RLS Rains Lucia Stern, PC

Michael L. Rains
Attorney at Law
MRains@RLSlawyers.com

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Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797

Re: Amicus Curiae Letter in Support of Petitions for Review
People v. Superior Court (Daryl Lee Johnson) **(2014) 228 Cal.App.4th 1046**
Supreme Court Number S221296
First Appellate District Number A140767, A140768
San Francisco Superior Court Case Number 12029482

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

The Legal Defense Fund of the Peace Officers' Research Association of California and the San Francisco Police Officers' Association respectfully submit this Amicus Curiae Letter in support of the Petitions for Review by the District Attorney of San Francisco County and the City and County of San Francisco through the San Francisco Police Department. (Cal. Rules of Court, Rule 8.500(g).) Review is necessary to resolve an irreconcilable conflict between the published Court of Appeal Opinion in the present case, the published Court of Appeal opinion in *People v. Gutierrez* (2003) 112 Cal.App.4th 1463 and because the Court of Appeal Opinion in the present case contravenes the holding of this Court in *People v. Mooc* (2001) 26 Cal.4th 1216, *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1224, and is inconsistent with the language contained in Penal Code Section 832.7(a).

Interest of Amicus Curiae

The Peace Officers' Research Association of California (PORAC) is a professional federation of local, state and federal law enforcement associations. Consisting of more than 700 member organizations, PORAC represents over 62,000 law enforcement officers in issues relating to employment rights and benefits, including the rights of personal privacy and privacy

in their personnel file information. Founded in 1953, PORAC has been representing peace officers in the State of California for over 60 years.

The San Francisco Police Officers' Association (SFPOA) consists of over 2,200 sworn police officers employed by the City and County of San Francisco. Their members hold ranks in that agency from Police Officer to Deputy Chief. The San Francisco Police Officers' Association was formed and exists today for the purpose of working collaboratively with the Police Department Administration and the City and County of San Francisco and the San Francisco District Attorney's Office to ensure that the constitutional rights of individuals charged with criminal offenses are observed and honored by its members, and that constitutional and statutory law establishing privacy rights in peace officer personnel files, and constraints under which such files may be accessed, are similarly observed and honored in all forms of judicial proceedings.

PORAC and the SFPOA filed an Amicus Curiae Brief in this matter in the Court of Appeal. As noted below in greater detail, Penal Code Section 832.8 describes an array of sensitive "personnel records" in an officer's personnel file which presumably, under the Decision of the Court of Appeal Opinion in the present case, can be accessed and reviewed in their entirety by representatives of the District Attorney's Office in order to comply with prosecution's obligation to identify *Brady* material.

PORAC and the SFPOA support review in this matter so that the existing conflict between the present case and other decisions of this Court and Appellate Courts may be reconciled, and the limitations in allowing prosecutors direct access to peace officer personnel records contained in Penal Code Section 832.7(a) be clarified.

NECESSITY FOR REVIEW

Review is necessary to secure uniformity of decision and to settle an important question of law concerning whether Penal Code section 832.7(a) permits a prosecutor to inspect the personnel records of a peace officer to determine if they contain *Brady* material. (Cal. Rules of Court, rule 8.500(b)(1).

As argued by Petitioners and in the Amicus Curiae letter filed by Ventura County District Attorney Gregory D. Totten, the decision in this matter is directly contrary to that of the 2nd District decision in *People v. Gutierrez* (2003) 112 Cal.App.4th 1463 and entirely inconsistent with this Court's holding in *People v. Mooc* (2001) 26 Cal.4th 1216, 1224, and *Alford v. Superior Court* (2003) 29 Cal.4th 1033. The Court in *Gutierrez* held that a prosecutor is not obliged to personally inspect the files of significant police officer witnesses and disclose any *Brady*

material because, under *Alford, supra,* 29 Cal.4th 1046, the prosecutor does not have either access to such files or the right to possess them:

> "As we recently explained in *People v. Jordan, supra,* 108 Cal.App.4th 358, 'a prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team , *knowingly possesses or has the right to possess'*...Because under *Alford* the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files, *Gutierrez's* argument for routine review of the complete files of all police officer witnesses in a criminal proceeding necessarily fails." (at 112 Cal. App.4th 1475). (Emphasis in original).

Although the *Johnson* court, citing *In re Brown* (1998) 17 Cal.4th 879, 881 correctly observed that the police department acts as the prosecutor's "agent" with respect to the retention of potential *Brady* material, the Court's holding nevertheless ignores this Court's determination in *Alford, supra, at* 1045, that a Pitchess hearing is essentially a third party discovery proceeding, and the District Attorney prosecuting the underlying criminal case represents neither the Custodian of Records of the agency employing the peace officer whose records are sought, not the officer herself or himself. In other words, *Johnson,* holding that "the District Attorney's office and the police department constitute a single prosecution team in any given criminal case" (228 Cal.App.4th 1072), fails to recognize this Court's pronouncement in *Alford* that, in matters where peace officer personnel records are to be reviewed for possible information favorable to the defense, *the District Attorney's office and police department do not constitute or function as a "single prosecution team."*

Further, as pointed out in the Petition for Review filed by the District Attorney of San Francisco (p. 19) a conflict exists between Johnson and four other published decisions as well: *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39; *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430; *People v. Superior Court (Gremminger)*(1997) 58 Cal.App.4th 397; and *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409.

Finally, review is required in order to settle an important question of law, specifically, whether the language contained in Penal Code section 832.7(a) permits a prosecutor to inspect the personnel records of a peace officer to determine if they contain *Brady* material. Until the decision in *Johnson,* no court in this state had ever determined that a prosecutor may directly access and inspect peace officer personnel records for *Brady* material.

The import of the *Johnson* decision on privacy interests of law enforcement officers throughout this state can perhaps be best appreciated by reviewing the language of Penal Code section 832.8, which defines the "personnel records" which prosecutors, pursuant to *Johnson,* may personally inspect. These records include:

(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 investigation 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 her duties;
(f) any other information that disclosure of which would constitute an unwarranted invasion of personal privacy.

In the context of *Brady* discovery, it is probably apparent to all that a peace officer's marital status, family members, educational and employment history, home address, medical history (including medical and/or psychological examinations and the results of such examinations during the officer's employment), election of employee benefits and other information "the disclosure of which would constitute an unwarranted invasion of personal privacy," while having no exculpatory or impeaching value to the defense, are now presumably subject to inspection by a prosecutor under *Johnson.* Even complaints or investigations of complaints which an officer's employing agency determined to be "not sustained," "unfounded," "exonerated," or "frivolous" (Penal Code section 832.5) are subject to inspection under *Johnson*, even though such complaints and investigations, by their very nature, are not *Brady* material.

Penal Code section 832.7(a) requires anyone seeking confidential personnel records of a peace officer to comply with Evidence Code sections 1043 and 1046. It contains one exception: prosecutors have direct access to the personnel records of peace officers in "...investigations or proceedings concerning the conduct of peace officers..." All published opinions preceding *Johnson* which have related to prosecutors directly accessing peace officer personnel records have involved situations where peace officers were the subject/target of a criminal investigation: *People v. Superior Court (Gremminger), supra; Fagan v. Superior Court* (2003)111 Cal.App.4th 607; *Gwillim v. San Jose* 929 F.2d 465 (9th Cir. 1991). Arguably, prior to *Johnson*, no Court has interpreted the language contained in Penal Code section 832.7(a) to provide prosecutors direct access to peace officer personnel records to inspect those records and identify any materials which must be disclosed under *Brady.*

Although the *Johnson* court recognized that its "fundamental task" was to examine the language contained in section 832.7 in order to effectuate the law's purpose (228 Cal.App.4th 1063) and although the Court recognized that "if the statutory language is unambiguous then its plain meaning controls (*Id, 1064),* the holding that section 832.7(a) permits a prosecutor direct access to inspect personnel records and identify *Brady* material is inconsistent both with previous

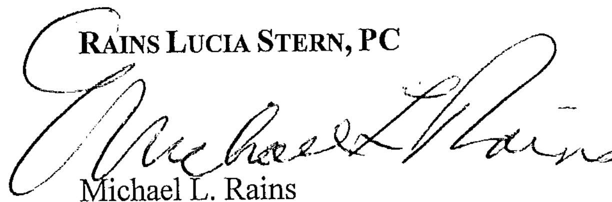
holdings of the courts of this state and the clear and unambiguous language contained in the statute.

At no point in its decision does the *Johnson* court describe the review of peace officer personnel records for purposes of identifying *Brady* materials as an "investigation" or "proceeding" concerning the "conduct" of peace officers. Instead, the court refers to this process as "the initial review and identification of *Brady* materials by the prosecution (p.1063); "Identify(ing) materials that must be disclosed under *Brady* (p. 1067); "Inspection" of an officer personnel file (p. 1068); "Inspection of officer personnel files" (p.1070); "Inspection of officer personnel files by a prosecutor (p. 1072); "Inspection of an investigatory agency's peace officer personnel files for *Brady* materials (p.1074).

Arguably, a District Attorney's office has an "interest" in the content of a peace officer's personnel records in only two different distinct situations: (1) when the District Attorney is investigating the conduct of an officer who is the target/subject of a criminal investigation, and (2) when an officer's personnel records may contain information relevant and/or favorable to the defense in a criminal case. While the language of section 832.7(a) permits the prosecutor direct access in the former situation, the holding of *Johnson*, in contravention of this section, now permits direct access in the latter situation as well. For this additional reason, review of this decision is required.

Very truly yours,

RAINS LUCIA STERN, PC



Michael L. Rains

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