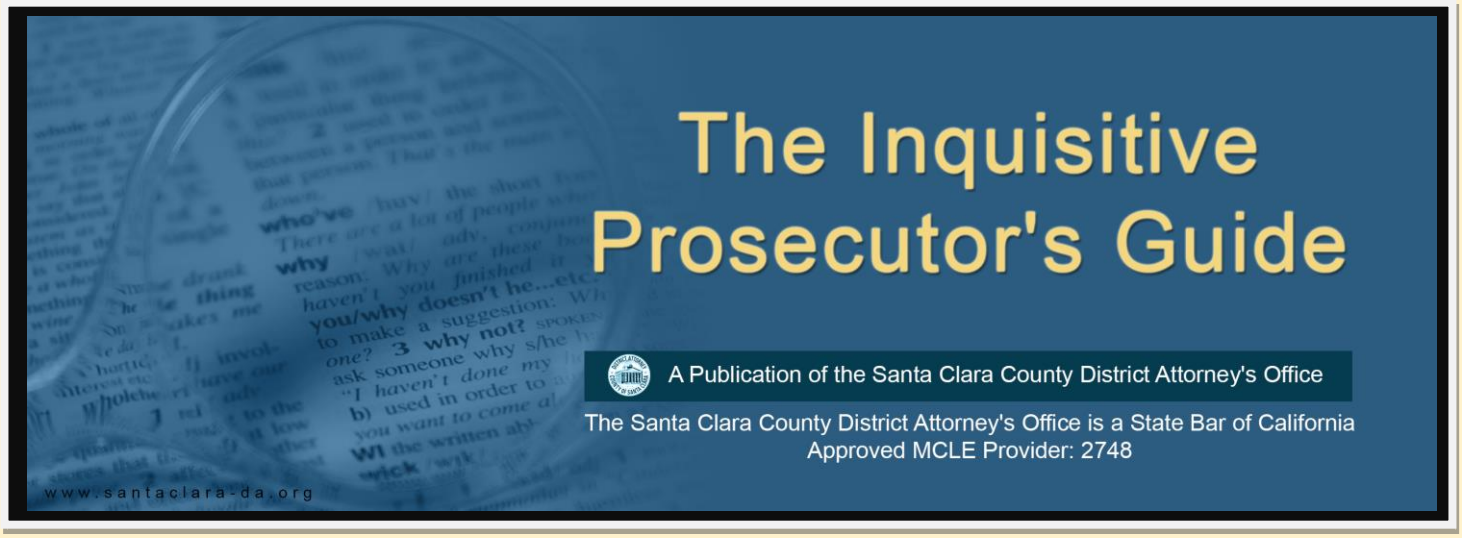

December 2, 2019

2019-IPG-42(*ALADS*, SB 1421, & "*BRADY* LISTS")

This IPG discusses the California Supreme Court case of ***Association for Los Angeles Deputy Sheriffs* v. *Superior Court of Los Angeles County*** (2019) 8 Cal.5th 828, the modification to the ***Pitchess*** statutes made by Senate Bill 1421 (SB 1421), and the respective impacts of both on various issues relating to prosecutorial disclosure obligations. The accompanying podcast features a conversation with discovery expert, Santa Clara County Assistant District Attorney David Angel. ADA Angel oversees his office's ***Brady*** Committee and developed the mechanisms for the transmission of voluntarily provided ***Brady*** alerts between law enforcement agencies and the district attorney's office. Among the dozen or so questions discussed:

1. Can, must, or should law enforcement agencies provide "***Brady*** tips" to prosecutors?
2. Can prosecutors pass on to *defense attorneys* "***Brady*** tips" received from law enforcement agencies without complying with the *Pitchess* procedures?
3. Can law enforcement agencies provide information about officers who might be witnesses in a *future* prosecution?
4. What peace officer personnel files do or don't remain confidential under SB 1421?

The accompanying podcast will provide **80 minutes of (self-study) MCLE ethics credit**. It may be accessed at: **http://sccdaipg.podbean.com/**

A Law Enforcement Agency Does Not Violate the *Pitchess* Statutes by Sharing with Prosecutors that there May be *Brady* Evidence in the Personnel File of an Officer Who Is a Potential Witness in a Pending Criminal Prosecution.
Association for Los Angeles Deputy Sheriffs* v. *Superior Court of Los Angeles County (2019) 8 Cal.5th 28

Facts and Procedural Background

In late 2016, the Los Angeles County Sheriff's Department (hereinafter "the Department") informed several hundred of its deputies that it done a review of the deputies' personnel records. The letter stated that the Department had identified potential exculpatory or impeachment information in those records and listed the type of "founded administrative investigations" that would qualify for inclusion on a "***Brady***" list. (***Id***. at p. 37.)*

Editor's note:** "The categories of misconduct upon which the panel based its decisions were administratively founded violations of various sections of the Sheriff's Manual of Policy and Procedures": (1) Immoral Conduct; (2) Bribes, Rewards, Loans, Gifts, Favors; (3) Misappropriation of Property; (4) Tampering with Evidence; (5) False Statements; (6) Failure to Make Statements and/or Making False Statements During Departmental Internal Investigations ; (7) Obstructing an Investigation/Influencing a Witness; (8) False Information in Records; (9) Policy of Equality—Discriminatory Harassment; (10) Unreasonable Force; and (11) Family Violence. (Id***. at p. 37.)

The letter advised deputies that, "in order to comply with our constitutional obligations," the Department was "***required*** to provide the names of employees with potential exculpatory or impeachment material in their personnel file to the District Attorney and other prosecutorial agencies where the employee may be called as a witness." (**Ibid**, emphasis added.) Albeit, the letter also stated that "no portion of an investigation or contents of your file will be turned over to either the prosecution or the defense absent a court order." (**Ibid**.) And deputies were told they could "object to their inclusion on the ***Brady*** list, by informing the Department that 'the deputy did not have a founded administrative investigation finding on one of the above policy violations' or that 'any such founded investigation had been overturned in a settlement agreement or pursuant to an appeal.'" (**Ibid**.)

The Association for Los Angeles Deputy Sheriffs (hereinafter "ALADS") then sought an injunction in the trial court preventing the Department "from disclosing the identity of deputies on the ***Brady*** list absent compliance with ***Pitchess*** procedures." (***Id***. at p. 38.)

The trial court ruled the list contained confidential information protected by the ***Pitchess*** statues "because the list linked officers to disciplinary action reflected in their personnel records." (**Ibid**.) Moreover, the trial court agreed that due process (i.e., ***Brady***) did not authorize disclosure of the list at the Department's discretion; rather, disclosure had to be connected to a criminal case. However, the trial court concluded it *was* proper for the Department to disclose the fact that a deputy was on the "***Brady*** List" when a criminal prosecution was pending, and the deputy was involved in the pending prosecution as a potential witness. (**Ibid**.)

The majority opinion of the Court of Appeal agreed with the trial court but held that it would not be proper to disclose the fact a deputy was on a ***Brady*** list *even if* a deputy was a witness in a pending prosecution. (***Id***. at pp. 38-39.)

The California Supreme Court granted review to decide: "When a law enforcement agency creates an internal ***Brady*** list [citation], and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in [that officer's] confidential personnel file ...?" (***Id***. at p. 38.)

After the enactment of Senate Bill 1421, which gave access by way of a public records request to various peace officer personnel files previously protected by the ***Pitchess*** statutes, the California Supreme Court also asked the parties to address the impact of that bill on the question originally taken up for review. (***Id***. at p. 38)

Analysis and Holding

1. The court characterized the case as one concerning "the relationship between prosecutors' constitutional duty to disclose information to criminal defendants and a statutory scheme that restricts prosecutors' access to some of that information." (***Id***. at p. 35.)

   On the one hand, the court recognized the prosecution's duty to "disclose to the defense ***certain*** evidence that is favorable to the accused." (***Id***. at p. 36 citing to ***Brady* v. *Maryland*** (1963) 373 U.S. 83.) (Emphasis added by IPG.) This duty "carries with it an obligation to 'learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" (**Ibid**.)* And that favorable evidence is "sometimes . . . evidence that will impeach a law enforcement officer's testimony." (***Id***. at p. 36 citing to ***Giglio* v. *United States*** (1972) 405 U.S. 150, 154-155.)

Editor's note:** Although the quoted language talks about a constitutional duty to learn of "any favorable" evidence, that should not be taken out of context. The constitutional duty only imposes obligations to learn of favorable evidence that is ***material. That is why IPG highlighted the term "certain" in the paragraph above. (**See also *Alads*** at p. 40 ["under ***Brady***, a prosecutor must disclose to the defense evidence that is "favorable to [the] accused" ***and*** "material either to guilt or to punishment."], emphasis added by IPG.)

On the other hand, the ***Pitchess*** statutes "restrict a prosecutor's ability to learn of and disclose certain information regarding law enforcement officers." (***Id***. at p. 36.) Specifically, "Penal Code section 832.7 renders confidential certain personnel records and records of citizens' complaints, as well as information "obtained from" those records." (**Ibid**.)

Editor's note:** The ***Pitchess statutes (Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1047) lay out the procedures under which persons may or may not access peace officer personnel records. **Penal Code section 832.8** states: "As used in Section 832.7, 'personnel records' means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following: [¶] (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. [¶] (b) Medical history. [¶] (c) Election of employee benefits. [¶] (d) Employee advancement, appraisal, or discipline. [¶] (e) ***Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties***. [¶] (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (Emphasis added by IPG; **see also *Commission on Peace Officer Standards & Training* v. *Superior Court*** (2007) 42 Cal.4th 278, 289–290 [only information falling into one of Penal Code section 832.8' s specifically listed categories is a "personnel record" for ***Pitchess*** purposes]; ***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, 188 [same].)

3. To address this apparent conflict between a prosecutor's ***Brady*** obligations and the confidentiality created by the ***Pitchess*** statutes for certain personnel records, the court stated some law enforcement agencies, including the agency in the instant case (the LASD), created so-called ***Brady*** lists. "These lists enumerate officers whom the agencies have identified as having potential exculpatory or impeachment information in their personnel files — evidence which may need to be disclosed to the defense under ***Brady*** and its progeny." (***Id***. at p. 36.)

4. The court acknowledged that records deemed "confidential" under Penal Code section 832.7 may only be released after the person seeking disclosure complies with the procedures laid out in the ***Pitchess*** statutes. (***Id***. at p. 44.) And held the identities of officers placed on a ***Brady*** list were "confidential" to the extent the identities of the officers were "obtained from" the records that were deemed "confidential" by Penal Code section 832.7. (***Id***. at pp. 43-44.)

5. However, the court held that not all peace officer personnel records are "confidential." (***Id***. at p. 44.) In particular, "[u]nder legislation enacted while this litigation was pending [Senate Bill 1421], . . . certain records related to officer misconduct are not confidential. (**See** Pen. Code, § 832.7, subd. (b) (section 832.7(b)).) Because such records are not confidential, information 'obtained from' those records is also not confidential. (§ 832.7(a).) With one possible exception not relevant here (**see *id***., § 832.7, subd. (b)(8)), the ***Pitchess*** statutes do not prevent the Department from disclosing — ***to anyone*** — the identity of officers whose records contain that nonconfidential information." (***Id***. at p. 44, emphasis and bracketed information added by IPG.)

> ***Editor's note:** The changes made to Penal Code section 832.7 by SB 1421 and what records have been rendered nonconfidential by SB 1421 is discussed in greater depth in this IPG at pp. 25-30.)

6. Thus, whether a ***Brady*** list is completely confidential, partially confidential, or nonconfidential will depend on the origin of, and type of information, that lands an officer on the list. Nevertheless, "[b]ecause [the court could not] say that the ***Brady*** list at issue [was] entirely nonconfidential, and because partial nonconfidentiality would not strip the remainder of the list of its confidential status," the court assumed the list itself was confidential and went on to address whether the Department could disclose ***even*** confidential information on its ***Brady*** list to prosecutors. (***Id***. at p. 49.)

7. The court had no doubt the confidential personnel records could potentially contain ***Brady*** material. "An officer may provide important testimony in a criminal prosecution. Confidential personnel records may cast doubt on that officer's veracity. Such records ***can*** constitute material impeachment evidence." (***Id***. at p. 51.)

> ***Editor's note:** "In general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime' [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citation].'" (***People* v. *Letner*** (2010) 50 Cal.4th 99, 177; ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1050.)

8. "Viewing the ***Pitchess*** statutes "against the larger background of the prosecution's [***Brady***] obligation [citation omitted]," the court concluded "the Department may provide prosecutors with the ***Brady*** alerts at issue here without violating confidentiality." (***Id***. at p. 51.) The court then expressly held that "the Department ***does not violate*** section 832.7(a) by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file." (***Id***. at p. 56, emphasis added by IPG.)

9. Perhaps because some of the rationale the court used to conclude "release" of personnel records by the law enforcement agency to the prosecution would not necessarily justify further release of the records without prosecution compliance with the Pitchess statutes, the court **declined** to address "whether it would violate confidentiality for a prosecutor to share an alert with the defense." (***Id***. at p. 56 [albeit citing to ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 722].)

10. The court cast some doubt on its previous holding in ***Johnson*** that the so-called "investigations exception" embodied in Penal Code section 832.7(a) did not allow direct prosecutorial access to records for purposes of checking up on the credibility of a police officer witness. (**See** this IPG at pp. 20-22.) However, the court declined to "revisit" the question of "whether prosecutors may ***directly*** access underlying records, or perhaps a subset of those records." (***Id***. at p. 56, emphasis added by IPG.)

11. And lastly, the court also declined to address the propriety of an agency "releas[ing] records concerning frivolous or unfounded civilian complaints 'pursuant to this section' when it shares them only with a prosecutor's office. (Pen. Code, § 832.7, subd. (b)(8).)" (***Id***. at p. 47, fn. 3.)

Questions an Inquisitive Prosecutor Might Have After Reading the *ALADS* Decision

A. Does the holding in *ALADS* *require* law enforcement agencies to create *Brady* lists and/or provide those lists to the prosecution?

The California Supreme Court in ***ALADS*** did not ***directly*** state that law enforcement agencies *must* create ***Brady*** lists or *must* provide ***Brady*** alerts to the prosecution. The ***ALADS*** court did, however, strongly suggest that, if ***Brady*** alerts are not provided, there *must* be *some* mechanism for law enforcement to provide the information to the prosecution:

> "The Fourteenth Amendment underlying ***Brady*** imposes obligations on states and their agents — not just, derivatively, on prosecutors. Law enforcement personnel are required to share ***Brady*** material with the prosecution. (**See, e.g.**, ***Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1219-1223 & fn. 12.) The harder it is for prosecutors to access that material, the greater the need for deputies to volunteer it. ¶ The Association's contrary view that "***Brady*** relates only to the prosecutor" and that "***Brady*** … does not impose obligations on law enforcement" is distressing and wrong. The prosecution may bear ultimate responsibility for ensuring that necessary disclosures are made to the defense (**see *In re Brown***, ***supra***, 17 Cal.4th at p. 881, 72 Cal.Rptr.2d 698, 952 P.2d 715), but that does not

> mean law enforcement personnel have no role to play. This is not to imply that ***Brady*** alerts are a constitutionally required ***means*** of ensuring ***Brady*** compliance; only that ***disclosure of Brady material is required***, and that ***Brady*** alerts help to ensure satisfaction of that requirement." (***Id***. at p. 52.)

Moreover, the same reasoning the ***ALADS*** court used to justify why alerts were ***permitted***, also supports the notion that law enforcement is ***required*** to use ***Brady*** alerts or come up with an equivalent mechanism to alert prosecutors of ***Brady*** information in personnel files.

For example, in explaining why "construing the ***Pitchess*** statutes ***to permit Brady*** alerts best 'harmonize[s]' ***Brady*** and ***Pitchess***," the court noted, inter alia, that since "[p]rosecutors are deemed constructively aware of ***Brady*** material known to anyone on the prosecution team and must share that information with the defense . . . construing the ***Pitchess*** statutes to cut off the flow of information from law enforcement personnel to prosecutors ***would be [an] anathema*** *to* ***Brady*** *compliance*." (***Id***. at p. 51, emphasis and bracketed information added by IPG.)

Later, the court observed that: "Without ***Brady*** alerts, prosecutors may be unaware that a ***Pitchess*** motion should be filed — and such a motion, if filed, may not succeed. Thus, interpreting the ***Pitchess*** statutes to prohibit ***Brady*** alerts would ***pose a substantial threat to Brady*** *compliance*. (***Id***. at p. 52.)

Editor's note:** Assuming law enforcement agencies or individual officers have a duty to disclose ***Brady information in personnel files, other than haphazard informal disclosures (**see *ALADS*** at p. 51 ["Even without formal procedures, conscientious prosecutors have conferred with law enforcement agencies to identify confidential files that may contain impeachment material."]), ***Brady*** lists combined with a ***Brady*** tip system are really the only practical and feasible mechanism for meeting this duty.

That said, because the question before the California Supreme Court in ***ALADS*** was not whether there was a ***Brady*** duty on the part of law enforcement to disclose ***Brady*** information in an officer's personnel file – only whether disclosure was ***permitted*** - the ***ALADS*** court did not have to find such a duty existed. But make no mistake. If the California Supreme Court has not already imposed such a duty (**see *ALADS*** at pp. 51-52), all the necessary theoretical groundwork has been laid for expressly finding such a duty on the part of the law enforcement agencies or upon the testifying officers themselves to alert the prosecution to *favorable and material* impeachment information (i.e., ***Brady*** information) located in the personnel file of a testifying officer.

Moreover, given the number of federal decisions that have held the police have a duty to provide known ***Brady*** evidence to the prosecution*, IPG respectfully submits it appears inevitable that the California Supreme Court will allow a *statutory* scheme (e.g., the ***Pitchess*** statutes) to unduly hinder that duty when it comes to ***Brady*** evidence in an officer's personnel file.

Editor's note:** Virtually every federal circuit has held "either that the police share in the state's obligations under ***Brady, or that the Constitution imposes on the police obligations analogous to those recognized in ***Brady***." (***Ricks* v. *Pauch*** (E.D. Mich. 2018) 322 F.Supp.3d 813, 823.) Albeit, courts differ on whether bad faith must be shown and when disclosure must occur. (**See *McMillian* v. *Johnson*** (11th Cir. 1996) 88 F.3d 1554, 1568 [as of 1987 and 1988, it would be "obvious to every like-situated, reasonable government agent that" that "a police officer had a clearly established duty under ***Brady*** to not intentionally withhold exculpatory or impeachment evidence from the prosecutor."]; ***Pierce* v. *Gilchrist*** (10th Cir. 2004) 359 F.3d 1279, 1298-1299 [police department chemist was not entitled to qualified immunity on claim under § 1983 for constitutional tort of malicious prosecution based on her alleged withholding of exculpatory evidence and fabrication of inculpatory evidence]; ***Mellen* v. *Winn*** (9th Cir. 2018) 900 F.3d 1085, 1096 [law in 1997-1998 clearly established "police officers investigating a criminal case were required to disclose material, *impeachment* evidence to the defense", emphasis added by IPG]; ***Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1219 [finding as far back as 1984 "it was clearly established that police officers were bound to disclose material, exculpatory evidence"]; ***White* v. *McKinley*** (8th Cir. 2008) 519 F.3d 806, 814["***Brady***'s protections also extend to actions of other law enforcement officers such as investigating officers" but bad faith must be shown to support a civil suit]; ***Anderson* v. *City of Rockford*** (7th Cir. 2019) 932 F.3d 494, 504 ["While most commonly viewed as a prosecutor's duty to disclose to the defense, the duty extends to the police and requires that they similarly turn over exculpatory/impeaching evidence to the prosecutor, thereby triggering the prosecutor's disclosure obligation."]; ***Beaman* v. *Freesmeyer*** (7th Cir. 2015) 776 F.3d 500, 509 ["the idea that police officers must turn over materially exculpatory evidence has been on the books since 1963"]; ***D'Ambrosio* v. *Marino*** (6th Cir. 2014) 747 F.3d 378, 389 ["the role that a police officer plays in carrying out the prosecution's ***Brady*** obligations is distinct from that of a prosecutor.... ***Brady*** obliges a police officer to disclose material exculpatory evidence only to the prosecutor rather than directly to the defense."]; ***Brown* v. *Miller*** (5th Cir.2008) 519 F.3d 231, 238 [allowing § 1983 claim against state crime lab technician for suppressing exculpatory blood results]; ***Owens* v. *Baltimore City State's Attorneys Office*** (4th Cir. 2014) 767 F.3d 379, 402 ["a police officer violates clearly established constitutional law when he suppresses material exculpatory evidence in bad faith"]; ***Yarris* v. *County of Delaware*** (3rd. Cir. 2006) 465 F.3d 129, 141 ["the ***Brady*** duty to disclose exculpatory evidence to the defendant applies ***only*** to a prosecutor" albeit finding officers may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor, emphasis added]; ***Bellamy* v. *City of New York*** (2d Cir. 2019) 914 F.3d 727, 751 ["When police officers withhold exculpatory or impeaching evidence *from* prosecutors, they may be held liable under § 1983 for violating the disclosure requirements of [Brady]" emphasis added by IPG]; ***Drumgold* v. *Callahan*** (1st Cir.2013) 707 F.3d 28, 38 ["law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant"]; **but see *Jean* v. *Collins*** (4th Cir. 2000) 221 F.3d 656, 660 (Wilkinson, C.J., concurring), ["to speak of the duty binding police officers as a ***Brady*** duty is simply incorrect. The Supreme Court has always defined the ***Brady*** duty as one that rests with the prosecution."]; ***Montgomery* v. *District of Columbia*** (D.D.C., 2019) 2019 WL 3557369, at *5 ["neither the Supreme Court nor the D.C. Circuit has clearly recognized ***Brady*** rights in the context of pretrial proceedings" and there is no "clearly established" right that "would require the government to disclose exculpatory information to the defense ***prior to a preliminary detention hearing*** in order to prevent unfair pretrial detention decisions" emphasis added by IPG].)

B. Assuming there *is* a duty on the part of law enforcement to disclose *Brady* material in an officer's personnel file, does that duty extend to disclosure of potentially impeaching information that is merely exculpatory and not reasonably likely to result in a different verdict if disclosed?

It is unlikely that law enforcement has a duty to disclose impeaching information in an officer's personnel file that is **not** both favorable *and* material (i.e., not ***Brady***) ***unless*** it falls into one of the categories of evidence covered by subdivision (b) of Penal Code section 832.7.*

***Editor's note:** Section 832.7(b) is discussed in this IPG memo at pp. 29-31 and 33-35.

The California Supreme Court has repeatedly held that, in criminal proceedings, "all court-ordered discovery is governed exclusively by-and is barred except as provided by-the discovery chapter newly enacted by Proposition 115." (***People* v. *Thompson*** (2016) 1 Cal.5th 1043, 1093; ***Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1103; ***In re Littlefield*** (1993) 5 Cal.4th 122, 129.) Courts are precluded from "broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal Constitution." (***People* v. *Tillis*** (1998) 18 Cal.4th 284, 294; **see also *Verdin* v. *Superior Court*** (2008) 43 Cal.4th 1096, 1116; ***Jones* v. *Superior Court*** (2004) 115 Cal.App.4th 48, 56-57; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1312-1313.)

Penal Code section 1054.6 states: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure, ***or which are privileged pursuant to an express statutory provision***, or are privileged as provided by the Constitution of the United States." (Emphasis added.)

Thus, evidence which is *privileged* under an express statutory provision is not subject to disclosure even if it is "exculpatory" as that term is defined in Penal Code section 1054.1(e) unless disclosure is "mandated by the Constitution of the United States." (Pen. Code, § 1054(e).) The only disclosure of evidence that is mandated by the federal Constitution is favorable material evidence under ***Brady***. (***In re Sassounian*** (1995) 9 Cal.4th 535, 543, fn. 5.)

Information in an officer's personnel file is protected by the privilege created by Penal Code section 832.7. (**See *City of Hemet* v. *Superior Court*** (1995) 37 Cal.App.4th 1411, 1427 ["Section 832.7 does not create a limited privilege; it creates a general privilege and then carves out a limited exception"]; ***Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 403 [describing Penal Code section 832.7 as a "new privilege" created by the Legislature]; ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 98-99 [repeatedly referring to peace officer personnel files as "privileged"].) This privilege protects the records from disclosure absent compliance with the procedures described in Evidence Code section 1043. (**See *Rosales* v. *City of Los Angeles*** (2000) 82 Cal.App.4th 419, 426; ***Hackett* v. *Superior Court*** (1993) 13 Cal.App.4th 96, 100-101.)

Up until the enactment of SB 1421, it was fairly clear that, to the extent *any* duty existed on the part of law enforcement to disclose the information in the files, it would be limited to disclosing the existence of ***Brady*** information in the files based on the above analysis. However, the passage of SB 1421 removed the confidentiality of information in officer personnel files that falls into the category described in subdivision (b) of Penal Code section 832.7. (**See *ALADS*** at p. 44.) And thus, it is likely SB 1421 *also* removed the privileged nature of those specific records. This now raises a new issue – which no case has yet addressed.

While many federal courts have held that the police have an obligation to disclose ***Brady*** information to prosecutors (**see** this IPG at p. 8), there do not appear to be cases requiring law enforcement to disclose information that is not ***Brady*** but is nonetheless exculpatory. Penal Code section 1054.1(e) "requires the prosecution to provide all exculpatory evidence, not just evidence that is material under ***Brady*** and its progeny." (***People* v. *Cordova*** (2015) 62 Cal.4th 104, 124 citing to ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 901; **accord *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 241; ***People* v. *Elder*** (2017) 11 Cal.App.5th 123, 132; ***People* v. *Lewis*** (2015) 240 Cal.App.4th 257, 266-267; ***People* v. *Bowles*** (2011) 198 Cal.App.4th 318, 326.)

But the prosecution does not have a duty to disclose evidence that is only *statutorily*-required to be disclosed unless the prosecution is in *actual* possession of the information. This is because section 1054.1 limits the disclosure obligation to materials and information that "the prosecuting attorney ***knows*** it to be in the possession of the investigating agencies[.]" (Pen. Code, § 1054.1, emphasis added by IPG.) The California Supreme Court has twice recognized that the prosecutor's ***statutory*** duty to disclose evidence would ***not*** apply to evidence in the possession of a member of

the prosecution team that was unknown to the prosecutor. (**See *People* v. *Whalen*** (2013) 56 Cal.4th 1, 65, fn. 27 [finding photos in the possession of a criminalist (but unknown to the prosecutor and belatedly disclosed to the defense) were in the possession of the prosecutor for ***Brady*** purposes because the criminalist was on the prosecution team but finding defendant's statutory right to disclosure of relevant real evidence and exculpatory evidence extended ***only*** to evidence in the possession of the prosecuting attorney or ***known by*** the prosecuting attorney to be in the possession of the investigating agencies]; ***People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 468 [expressing concern that the prosecution was unaware of multiple reports that were found in the trial notebook of the lead investigating detective *until after the trial was well underway* but finding ***no statutory error*** in disclosure arose because the materials were disclosed by the *prosecutor* as soon as the *prosecutor* came into possession of the materials even though they had been in possession of law enforcement in advance of 30 days before trial].)

So far, no court has expressly imposed a duty upon *law enforcement* to disclose unprivileged evidence that is not required to be disclosed by the federal constitution but only by statute. (**But see *People* v. *Mora and Rangel*** (2018) 5 Cal.5th 442, 463-466 [finding trial court's remedy of granting a continuance and giving an instruction about the content and late discovery of a report known only to law enforcement while clarifying for the jurors that no *party* had been aware of the report prior to its discovery was an adequate remedy to address belated disclosure of statutorily - required evidence].) However, if there ***is*** such a statutory duty imposed on law enforcement, then law enforcement should probably assume there is a reasonable possibility they may be required to provide not only alerts/tips to the prosecution regarding ***Brady*** material in an officer's personnel file but at least non-***Brady*** exculpatory impeachment evidence *that is no longer privileged* because it falls under one of the categories of reports described in subdivision (b) of section 832.7.

C. *Assuming* there is a duty on the part of law enforcement to disclose *Brady* material in an officer's file, does *ALADS* suggest there is also a duty on the part of the *prosecution* to *request* such information from the law enforcement agency?

Before ***ALADS*** issued, it was *fairly* clear that, as long as the prosecution was not already aware of information contained in a peace officer personnel file, there was **no** obligation to either file a ***Pitchess*** motion or ask law enforcement about information contained in an officer's personnel file because those files were not deemed to be in the constructive possession of the prosecution.

It has been long-standing law that when it comes to a prosecutor's constitutional (***Brady***) discovery obligations, "a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information" (***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 53; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1315.) Evidence within the possession of persons or agencies not on the prosecution team is referred to as being within the possession of "third parties" (**See e.g.**, ***People ex rel. Lockyer* v. *Superior Court*** (2004) 122 Cal.App.4th 1060, 1077; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 57; ***People* v. *Superior Court (Barrett)*** (2000) 80 Cal.App.4th 1305, 1318.) And in ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, the California Supreme Court noted the language in section 1054.1 requiring provision of materials and information to the defense "refers only to evidence possessed by the prosecutor's office and "the investigating agencies[,]" and then stated, "[t]here is no reason to assume the quoted statutory phrase assigns the prosecutor a *broader* duty to discover and disclose evidence in the hands of other agencies than do ***Brady*** and its progeny." (***Zambrano*** at pp. 1133-1134, emphasis added; **accord *Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 905 [same]; **see also *People* v. *Superior Court (Dominguez)*** (2018) 28 Cal.App.5th 223, 235 [citing to ***In re Steele*** (2004) 32 Cal.4th 682, 696 and ***Barnett* v. *Superior Court*** (2010) 50 Cal.4th 890, 904 for the proposition that "our Supreme Court has more than once interpreted the statutory discovery requirements with respect to this particular issue as 'consistent with' the prosecution's ***Brady*** obligations."]; **cf.**, ***People* v. *Little*** (1997) 59 Cal.App.4th 426, 438 [informal request for standard reciprocal discovery is sufficient to create a prosecution duty to disclose the felony convictions of all material prosecution witnesses if the record of conviction is "reasonably accessible" to the prosecutor by the simple expedient of running a criminal history].)

Consistent with that general principle, the California Supreme Court and numerous appellate courts in California had traditionally treated information in ***Pitchess*** files that was *unknown* to prosecutors as third-party records (i.e., records *outside* the possession of the prosecution team). (**See *Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1046 [holding absent compliance with the ***Pitchess*** procedures "peace officer personnel records retain their confidentiality vis-à-vis the prosecution; ***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, 415 [same, albeit also noting an officer remains free to voluntarily provide the prosecution with material contained in the officer's own personnel file]; ***People* v. *Gutierrez*** (2004) 112 Cal.App.4th 1463, 1475 [same, albeit also noting prosecutor cannot conduct its own ***Brady*** review absent compliance with sections 1043 and 1045]; **accord *Rezek* v. *Superior Court*** (2012) 206 Cal.App.4th 633, 642; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 56; ***Garden Grove Police Dept* v. *Superior***

Court (2001) 89 Cal.App.4th 430, 431-432 & fns. 1 & 2, 434; ***People* v. *Superior Court (Gremminger)*** (1997) 58 Cal.App.4th 397, 404-405; ***People* v. *Gonzalez*** (unreported) 2006 WL 3259202, *4-*5 [holding trial court's order that prosecution has to check with IA unit for ***Brady*** information in officer personnel files erroneous because the IA unit of the investigating agency is not on the "prosecution team" – ***Pitchess*** motion is the only vehicle available to obtain the information].)

More recently, in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court had the opportunity to address the question of whether ***Pitchess*** files are considered records within the possession of the prosecution team or should be treated as third party records for purposes of deciding whether the prosecution had an obligation to review such files for potential ***Brady*** information. That case arose when the prosecution received a "***Brady*** tip" from the San Francisco Police Department that potential ***Brady*** information existed in an officer's personnel file – albeit no further information was provided by the department. Based on this tip, the People filed their own ***Brady/Pitchess*** motion to obtain the file, but the trial court refused to hear the motion. (***Id***. at pp. 706-708.) Eventually, the case made its way to the California Supreme Court on "two interrelated questions: (1) May the prosecution examine the records itself to determine whether they contain exculpatory information, or must it, like criminal defendants, follow the procedures the Legislature established for ***Pitchess*** motions? (2) What must the prosecution do with this information to fulfill its ***Brady*** duty?" (***Id***. at p. 705.)

The ***Johnson*** court did not directly answer the question of whether officer personnel files were in constructive possession of the prosecution (thus triggering a duty of review). Instead, it resolved the case on a different ground – albeit one suggesting the files *were* third party records. The ***Johnson*** court pointed out that a violation of due process (i.e., the ***Brady*** rule) can only occur "if evidence has been suppressed by the State, either willfully or inadvertently" and that "[e]vidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence." (***Id***. at pp. 715-716.) Since "the prosecution and the defense have equal access to confidential personnel records of police officers who are witnesses in a criminal case[,]" there could be no ***Brady*** violation if information contained in the file was not disclosed so long as the prosecution provided what information they did have to the defense. (***Johnson*** at pp. 716, 722.) The ***Johnson*** court affirmed that the ***Pitchess*** procedure is "in essence a special instance of ***third party*** discovery" (***id***. at p. 713, emphasis added) and "that the prosecution does not have access to confidential personnel records absent compliance with the ***Pitchess*** procedures." (***Id***. at p. 713.)

The ***Johnson*** court concluded: "[U]nder these circumstances, permitting defendants to seek ***Pitchess*** discovery ***fully protects*** their due process right under ***Brady*** . . . to obtain discovery of potentially exculpatory information located in confidential personnel records. The prosecution ***need not do anything*** in these circumstances beyond providing to the defense any information it has regarding what the records might contain—in this case informing the defense of what the police department had informed it." (***Johnson*** at pp. 721-722, emphasis added by IPG.) This language is consistent with the position that the prosecution has no discovery obligation to seek out information in personnel files unless they have been provided a ***Brady*** tip; and even then, providing that tip to the defense suffices to meet the prosecution's discovery obligation.

However, the decision in ***ALADS*** portends a shifting approach to the question of whether prosecutors are in constructive possession of ***Brady*** information in an officer's file (or put another way, whether there is a duty to inquire with the agency or the officer about whether such information exists). It is true that the ***ALADS*** court did **not hold** prosecutors are in constructive possession of ***Brady*** information in personnel files. Indeed, the ***ALADS*** court recognized that "if an 'agency ... has no connection to the investigation or prosecution of the criminal charge against the defendant,' the agency is not part of "the prosecution team," and that "the prosecutor does not have the duty to search for or to disclose" "information possessed by [that] agency." (***Id***. at p. 52 citing to ***In re Steele*** (2004) 32 Cal.4th 682, 697.)

Nevertheless, the ***ALADS*** court appeared to back away from its earlier view of such files being treated solely as third party records when discussing why it rejected the claim that "when a law enforcement agency maintains information about a peace officer in [the officer's] personnel file, it is acting in an administrative, not an investigative, capacity, and such information is not within the purview of the prosecutor's duty under ***Brady***." (***Id***. at p. 52.) The ***ALADS*** court indicated that if the personnel file belongs to an officer on the prosecution team (and/or if a prosecutor is aware of information in the file), "it does not follow that information in an officer's confidential personnel file ***categorically*** falls outside the ***Brady*** duty to disclose." (***Id***. at p. 52, emphasis added by IPG.) This is what they said:

> Even if one assumes that a law enforcement agency is not a member of the prosecution team when acting in its capacity as a custodian of records — a proposition ***Steele*** does not establish — it may be that others, who clearly are on the prosecution team, are aware of the existence and content of those records. A prosecutor, for example, may know from a prior ***Pitchess*** motion that a confidential file contains ***Brady*** information regarding an officer involved in a pending prosecution. Moreover, the correspondence sent to deputies in this case served to "remind" them about information in their records, reflecting the fact that an officer

> will often (if not always) be aware of the contents of the officer's own confidential file. Thus, ***even assuming that custodians are not necessarily part of the prosecution team, it does not follow that confidential personnel records are categorically unknown to the members of that team***. (Id. at p. 53, emphasis added by IPG.)

It is also true, that in a footnote attached the quoted paragraph, the ***ALADS*** court did not follow through to the arguably logical conclusion of its analysis: "We need not hold that all information known to officers is necessarily within the scope of the ***Brady*** duty. For now, it is enough to say that records connected to officers' discipline cannot be categorically excluded from that duty." (***Id***. at p. 53, fn. 6.) But, certainly, if a prosecutor is ***aware*** of ***Brady*** information in an officer's personnel file, the prosecutor cannot sit on it. And do not be surprised if a future case expressly holds that ***Brady*** information in a peace officer's personnel file is constructively in the possession of the prosecution if that peace officer is deemed to be on the prosecution team.*

Editor's note and warning:** As explained in much greater depth in the 2019 IPG-40 at pp. 105-108, if the prosecution is deemed to be in possession of evidence impeaching a civilian witness that is known only to the investigating officer (which the prosecution clearly is), how can the prosecution *not* be deemed to be in possession of evidence in an officer's personnel file known to an investigating officer that impeaches his or her own credibility or the credibility of a fellow investigator on the prosecution team? And, in fact, there are cases from out of state coming to this conclusion. Indeed, there are a couple of out-of-state cases indicating that the prosecution is in constructive possession of information impeaching a police officer witness *even when the information has not yet resulted in an investigation*, i.e., the information was not, at the time of trial, in the officer's personnel file. (**See** the 2019 IPG-40 at p. 107 [albeit most courts do not go this far].) The 2019 IPG-40 covers the arguments why prosecutors should or should not be held to be in possession of information in officer personnel files at pp. 105-109. Suffice to say, ***ALADS moves the needle closer to the "should" side. And prosecutor's offices that do not set up a ***Brady*** Bank to keep track of information in personnel files that has been passed on to a prosecutor in the office at some point and a ***Brady*** tip system (or its equivalent) with law enforcement agencies to alert prosecutors to information in the files that may be unknown to prosecutors (but known to members of the prosecution team) are resting convictions on shifting sand. A pre-***ALADS*** list of ten reasons for setting up ***Brady*** tip systems can be found in the 2019 IPG-40 at pp. 383-386. The language in ***ALADS*** adds a compelling eleventh reason.

D. Can law enforcement provide the *Brady* list to prosecutors even though officers named on the list are not *currently* designated as a witness in a pending trial?

In ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court appeared to approve of the ***Brady*** tip procedures used by the San Francisco Police Department to

alert prosecutors to the existence of potential ***Brady*** information in an officer's file. Specifically, the court stated: "In this case, the police department has ***laudably*** established procedures to streamline the ***Pitchess/Brady*** process." (***Id***. at p. 721, emphasis added.) The court even saw fit to attach the policy protocol as an appendix to their opinion. (***Id***. at p. 723; **see also *ALADS*** at p. 54 [noting it "viewed ***Brady*** alerts as so 'laudabl[e]'" in ***Johnson***, that it attached the order " 'establish[ing] department procedures for ***Brady*** disclosure of materials in employee personnel files'"].)

Under the policy described in that protocol, the police department reviews the conduct of an officer that may give rise to a ***Brady*** obligation to report. Upon completion of that internal review, the police department sends a written memorandum to the District Attorney's office that states: "The San Francisco Police Department is identifying [name of employee, star number if applicable, . . .] who has material in his or her personnel file that may be subject to disclosure under ***Brady* v. *Maryland*** (1963) 373 U.S. 83.)" (Id. at p. 723 [Appendix at p. vi].) The protocol also provided that the "Department is aware the ***District Attorney's*** Office will ***create a list*** of Department employees, who have potential ***Brady*** material in their personnel files." (**Ibid** [Appendix at p. vii], emphasis added by IPG. Thus, the policy of the police department approved in ***Johnson did not condition*** disclosure of the ***Brady*** tip to the prosecution nor placement of the officer on the list based on the officer being a witness in a pending case.

The ***ALADS*** court did not retreat from its approval of the policy in ***Johnson***, but did create some *ambiguity* as to the permissibility of a police department providing a ***Brady*** tip to the district attorney's office for inclusion on a list in advance of a pending prosecution in which the officer was a potential witness. It created this ambiguity by limiting its holding to the conclusion "that the [Los Angeles Sheriff's] Department does not violate section 832.7(a) by sharing with prosecutors the fact that an officer, *who is a potential witness in a pending criminal prosecution*, may have relevant exonerating or impeaching material in that officer's confidential personnel file." (***Id***. at p. 56.)

Expect some police departments to argue that absent a pending case, there can be no ***Brady*** obligation to disclose, which was the position adopted by the appellate court in ***ALADS***. (**See *Association for Los Angeles Deputy Sheriffs* v. *Superior Court*** (2017) 13 Cal.App.5th 413, 426 [rev'd and remanded (2019) 8 Cal.5th 28] ["When a deputy on the list is not involved as a witness in a particular filed prosecution, however, the ***Brady*** disclosure obligation is not triggered . . ."].)

However, given the ***Johnson***'s court earlier approval of the San Francisco police department protocol and recognition of the rationale behind it, i.e., that "[r]epetitive requests by the District Attorney that the [Police] Department check employee personnel files of Department employees who may be witnesses create unnecessary paperwork and personnel costs" (***id***. at p. 707; **see also *ALADS*** at p. 51), the holding in ***ALADS*** should *not* be interpreted as precluding the provision of ***Brady*** lists created by police departments to prosecutor's offices even though there is not a pending case against every officer on that list.

To the contrary, the ***ALADS*** court recognized that prosecutors must have a mechanism for ensuring compliance with their ***Brady*** obligations. (**See *ALADS*** at p. 52 [expressing reluctance "to imply that ***Brady*** alerts are a constitutionally required means of ensuring ***Brady*** compliance" while *also* recognizing "that disclosure of ***Brady*** material is required, and that ***Brady*** alerts help to ensure satisfaction of that requirement"].) If the prosecution cannot effectively and practically meet its ***Brady*** obligation without asking the police department to provide a list of officers with potential ***Brady*** material in advance so that each time a case needs to be subpoenaed, all (but only) the officers with such material in their personnel file can be flagged, then there should be no barrier to providing that limited information in advance.

To quote from the *unpublished* decision in ***People* v. *Coleman*** 2016 WL 902638, which had to address whether the prosecution should be compelled to run an officer's rapsheet:

> "[E]ven when material information is within the constructive possession of the prosecution, ***Brady*** does not empower a defendant to compel the precise manner by which prosecutors learn whether such information exists. To be sure, ***prosecutors need some mechanism for ensuring they learn of Brady material within their constructive possession***. (See ***Giglio* v. *United States*** (1972) 405 U.S. 150, 154; see also ***Johnson***, supra, 61 Cal.4th at pp. 706–706, 721.) ***But the choice of that mechanism is within district attorneys' broad 'discretionary powers in the initiation and conduct of criminal proceedings***,' which 'extend from the investigation and gathering of evidence relating to criminal offenses [citation], through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings."'" (***Coleman*** at p. *8.)

Moreover, the Attorney General has opined that it is ***proper*** for law enforcement agencies to provide advance lists of officers with potential ***Brady*** material in their personnel file. In a post-***Johnson*** (but pre-***ALADS***) opinion, the Attorney General approved of "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." (***Id***. at p. *1.) To carry out that compliance, the

proposed policy would result in the CHP reviewing the personnel files of CHP officer-witnesses for potential ***Brady*** information. "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. The conduct itself would not be described. Prosecutors would have access to this ***Brady*** list and could search it for the names of officers who have been subpoenaed to testify in upcoming criminal trials." (***Id***. at p. *5.) In other words, prosecutors would be provided with the list ***before*** the officer was identified as a witness - although the district attorney would not file the ***Pitchess/Brady*** motion for the actual information in the file until the officer was expected to a be a witness in a criminal case. (**Ibid**.) The Attorney General concluded: "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." (***Id***. at p. *8, emphasis added by IPG.)

E. Can prosecutors disclose the *Brady* alert provided to them by law enforcement *to defense counsel* without complying with the *Pitchess* procedures?

Whether the prosecution can provide the defense with a ***Brady*** tip about information located in a peace officer's personnel file that was provided by law enforcement to the prosecution is an open question.

In ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court seemed to approve of the prosecution passing on the limited privileged information it received from the police department (i.e., provide a ***Brady*** tip) to the defense: "In this case, the police department has ***laudably*** established procedures to streamline the ***Pitchess/Brady*** process. It notified the prosecution, ***who in turn notified the defendant, that the officers' personnel records might contain Brady material***." (***Id***. at p. 721, emphasis added by IPG)].) However, notwithstanding this apparent approval, in ***ALADS***, the California Supreme Court muddied up the question of whether such ***Brady*** alerts by the prosecution to the *defense* would be permitted by specifically declining to "address whether it would violate confidentiality for a prosecutor to share an alert with the defense." (***Id***. at p. 56.)

Part of this reluctance to address the question might stem from the fact that one of the rationales given for allowing ***Brady*** tips to be provided to the prosecution in ***ALADS*** (i.e., that disclosure to of information in the personnel records to members of the "prosecution team" does not intrude upon the confidentiality of personnel records in the same way that intrusion by non-members would) is not equally applicable to provision of ***Brady*** tips to defense counsel.

Specifically, the ***ALADS*** court intimated that prosecutors *might* be able to view officer personnel files for ***Brady*** material under the exception provided in Penal Code section 832.7 for "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." (Pen. Code, § 832.7(a); ***ALADS*** at p. 55; this IPG at pp. 20-22.) And the court also noted that while "the statutes may shield the fact that an officer has been disciplined from disclosure to the public at large, the mere fact of discipline, disclosed merely to prosecutors, raises less significant privacy concerns than the underlying records at issue in ***Johnson***." (***Id***. at p. 55.)

That said, in the same sentence declining to address the question of whether prosecutors can share ***Brady*** alerts with the defense, the ***ALADS*** court cited to the page in ***Johnson*** where it had earlier stated that providing the defense with whatever information had been provided by law enforcement sufficed to meet the ***Brady*** obligation: "[t]he prosecution need not do anything in these circumstances beyond providing to the defense any information it has regarding what the records might contain-in this case informing the defense of what the police department had informed it." (***ALADS*** at p. 56 citing to ***Johnson*** at p. 722.) That should provide adequate support for continuing to allow ***Brady*** tips to be given to the defense when the prosecution and defense have similar access to the privileged records once the alert is provided.

Moreover, having to file a ***Brady/Pitchess*** motion in every case in which an officer is going to testify is very onerous and can result in delaying cases where the defense would not bother to file such a motion because the officer's credibility may not matter to the defense. As pointed out in ***Johnson***, "[i]f the defense does not intend to challenge an officer's credibility, it might reasonably choose not to bring a ***Pitchess*** motion. But the prosecution would not know this. Requiring the prosecution to seek the information on the defendant's behalf would essentially force the ***Pitchess*** procedures to be employed in most, if not all, criminal cases, including those in which the defense has no need of impeaching material. The ***Pitchess*** procedures should be reserved for cases in which officer credibility is, or might be, actually at issue rather than essentially mandated in all

cases." (***Id***. at p. 718.) In addition, "[r]equiring the prosecution routinely to seek ***Brady*** material in personnel reports will also foster unnecessary duplicative proceedings." (***Id***. at p. 719.)

Because requiring prosecutors to comply with the ***Pitchess*** statutes in every case involving an officer for whom a ***Brady*** alert was provided to the prosecution will prevent the prosecution from effectively and practically fulfilling its ***Brady*** obligation, the provision of such alerts to the defense should be allowed.

On the off chance a court may decide otherwise, CDAA will likely be proposing legislation adding language to section 832.7 specifically permitting the prosecution to disclose ***Brady*** alerts to the defense without having to file a ***Pitchess*** motion.

F. Can prosecutors access peace officer personnel files for *Brady* material impeaching a peace officer who is testifying a witness pursuant to the "investigations" exception of Penal Code section 832.7?

Penal Code section 832.7(a) allows prosecutors to directly access peace officer personnel files for certain investigations and proceedings. The confidentiality created by subdivision (a) of section 832.7 for peace officer personnel "***shall not apply 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. (Pen. Code, § 832.7(a), emphasis added.)

In ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, the California Supreme Court held the exception for investigations described in subdivision (a) does **not** allow the prosecution to review personnel records of police officer witnesses for ***Brady*** material without complying with the ***Pitchess*** procedures." (***Id***. at p. 713.) "Checking for ***Brady*** material is not an investigation for . . . purposes [of this investigation exception]. A police officer does not become the target of an investigation merely by being a witness in a criminal case." (***Id***. at p. 714.) "Treating such officers as the subject of an investigation whenever they become a witness in a criminal case, thus giving the prosecutor routine access to their confidential personnel records, would not protect their privacy interests 'to the fullest extent possible.'" (**Ibid**.)

In ***ALADS***, however, the California Supreme Court softened its position that the investigation exception did not allow prosecutors seeking to meet their ***Brady*** obligations to access personnel

files. The court acknowledged the argument that its analysis of the investigation exception could apply to prevent ***Brady*** alerts since ***Brady*** alerts communicate information obtained from confidential records. (***Id***. at p. 54.) They also recognized "that nothing in section 832.7(a) — including the investigations exception — explicitly declares that different kinds of confidential information should be treated differently." (**Ibid**.) Nevertheless, the ***ALADS*** court decided that law enforcement agencies could provide ***Brady*** alerts to prosecutors.

In explaining why ***Brady*** alerts were permitted, the ***ALADS*** court appeared to put the scope of the "investigations" exception once again in play and **backtracked** from its analysis in ***Johnson*** – at least when it came to files that contained potential ***Brady*** information. (See ALADS at p. Specifically, after noting that "the relationship between the term 'confidential' and the investigations exception" was not "beyond debate", the ***ALADS*** court stated:

> ***Johnson*** inferred that because there is an exception to confidentiality for investigations, the ***Pitchess*** statutes otherwise limit investigators' (specifically, prosecutors') access to "confidential" information. (See ***id***., at pp. 713-714 [alternate citations omitted].) But an exception aimed at ***investigations*** need not imply anything about whether ***investigators*** can view confidential material; for example, the exception could concern prosecutors' ability to share information with others when an investigation is ongoing. Moreover, even if the investigations exception does imply that prosecutors lack unlimited access to confidential records during ordinary criminal cases, the exception could be understood to set a floor on prosecutorial access, rather than, as in ***Johnson***, a ceiling. We need not embrace either of these interpretations to conclude that ***Johnson***'s approach is not compelled by the statutory text — and should not be reflexively extended without considering "defendants' due process rights." (***ALADS*** at p. 55 [underlining but not emboldening added by IPG].)

The ***ALADS*** court then went on to find that disclosure of ***Brady*** alerts* to prosecutors was permissible "***even if*** the investigations exception is the ***only*** basis on which prosecutors may directly access underlying confidential records without a ***Pitchess*** motion." (***ALADS*** at p. 55, emphasis added by IPG.) The court reasoned that while the ***Pitchess*** statutes "may shield the fact that an officer has been disciplined from disclosure to the public at large, the mere fact of discipline, disclosed merely to prosecutors, raises less significant privacy concerns than the underlying records at issue in ***Johnson***." (***ALADS*** at p. 55.)

Editor's note:** The ***ALADS court decline to decide whether prosecutors could obtain alerts regarding records "concerning frivolous or unfounded civilian complaints" (i.e., information that would not likely be considered ***Brady*** information) under the "investigations" exception of Penal Code section 832.7(a). (***Id.*** at p. 47, fn. 3[and citing to Pen. Code, § 832.7(b)(8) - which prohibits the release of records "of a civilian complaint, or the investigations, findings, or dispositions of that complaint" if the complaint is "frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded."].)

Ultimately, the court did not *fully* abrogate its earlier language in ***Johnson*** regarding the scope of the investigations exception: "[B]ecause this case concerns only ***Brady*** alerts, it provides no occasion to revisit whether prosecutors may directly access underlying records, or perhaps a subset of those records." (***Id***. at p. 56 citing to Pen. Code, § 832.8, subd. (a)(4) ["discipline"], (5).) And it is possible it may never do so since the opening of personnel files under SB 1421 (**see** this IPG at pp. 5, 25) may largely obviate the need to interpret the "investigations" exception in a broad fashion. But, given the change of course regarding the scope of the "investigations" exception in ***ALADS***, neither law enforcement nor prosecutors should *assume* that the exception will continue to be interpreted in a way that bars prosecutors from directly reviewing the files for ***Brady*** evidence or even potentially other less material impeachment evidence.

Keep in mind that even if the investigations exception permits access to prosecutors, it does not allow <u>further</u> disclosure. The ***ALADS*** court did not suggest that information obtained pursuant to the "investigations" exception by prosecutors could be provided to the defense without complying with the ***Pitchess*** statutes. (**See *ALADS*** at p. 55 ["The Department may share this limited information, for the limited purpose of ensuring ***Brady*** compliance, with the ***limited class of persons (i.e., prosecutors)*** with a particularized need to know." (Emphasis added by IPG)]; **see also *Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 618-619 [the "district attorney properly gained access to petitioners' confidential peace officer personnel files under section 832.7, subdivision (a); however, the information obtained from those files remains confidential absent judicial review pursuant to Evidence Code section 1043, et seq."]; ***Zanone* v. *City of Whittier*** (2008) 162 Cal.App.4th 174, 187, fn. 14 [it is an unresolved "question whether a party that legitimately obtains personnel records subject to such protection without first filing a ***Pitchess*** motion (for example, by receiving copies from the involved officer) is nonetheless precluded from offering that information into evidence or using it in cross-examination: that is, whether the ***Pitchess*** procedures affect not only discovery of personnel information but also its admissibility."]; **but see** this IPG at pp. 18-20 [describing why prosecutors should be able to provide a Brady tip to the defense without requiring the filing of a ***Brady/Pitchess*** motion].)

G. Is a *Brady* tip sufficient to meet the threshold standard for a defendant to obtain in camera review of personnel records under *Pitchess*?

Evidence Code section 1043(b)(3) requires that the party seeking discovery or disclosure of ***Pitchess*** information file a written motion. The motion must identify the officer or officers at

issue (**id**., § 1043, subd. (b)(1)) and describe "the type of records or information" desired (**id**., § 1043, subd. (b)(2)). (***ALADS*** at p. 41.)

The motion must be supported by affidavits showing "good cause for the discovery." (***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; **accord *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 710.) "This 'good cause' requirement has two components." (***ALADS*** at p. 41.) "First, the movant must set forth 'the materiality' of the information sought 'to the subject matter involved in the pending litigation.' (Evid. Code, § 1043, subd. (b)(3).)" (**Ibid**.) "If the movant shows that the request is 'relevant to the pending charges, and explains how, the materiality requirement will be met.'" (**Ibid**.) "[M]ateriality . . . in this context, means the evidence sought is admissible or may lead to discovery of admissible evidence." (***Riske* v. *Superior Court*** (2016) 6 Cal.App.5th 647, 658 citing to ***Richardson* v. *Superior Court*** (2008) 43 Cal.4th 1040, 1048–1049 ["the materiality standard [of Evidence Code section 1043] is met if evidence of prior complaints is admissible or may lead to admissible evidence"].) Second, the movant must state "upon reasonable belief" that the police agency has the records or information at issue. (***Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; **accord *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 710.)

"This belief 'may be based on a rational inference'." (***Association for Los Angeles Deputy Sheriffs* v. *Superior Court of Los Angeles County*** (2019) 8 Cal.5th 28, 42.) "Certainly, a movant is not required "'to allege with particularity the very information'" sought." (**Ibid**.) "At the least, the ***requisite "reasonable belief" exists when a movant declares that the agency from which the movant seeks records has placed the officer at issue on a Brady list***. (**Ibid,** emphasis added by IPG; **see also *Serrano* v. *Superior Court*** (2017) 16 Cal.App.5th 759, 777 ["t]he prosecutor's notice to [defendant] that [the deputy's] personnel file contains potential ***Brady*** material, together with counsel's declaration explaining that [the deputy] is the prosecution's sole witness to many of the events leading to [the defendant's] arrest, is sufficient to establish his claim that [the deputy's] file contains potential impeachment evidence that may be material to his defense. Nothing more is required to trigger the trial court's in camera review."].)

H. If the prosecution decides to file its own *Brady/Pitchess* motion for the actual records in the personnel file, will the *Brady* tip be sufficient to meet the threshold standard for an in camera review?

Alleging that a ***Brady*** tip has been provided by law enforcement to the prosecution should also

generally suffice to meet the showing required to obtain in camera review of an officer's personnel file by a court under ***Pitchess*** even without being able to identify the specific act of misconduct committed by the officer. (**See *Serrano* v. *Superior Court*** (2017) 16 Cal.App.5th 759, 774 [It "would be nonsensical to require the prosecution to allege that an officer, who is part of the prosecution team and an intended witness, engaged in specific acts of misconduct."].)

However, should a court require more of a showing, the prosecution could, presumably, in support of its good cause showing, assert any or all the following reasons in establishing good cause for review:

(1) It is necessary to avoid the possibility that the defense will end up in possession of information (never disclosed to the prosecution) that could be used to sandbag a prosecution peace officer witness. (**See *People* v. *Tillis*** (1998) 18 Cal.4th 284, 290-291 [no statutory duty to disclose impeachment evidence where attorney simply plans to ask witness about a prior event based on information available to the attorney].)

(2) It is necessary to help ensure the prosecution has all the information it needs in deciding whether to rely on the officer's testimony. For example, in cases where the evidence of defendant's guilt relies heavily on the credibility of an officer the information might be useful in helping to determine whether to proceed with the prosecution, enter into plea negotiations, or dismiss the case, or eschew reliance on the officer's testimony. This is especially true when the prosecution is aware that the defendant will be challenging the truthfulness of an officer's report. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 719 ["the prosecution will often be able to anticipate what information the defense might want, and it might be able to present the defense position reasonably well to the court in a ***Pitchess*** motion"].)

(3) It is necessary to help ensure that the information in the file is presented to the defense so that there can be no later claim that defense counsel provided ineffective assistance of counsel by failing to file a ***Brady/Pitchess*** motion. (**See e.g.**, ***In re Avena*** (1996) 12 Cal.4th 694, 730 [rejecting argument defense attorney's failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel, but only ***because*** the defense had failed to show there was any information in the officer's file that would have changed the verdict].)

I. What is the impact of SB 1421 on the confidentiality of peace officer personnel records?

1. Statutory language of Penal Code section 832.7 as amended by SB 1421.

Penal Code section 832.7 is the statute that codified the protections given to peace officer personnel files. Senate Bill 1421 amended section 832.7 to allow for much greater access to peace officer files. Below is the current language of **Penal Code section 832.7**

(a) ***Except as provided in subdivision (b),*** the personnel records of peace officers and custodial officers 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 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.

(b)(1) Notwithstanding subdivision (a), subdivision (f) of Section 6254 of the Government Code, or any other law, the following peace officer or custodial officer personnel records and records maintained by any state or local agency ***shall not be confidential*** and shall be made available for public inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code):

(A) A record relating to the report, investigation, or findings of any of the following:

(i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.

(ii) An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

(B)(i) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

(ii) As used in this subparagraph, “sexual assault” means the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

(iii) As used in this subparagraph, “member of the public” means any person not employed by the officer's employing agency and includes any participant in a cadet, explorer, or other youth program affiliated with the agency.

(C) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

(2) Records that shall be released pursuant to this subdivision include all investigative reports; photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(3) A record from a separate and prior investigation or assessment of a separate incident shall not be released unless it is independently subject to disclosure pursuant to this subdivision.

(4) If an investigation or incident involves multiple officers, information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph (1), unless it relates to a sustained finding against that officer. However, factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a

sustained finding against another officer that is subject to release pursuant to subparagraph (B) or (C) of paragraph (1).

(5) An agency shall redact a record disclosed pursuant to this section only for any of the following purposes:

(A) To remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers.

(B) To preserve the anonymity of complainants and witnesses.

(C) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers.

(D) Where there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person.

(6) Notwithstanding paragraph (5), an agency may redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

(7) An agency may withhold a record of an incident described in subparagraph (A) of paragraph (1) that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A)(i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the use of force occurred or until the district attorney determines whether to file criminal charges related to the use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about use of serious force by peace officers and custodial officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(iv) In an action to compel disclosure brought pursuant to Section 6258 of the Government Code, an agency may justify delay by filing an application to seal the basis for withholding, in accordance with Rule 2.550 of the California Rules of Court, or any successor rule thereto, if disclosure of the written basis itself would impact a privilege or compromise a pending investigation.

(B) If criminal charges are filed related to the incident in which force was used, the agency may delay the disclosure of records or information until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time to withdraw the plea pursuant to Section 1018.

(C) During an administrative investigation into an incident described in subparagraph (A) of paragraph (1), the agency may delay the disclosure of records or information until the investigating agency determines whether the use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the use of force, or allegation of use of force, by a person authorized to initiate an investigation, or 30 days after the close of any criminal investigation related to the peace officer or custodial officer's use of force, whichever is later.

(8) A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded.

(c) Notwithstanding subdivisions (a) and (b), a department or agency shall release to the complaining party a copy of his or her own statements at the time the complaint is filed.

(d) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may disseminate data regarding the number, type, or disposition of complaints (sustained, not sustained, exonerated, or unfounded) made against its officers if that information is in a form which does not identify the individuals involved.

(e) Notwithstanding subdivisions (a) and (b), a department or agency that employs peace or custodial officers may release factual information concerning a disciplinary investigation if the officer who is the subject of the disciplinary investigation, or the officer's agent or representative, publicly makes a statement he or she knows to be false concerning the investigation or the imposition of disciplinary action. Information may not be disclosed by the peace or custodial officer's employer unless the false statement was published by an established medium of communication, such as television, radio, or a newspaper. Disclosure of factual information by the employing agency pursuant to this subdivision is limited to facts contained in the officer's personnel file concerning the disciplinary investigation or imposition of disciplinary action that specifically refute the false statements made public by the peace or custodial officer or his or her agent or representative.

(f)(1) The department or agency shall provide written notification to the complaining party of the disposition of the complaint within 30 days of the disposition.

(2) The notification described in this subdivision shall not be conclusive or binding or admissible as evidence in any separate or subsequent action or proceeding brought before an arbitrator, court, or judge of this state or the United States.

(g) This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

(h) This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess* v. *Superior Court* (1974) 11 Cal.3d 531.

(i) Nothing in this chapter is intended to limit the public's right of access as provided for in *Long Beach Police Officers Association* v. *City of Long Beach* (2014) 59 Cal.4th 59." (Emphasis added.)

Penal Code Section 832.8

Section 1421 also amended Penal Code section 832.8 to provide definitions for the terms "sustained" and "unfounded" as those terms are used in amended section 832.7.

Penal Code section 832.8 (b) now defines "Sustained" as meaning "a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy." (Pen. Code, § 832.8(b).)

Penal Code section 832.8(c) now defines "Unfounded" as meaning "that an investigation clearly establishes that the allegation is not true." (Pen. Code, § 832.8(c).)

2. In light of *ALADS* finding that records under subdivision (b) of Penal Code section 832.7 are "not confidential," are there no protections for such records?

As noted above, the California Supreme Court in ***ALADS*** held that the records described in subdivision (b) of Penal Code section 832.7 are "not confidential" and that any portion of a ***Brady*** list that is "based on these types of records is not confidential, and section 832.7(a) does not restrict dissemination of such information." (***ALADS*** at p. 46.)

However, the ***ALADS*** court also stated that its "conclusion that records described in section 832.7(b) are not 'confidential' (§ 832.7(a)) does not mean that they are invariably open for public inspection over the agency's objection. (***ALADS*** at pp. 46–47.) The ***ALADS*** court claimed that it did not mean to "suggest that nonconfidential records must be fully disclosed, at any time, under

the California Public Records Act." The court observed that "[a]s amended, Penal Code section 832.7 contemplates that it may be appropriate for an agency to redact records (***id***., § 832.7, subd. (b)(5)-(6)) or to delay disclosure of records to avoid interference with certain investigations or enforcement proceedings (***id***. § 832.7, subd. (b)(7))." (***ALADS*** at p. 46.)

3. Can the defense obtain the officer personnel records described in Penal Code section 832.7(b) directly from law enforcement without having to go through the prosecution to obtain them?

It appears that the defense attorneys can obtain the records described in subdivision (b) directly from law enforcement agencies without having to go through the district attorney's office. On its face, the statute provides those records "shall not be confidential and shall be made available for ***public inspection*** pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code)". (Pen. Code, § 832.7(b)(1), emphasis added by IPG.) Nothing limits the public inspection to persons other than defense attorneys.

The ***ALADS*** court recognized that Senate Bill 1421 does not "supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with [Evidence Code] Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess* v. *Superior Court* (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897, 522 P.2d 305." (***Id***. at p. 46 citing to Pen. Code, § 832.7, subd. (h).) But then stated that "these provisions are beside the point." (**Ibid**.) Probably because while Penal Code section 1054(e) precludes courts from "broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the federal Constitution" (***People* v. *Tillis*** (1998) 18 Cal.4th 284, 294), subdivision (b) of section 832.7 *is* an "express statutory provision." (**See also *ALADS*** at p. 44 ["With one possible exception not relevant here (see id., § 832.7, subd. (b)(8)), the ***Pitchess*** statutes do not prevent the Department from disclosing — ***to anyone*** — the identity of officers whose records contain that nonconfidential information.", emphasis added by IPG.)

4. Can the defense (or prosecution) obtain the "*findings or recommended findings*" of internal affairs investigators or investigations kept in the personnel records described in Penal

Under the ***Pitchess*** scheme, a judge deciding what information in an officer's personnel records must be disclosed is prevented from disclosing "the *conclusions* of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code." (Evid. Code, § 1045(b)(2).)

Moreover, while not specifically required by statute, after a court finds good cause for disclosure, at a ***Pitchess*** motion, the court typically discloses only the "name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question[.]" (***Chambers* v. *Superior Court*** (2007) 42 Cal.4th 673, 679; **accord *Warrick* v. *Superior Court*** (2005) 35 Cal.4th 1011, 1019; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1039; ***see also City of Santa Cruz* v. *Municipal Court*** (1989) 49 Cal.3d 74, 84 [and noting courts generally refuse to disclose verbatim reports]; **but see *Alvarez v. Superior Court*** (2004) 117 Cal.App.4th 1107, 1112 ["[t]he practice of disclosing only the name of the complainant and contact information must yield to the requirement of providing sufficient information to prepare for a fair trial."].)

Much more information is disclosable pursuant to a post-SB 1421 section 832.7(b) request, including "documents setting forth findings or recommended findings and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the *Skelly* or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action." (Pen. Code, § 832.7(b)(2).)

a. Is evidence of an administrative finding or conclusion regarding peace officer misconduct admissible in evidence?

Although an officer may potentially be impeached with *the conduct* underlying the administrative finding at issue, the finding or conclusion *itself* should be excluded on grounds it is hearsay (Evid. Code, § 1200) and, in effect, impermissible lay opinion regarding whether the conduct occurred.

"Analytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. [Citations.] It is in substance a statement of the court that determined the previous action [i.e., other than by a testifying witness] ... that is offered 'to prove the truth of the matter stated.' [Citation.] Therefore, unless an exception to the hearsay rule is provided, a judgment would be inadmissible if offered in a subsequent action to prove the matters determined." (***People* v. *Wheeler*** (1992) 4 Cal.4th 284, 298; **see also *People* v. *Alvarez*** (1996) 14 Cal.4th 155, 201, fn. 11 ["Strictly speaking, evidence of prior misdemeanor convictions themselves is not relevant for impeachment, but rather the misconduct underlying such convictions."]; ***People* v. *Chatman*** (2006) 38 Cal.4th 344, 373 ["Misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying conduct may be admissible subject to the court's exercise of discretion."].)

Like convictions, administrative findings and conclusions should also be deemed hearsay. And, unlike with convictions, there are no hearsay exceptions allowing those findings or conclusions to be used to prove the underlying conduct. (**Cf**., Evid. Code, § 788 [creating hearsay exception allowing in felony convictions to impeach] and Evid Code, § 452.5(b) [creating a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred]; ***People* v. *Cadogan*** (2009) 173 Cal.App.4th 1502, 1515, fn. 4.)

J. If law enforcement agencies decline to provide *Brady* tips to the prosecution, *can, must, or should* the prosecution utilize the new version of Penal Code section 832.7(b) to directly obtain information in a peace officer's personnel record?

The California Supreme Court in ***ALADS*** recognized that "[n]ot all departments maintain ***Brady*** lists." (***Id***. at p. 53.) And, as discussed in this IPG at p. 6-8, the California Supreme Court in ***ALADS*** court did strongly suggest that if ***Brady*** alerts are not provided, there must be some mechanism for law enforcement to provide the information to the prosecution. However, the ***ALADS*** court did not directly state that law enforcement agencies must create ***Brady*** lists or must provide ***Brady*** alerts to the prosecution. (**But see** this IPG, editor's note at p. 7 [from a practical standpoint, ***Brady*** lists and alerts are the only feasible means of meeting this strongly suggested obligation].)

Thus, some risk-tolerant law enforcement agencies may choose not to create ***Brady*** lists or provide any ***Brady*** tips to prosecutor's offices. In that event, prosecutors may want to consider making requests for the records described in Penal Code section 832.7(b). For the same reasons that the defense can obtain information covered by Penal Code section 832.7(b) (**see** this IPG at p. 31), so ***can*** the prosecution.

Granted this strategy will not necessarily capture ***all*** potential Brady evidence in a peace officer's file. As noted in ***ALADS***, a system permitting ***Brady*** alerts from law enforcement agencies will not "completely resolve[] the tension between ***Brady*** and the ***Pitchess*** statutes." (***Id***. at p. 53.) "And nothing guarantees that a ***Brady*** list will reflect all information that might prove 'material' in each particular case." (**Ibid**.) However, ***most*** information in personnel files that might reasonably be characterized as "***Brady***" material *will* be captured by seeking this information pursuant to section 832.7(b). And there is no question that it can then be revealed to the defense as necessary without having to file any additional motions under the ***Pitchess*** statutes.

It is true that Penal Code section 832.7(b) does not allow for disclosure of frivolous or unfounded complaints. (**See** Pen. Code, § 832.7(b)(8) ["A record of a civilian complaint, or the investigations, findings, or dispositions of that complaint, shall not be released pursuant to this section if the complaint is frivolous, as defined in Section 128.5 of the Code of Civil Procedure, or if the complaint is unfounded."].) But such complaints should rarely be deemed material, let alone favorable, evidence for ***Brady*** purposes. (**See *People* v. *Jordan*** (2003) 108 Cal.App.4th 349, 362 [contrasting "citizen's complaints of officer misconduct which the officer's employer *has sustained as true*" with claims of peace officer misconduct asserted at trial by a defendant trying to avoid criminal liability" and noting the latter do not appear to constitute "favorable evidence within the meaning of ***Brady***" since such complaints "do not immediately command respect as trustworthy or indicate actual misconduct on the part of the officer"].)

Whether the prosecution ***must*** (i.e., is required to) request records identified in subdivision (b) is a different question. Even assuming there is a duty to ascertain ***Brady*** information in personnel files of peace officers who will be testifying as witnesses in a criminal case (**see** this IPG at pp. 6-15), it is unlikely there would be a constitutional duty to request records identified in subdivision (b) because the defense has equal access to those records through the exercise of due diligence. (**See** this IPG, at p. 35.)

Whether the prosecution ***should*** request records identified in subdivision (b) is a yet a different question. The answer to that question will likely depend on: (i) whether the district attorney believes ***ALADS*** has imposed, or set the stage for imposing, upon prosecutors a general duty to seek out ***Brady*** material in officer personnel files; (ii) whether the district attorney's office has set up an alternative mechanism (i.e., a ***Brady*** tip system) to obtain that information (in which case it is probably not necessary); and (iii) whether the district attorney believes the efforts in utilizing section 832.7(b) to request the records is or is not worth the pay-off in the information gained.

At least two considerations should be taken into account in deciding whether to request the records described in subdivision (b). The first is the potential problem that arises if the defense makes the request and the prosecution does not. The prosecution will be at a big disadvantage should significant impeachment evidence exist in the file as the defense will be able to sandbag the prosecution by bringing up the impeachment (with no advance notice) on cross-examination. The second is the problem that arises if the defense counsel does *not* try to obtain the evidence. If the evidence available by way of a request pursuant to section 832.7(b) is true ***Brady*** evidence and neither the prosecution nor the defense obtain it, there will not be a ***Brady*** violation. But the case

could still potentially be reversed for ineffective assistance of counsel. (**See *In re Avena*** (1996) 12 Cal.4th 694, 730 [rejecting argument defense attorney's failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel, but only ***because*** the defense had failed to show there was any information in the officer's file that would have changed the verdict].)

K. If law enforcement agencies decline to provide *Brady* tips, can the prosecution utilize the "investigations exception" under 832.7(a) as modified by SB 1421 to obtain information in a peace officer's personnel record?

As discussed in this IPG at pp. 20-22, whether prosecutors can directly access peace officer personnel files to meet ***Brady*** obligations pursuant to the "investigations exception" of Penal Code section 832.7(a) is not as open and shut as it was before ***ALADS***. However, given the uncertainty of the scope of the exception, using section 832.7(b) to access the records is undoubtedly the easier path. (**See** this IPG at pp. 33-34.)

L. Does the passage of SB 1421 relieve the prosecution of any obligation to disclose *Brady* information known to the prosecution that is accessible to the defense by way of the public records request described in Penal Code section 832.7(b)?

The amendments to Penal Code section 832.7 giving the public access to records described in subdivision (b) (**see** this IPG at p. 25) will likely moot the issue as to whether prosecutors have a ***Brady*** obligation to provide these specified records since these records are as accessible to the defense as to the prosecution; and failure to disclose evidence that is known and reasonably accessible to the defense is not a violation of federal due process, i.e., is not a ***Brady*** violation. (**See *People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1134, citing to ***People* v. *Salazar*** (2005) 35 Cal.4th 1031, 1048-1049.

However, if the records described in subdivision (b) are deemed to be in possession of the prosecution because the information in the records happens to be known to the prosecutor handling the case (**see *ALADS*** at p. 53 [noting that a prosecutor "may know from a prior ***Pitchess*** motion that a confidential file contains ***Brady*** information regarding an officer involved in a pending prosecution"]) or perhaps even to any prosecutor in the office (**see** 2019-IPG-40 at pp. 89-94), then failure to disclose the information *may* constitute a *statutory* violation. This is

because there is nothing in the language of section 1054.1 that renders the prosecutorial duty to disclose statutorily-designated discoverable evidence a nullity if that evidence is known and reasonably accessible to the defense. Indeed, the case law indicates the contrary. (**See *People* v. *Little*** (1997) 59 Cal.App.4th 426, 430 [finding a duty to disclose the felony conviction of a witness known to the defense was a statutory violation because "even if . . . the prosecution did not have actual knowledge of the witness's prior conviction, and the defense had alternative access to that information, section 1054.1 creates a prosecution duty to inquire and disclose."]; **see also *In Matter of Nassar*** (Cal. Bar Ct., Sept. 18, 2018, No. 14-O-00027) 2018 WL 4490909, *8 [rejecting claim prosecutor had no duty to disclose exculpatory letter the prosecutor had obtained by way of a mail cover because letter was in defense's possession].)

M. Can officers object to the release of information in their personnel files pursuant to a government records request made under Penal Code section 832.7(b) without a judicial determination release is proper on *state privacy grounds*?

One of peculiar results of SB 1421 is that the personnel records of officers went from being subject to greater protection than almost everyone else's personnel files to being given *less* protection than almost everyone else's personnel records. However, do not be surprised if peace officers seek to prevent disclosure of information without at least a judicial determination that disclosure of the records necessarily outweighs the state privacy right in personnel records.

At least some information in police officer personnel files is very likely protected by the ***state constitutional right of privacy*** that is enshrined in article 1, section 1 of the state Constitution. That section states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and ***privacy***." (Cal. Const., Art. I, § 1, emphasis added.) Information is considered "private" under the state constitutional right of privacy "when well established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (***International Federation of Professional and Technical Engineers, Local 21, AFL CIO* v. *Superior Court*** (2007) 42 Cal.4th 319, 330; ***Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 30.) Among other information protected by the state constitutional right to privacy are ***personnel files***. (**See *In re Cler`gy Cases I*** (2010) 188 Cal.App.4th 1224, 1235; ***San Diego Trolley, Inc.* v. *Superior Court*** (2001) 87 Cal.App.4th

1083, 1097 [and finding "personnel records are within the scope of the protection provided by both the state and federal Constitutions]; ***El Dorado Savings & Loan Assn.* v. *Superior Court*** (1987) 190 Cal.App.3d 342, 345-346; ***Board of Trustees* v. *Superior Court*** (1981) 119 Cal.App.3d 516, 528.) Officers might very well argue that the state constitutional right of privacy trumps any *statutory* law that reduces that right of privacy.

Of course, the state constitutional right of privacy provides a *different* type of protection for personnel files of officers than the ***Pitchess*** scheme. The constitutional right would require a person requesting access to the files to comply with the ***Pitchess*** procedures (even if section 832.7 had not been amended by SB 1421). But if police personnel files are protected by the state constitutional privacy right, then they would only be protected to the extent that an in camera judicial determination on the propriety of release would have to proceed disclosure. This is because in determining whether privileged or private information should be disclosed in order to vindicate a competing need such as defendant's state or federal constitutional right to discovery, it is proper (and likely mandatory) that a court conduct an in camera review of the materials. (**See *Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39, 61 [requiring in camera review to determine whether defendant's interest in disclosure outweighed state's need to protect the confidentiality of those involved in child-abuse investigations]; ***People* v. *Webb*** (1993) 6 Cal.4th 494, 518 [when allegedly material evidence is subject to a state privacy right, and "the state seeks to protect such privileged items from disclosure, the court ***must*** examine them in camera to determine whether they are 'material to guilt or innocence", emphasis added]; ***Rubio* v. *Superior Court*** (1988) 202 Cal.App.3d 1343, 1349-1351 [requiring in camera review of videotape of sexual relations between a married couple to determine whether criminal defendant's right to due process outweighs couple's constitutional rights of privacy and their statutory privilege not to disclose confidential marital communications]; **see also *Roland* v. *Superior Court*** (2004) 124 Cal.App.4th 154, 169 [if discoverable material in possession of defense is potentially protected by the work product privilege, the attorney "can seek a protective order to that effect . . . or *an in camera review* in which the privileged material can be excised"].)

At that hearing, the judge must determine (i) if there is a protected privacy interest; (ii) whether there is a reasonable expectation of privacy in the circumstances; (iii) how serious is the invasion of privacy, and (iv) whether the invasion is outweighed by legitimate and competing interests. (***Hill* v. *National Collegiate Athletic Assn.*** (1994) 7 Cal.4th 1, 39-40.) "The key element in this process is the weighing and balancing of the justification for the conduct in question against the intrusion on privacy resulting from the conduct whenever a genuine, nontrivial invasion of

privacy is shown." (***Alfaro* v. *Terhune*** (2002) 98 Cal.App.4th 492, 509.) "[N]ot 'every assertion of a privacy interest under article I, section 1 must be overcome by a 'compelling interest.'" (***Williams* v. *Superior Court*** (2017) 3 Cal.5th 531, 556.) But a "compelling interest" is still required to justify "an obvious invasion of an interest fundamental to personal autonomy." (**Ibid**; **see also *American Academy of Pediatrics* v. *Lungren*** (1997) 16 Cal.4th 307, 341 ["When a statute significantly intrudes upon a fundamental, autonomy privacy interest" there must be "a showing that the intrusion upon such a basic and fundamental right is necessary to further a "compelling"—i.e., an extremely important and vital—state interest."].)

One response by a defense counsel seeking direct access to the personnel records for information described in subdivision (b) of section 832.7 to an assertion of this state privacy right by an officer is that the information described in subdivision (b) is not the *type of* information that the state right of privacy protects -even though it is ensconced in a "personnel record." The state right privacy exists "when well established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." (***International Federation of Professional and Technical Engineers, Local 21, AFL CIO* v. *Superior Court*** (2007) 42 Cal.4th 319, 330.) There is no well-established social norm in protecting against disclosure of conduct engaged in by police like shootings, sexual assaults, and acts of dishonesty – especially given the passage of SB 1421 and the legislative determination that "[t]he public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force." (**See** S.B. 1421 (Leg. Session 2018-2019) SEC. 1 (b); **see also *Michael* v. *Gates*** (1995) 38 Cal.App.4th 737, 745 [no violation of a police officer's constitutional right to privacy where a limited review of his personnel file did not do injustice to his reasonable expectation of privacy because, inter alia, the privilege created by Evidence Code section 1043 is a conditional privilege . . . and the statutory scheme makes it clear that the right to privacy in the records is limited"]; ***Rosales* v. *Los Angeles*** (2000) 82 Cal.App.4th 419, 429 [police officer had no reasonable expectation that his personnel records would not be disclosed to plaintiff's counsel or used by city in defending action alleging officer's sexual misconduct during employment].) And, in any event, the type of information that is *ordinarily* protected by the right of privacy in personnel records is not the type of information that must be disclosed in response to a section 832.7(b) request. (**See** Pen. Code, § 832.7(b)(5)(A)&(C) [allowing an agency to redact a record requested under section 832.7(b) "[t]o remove personal data or information, such as a home address, telephone number, or identities of family members, other than the names and work-related information of peace and custodial officers"

and "protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force by peace officers and custodial officers"]; (b)(6) [allowing redaction "including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information."].)

Even if these arguments for finding no state privacy right existed in the subdivision (b) records failed, the defense would still be able to obtain the records if, at the judicial in camera hearing, the defense was able to show their interest in disclosure (e.g., vindication of a more compelling *federal* due process right to discovery of ***Brady*** evidence) outweighed whatever state privacy right in the records existed.

The same arguments for demanding access to and disclosure of the information in officer personnel files pursuant to section 832.7(b) made by defense counsel can be made by prosecutors seeking such disclosure. However, prosecutors would *also* have the argument that *their* access to the files does not violate the state constitutional privacy right because the right was not breached by giving such access to prosecutors. (**See *ALADS*** at p. 55 [noting that while the ***Pitchess*** "statutes may shield the fact that an officer has been disciplined from disclosure to the public at large, the mere fact of discipline, *disclosed merely to prosecutors*, raises less significant privacy concerns than the underlying records at issue in ***Johnson***."], emphasis added by IPG; **see also *Michael* v. *Gates*** (1995) 38 Cal.App.4th 737, 745 ["where, as here, a governmental agency and its attorney conduct a contained and limited review of peace officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes"].)

M. Does either the *ALADS* decision or SB 1421 have any impact on the confidentiality of criminal history records of officers?

1. Before the *ALADS* decision and SB 1421, were officer arrest records protected by the *Pitchess* statutes?

Police officer criminal records may or may not be deemed reasonably accessible to the prosecution notwithstanding their inclusion in a criminal database. The question of whether prosecutors are in constructive possession of information that might impeach an officer contained in a *criminal*

history database is a ***different*** question than whether prosecutors are in constructive possession of *peace officer personnel files*.

The only published case to hint that information about police officers maintained in a ***criminal history*** database is off-limits absent compliance with the ***Pitchess*** scheme is the case of ***Garden Grove Police Department* v. *Superior Court (Reimann)*** (2001) 89 Cal.App.4th 430. In ***Garden Grove***, the defendant asked the district attorney to run criminal record checks on the officers involved in the defendant's arrest and to "provide information of crimes or acts of moral turpitude or misdemeanor or felonious behavior or convictions." The defendant also sought "specific acts of misconduct" and "other acts done under 'color of authority'" to "impeach the credibility" of the officers. (***Id***. at p. 433.) When the district attorney declined, the defendant filed a motion requesting the information. Both the police department and the district attorney filed motions in oppositions. (***Id***. at p. 432.) The trial judge ordered the district attorney to run criminal records checks on the officers. And because the district attorney needed the officers' birth dates to run the criminal records checks, the judge ordered the police department to disclose the birth dates to the district attorney. (***Id***. at p.432.)

The police department then filed a writ of mandate seeking to vacate the order requiring it to disclose the officers' birth dates to the district attorney. (***Id***. at p. 432.) The appellate court granted the writ, finding the trial court abused its discretion when it ordered the police department to disclose the birth dates of the police officers to the District Attorney "for the purpose of running criminal records checks." (***Id***. at p. 431.)

Garden Grove may be read as generally condemning the running of police officer criminal records absent compliance with the ***Pitchess*** procedures (which would indicate that such records are third party records). But it is also plausibly read as standing only for the proposition that seeking access to information *about peace officer dates of birth* requires compliance with the ***Pitchess*** procedures. (**See *Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 401-402 [stating ***Garden Grove*** "informs us ***only*** that the birth date of a police officer is covered by Penal Code section 832.8 and can be discovered only by means of a ***Pitchess*** motion" emphasis added.)

In ***People* v. *Little*** (1997) 59 Cal.App.4th 426, the court held that information contained in databases that are reasonably accessible to members of the prosecutor's office is in the constructive possession of the prosecution team. (**Id**. at pp. 432-433; **see also *United States* v. *Perdomo*** (3rd Cir. 1991) 929 F.2d 967, 971; ***United States* v. *Auten*** (5th Cir. 1980) 632 F.2d 478, 481; ***United States* v. *Lujan*** (D.N.M. 2008) 530 F.Supp.2d 1224, 1258-1259 [discussing

numerous federal cases to this effect].) However, the finding in ***Little*** was specifically based on the fact that when it came to DOJ rapsheets, the information in the rapsheets was "reasonably accessible" to the prosecution. (***Id***. at p. 433.) Thus, an argument can be made that prosecutors are not in constructive possession of the criminal history of police officers, since absent an officer's date of birth, an officer's rapsheet ***is not reasonably accessible*** to the prosecution. (**See *Garden Grove*** at p. 432.)

Nevertheless, an equally plausible argument may be made that, in many instances, the prosecution *can* check an officer's criminal records without having the officer's date of birth. For example, if the officer's name is unique, or by narrowing down the list of potential candidates with the same name based on race, ethnicity, approximate age, and criminal record. It may take longer to conduct a search for the records, but such searches are routinely conducted for witnesses whose date of birth is unknown. Moreover, if the lack of a date of birth for a police officer witness places an officer's rapsheet outside the constructive possession of the prosecution, then the lack of a date of birth about *any* witness would place that witness's rapsheet outside the constructive possession of the prosecution. This is a dubious proposition. (**Cf.**, ***People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1080 [discounting prosecution's argument that failure to disclose prosecution witness' criminal history was excusable on ground the prosecution did not have the witness' date of birth and the witness had a common name].)

2. What impact, if any, will SB 1421 or the *ALADS* decision have on prosecutorial access to the arrest records of police officers?

If there is an inability to run a rapsheet on a police officer but a request pursuant to Penal Code section 832.7(b) might reveal an officer's criminal history (e.g., because the administrative investigation overlaps with a criminal investigation), then SB 1421 might allow discovery of a crime that would not otherwise be accessible to the prosecution.

NEXT EDITION: *EITHER* OUR LONG OVERDUE IPG ON THE CURRENT STATE OF FELONY MURDERS, SECOND DEGREE MURDERS, PROVOCATIVE ACT MURDERS, NATURAL AND PROBABLE CONSEQUENCES MURDERS AND PENAL CODE SECTION 1170.95 HEARINGS *OR* A DISCUSSION OF THE BRAND NEW CALIFORNIA SUPREME COURT CASE PLACING NEW RESTRICTIONS ON SEARCHES OF VEHICLES FOR EVIDENCE OF IDENTIFICATION: *PEOPLE* V. *LOPEZ* 2019 WL 6267367.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.