced on Feb. 17, 2011, but not enacted) (on file with the McGeorge Law Review). SB 573 would amend [section 832.7 of the California Penal Code](#) to give prosecutors informal access to peace-officer records only when prosecutors are pursuing a “criminal” investigation of the officer. The legislative analysis for SB 573 indicates that the proposed change is likely to adversely impact prosecutors' Brady duty: “Because prosecutors are required in every case to determine whether there is any Brady material in police files, requiring prosecutors to go through the formal ‘Pitchess’ process in every case, as this bill is intended to do, would be a significant departure from past practice, would place a substantial burden on prosecutors and may not even be possible, given that a ‘Pitchess’ motion requires that there be a pending criminal matter.” Senate Committee on Public Safety, Committee Analysis of SB 573, at 14

(May 3, 2011) (on file with the McGeorge Law Review).

[FN123]. Under current law, material disclosed pursuant to a Pitchess motion may be used only in the court proceeding in which the officer information was sought. See [Cal. Evid. Code § 1045\(e\)](#); [Alford v. Superior Court](#), 63 P.3d 228, 231 (limiting language of [section 1045\(e\)](#) to proceeding in which motion was filed).
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