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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. DONALD JAMES MYERS aka: ANGRYGAY MONIKER, Defendant. LOS ANGELES POLICE DEPARTMENT CUSTODIAN OF RECORDS, Real Party in Interest.	**CASE NO. 6CJ06496** **OPPOSITION TO MOTION FOR PRETRIAL DISCOVERY (*PITCHESS*); MEMORANDUM OF POINTS AND AUTHORITIES** **[PROPOSED] PROTECTIVE ORDER** **Filed Concurrently** DATE: April 13, 2016 TIME: 8:30 a.m. PLACE: Dept. 54

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that the Los Angeles Police Department, Real Party in Interest, opposes Defendant's motion for *Pitchess* discovery of the personnel records of **Officers Lopez #38805, Stauber #41178, Carrillo #40854, and Asuncion #36248.**

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I.

INTRODUCTION

To establish good cause for the court to conduct an in camera review of statutorily protected police officer personnel records, a defendant must demonstrate good cause or in other words, detail how the information requested is material to an articulated defense of the case. The defendant must set forth a "scenario of alleged officer misconduct that could or might have occurred," (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011) but that is not the end of the inquiry. Per Justice Joyce Kennard of the California Supreme Court, *Pitchess* discovery "requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick,* 35 Cal.4th 1011, 1021.)

A court must determine whether defendant's averments "[v]iewed in conjunction with the police reports," and any other "pertinent" documents suffice to "establish a plausible factual foundation" for the alleged officer misconduct." (*Id.*, at 1025, citing *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74.) The "defendant must present a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.*) Collateral evidence may be considered. (*Id.*) A scenario is deemed plausible when "it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.*, at 1027.)

In light of all information before the court, the defense declaration must: (1) show a logical connection between the charges and the proposed defense; (2) be factually specific and tailored to support the claim of officer misconduct; (3) demonstrate how the requested discovery will support the proposed defense, or be likely to lead to information that would support the proposed defense; and (4) provide a theory of admissibility at trial. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011 at p. 1027.)

Finally, the presentation of such facts must be in affidavit form on "information and belief" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74). In the absence of a declaration on

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"information and belief," there is no evidentiary foundation upon which a court can exercise its discretion in determining whether good cause exists for a *Pitchess* in camera review.

Defendant seeks to compel review of the personnel records of the FOUR listed officers based on an allegation of serious police misconduct. Police personnel records are confidential. They may be obtained only by a discovery motion under Evidence Code § 1043. (Penal Code § 832.7.) Strict compliance with section 1043 is required in order to ensure that an officer has an opportunity to protect his right to privacy. (*Evid. Code* § 1043(a).)

In this case, the defendant was arrested for sexual battery via a private person's arrest. The officers were not present when the defendant committed a sexual battery.

The defendant argues that the officers had no probable cause to arrest him.

The Defendant fails to state any plausible factual scenario of officer misconduct. This is nothing but a denial and conclusions and does not suffice as good cause under current *Pitchess* case law. The Defendant fails to provide any ALTERNATIVE specific factual scenario of officer misconduct. The Defendant doesn't list an alternate version of the facts and/or circumstances and, therefore, the Defendant's declaration is insufficient to support a finding of good cause for an in camera review of record. A private person's arrest gives the officers probable cause to arrest the defendant.

The Court of Appeals in *People v. Thompson* (2006) 141 Cal.App.4th 1312 stated that a mere denial of a charge, in the absence of "an alternate version of the facts" is insufficient to support a finding of good cause for an in-camera review of private records. The Court further set forth that the trial court is within its discretion to make a "common sense" determination that the defendant's version of the events is not plausible "based on a reasonable and realistic assessment of the facts and allegations." *People v. Sanderson,* 181 Cal.App.4th 1334 (2010).

In *Sanderson*, the defendant was charged with making criminal threats. The officer in question heard the defendant state that he would return to the victims' home and "kick their ass" and "we got guns and we'll be back." The defendant merely denied making the statements. The Court opined that this mere denial was insufficient because the defendant did not deny that he made the phone call or state the reason and nature of said phone call. (*Id.* at p. 9.)

Likewise, in the instant matter, the defendant merely denies the charge. Further, the Real Party submits that the defendant's story does not pass the "common sense" test because the declaration contains a mere denial and does not contain a factual scenario that is "reasonable and realistic" after considering the facts and allegations.

For the foregoing reason, Real Party in Interest, requests that this *Pitchess* motion be denied. To do otherwise would be improper based on the declaration because defendant has failed to provide a plausible factual scenario that is contrary to the police report.

The case of *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135 is illustrative:

> Here, defendant asserted that "knowing and voluntary consent to enter was not in fact obtained," without explaining in what respect the search was illegal. Similarly, defendant only asserted that the police reports contained "material misrepresentations" and that the police had "mishandled" evidence, without explaining what the misrepresentations were, what items of evidence were mishandled, or how the evidence was mishandled. He therefore failed [***26] to provide a "specific factual scenario" establishing a "plausible factual foundation" for the allegations. (*City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 85-86.) Without some notice of the specifics of the allegedly improper police conduct, the trial court could not determine whether "the discovery or disclosure sought" was material to "the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).)

As a final note of guidance, Justice Kennard set forth a four-part inquiry for the trial court to determine whether the defendant's declaration has established the materiality of the requested information to the pending litigation:

1. **"Has the defense shown a logical connection between the charges and the proposed defense?**
2. **Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct?**
3. **Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense?**

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4. Under what theory would the requested information be admissible at trial?"

(*Warrick v. Superior Court* (2005) 35 Cal.4th 1011.)

Per Justice Kennard's directive, Real Party in Interest requests that prior to any in camera review, that the court articulate exactly how the declaration satisfies the foregoing four questions.

In addition to addressing the foregoing four questions, a good cause showing is more than the ever-attainable claim that: (a) a peace officer will testify, and (b) if there is evidence of misconduct in the officer's file, it can be used to impeach him. Should these two elements alone constitute good cause, a defendant, with minimal effort, could pierce an officer's right to privacy under Penal Code Section 832.7 in every *Pitchess* motion.

In *Eulloqui v Superior Court* (2010) 181 Cal.App.4th 1055, the defendant was convicted of murder and later filed a habeas corpus petition seeking *Pitchess* material from the personnel records of the detective that investigated his case based on an allegation that the defective was dishonest. His alternative scenario was that if the detective's declaration "was false and, if he testified at the evidentiary hearing in conformity with the declaration, his testimony would be false." (*Id.*, at p. 1069.) The *Eulloqui* court rejected this argument and found that the aforementioned reasons to support a finding of good cause were insufficient.

The *Eulloqui* opinion sets forth:

> The same could be said by every defendant regarding every police officer witness in every trial. To hold this type of bare "the officer lied and will do so again" allegation constitutes a plausible factual scenario of officer misconduct warranting review of confidential personnel records would abrogate the strong ring of protection the Legislature and courts have erected around peace officer personnel records. [Citation.] (*Ibid.*)

"Materials from an officer's personnel file reflecting dishonesty or nonfelony acts of moral turpitute do not become discoverable simply because a defendant argues that the officer will testify and might testify falsely. [Citation.]" (*Eulloqui* at p. 1064.)

Based on the foregoing, Defendant's request must be considered a "fishing expedition," which was precluded by the California Supreme Court in *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 85 (quoting *Pitchess v. Superior Court* (1975) 11 Cal.3d 531, 538). The defendant has failed to

provide sufficient good cause for obtaining the items described above. If this Court deems it necessary to review any records, Real Party in Interest asks that the review take place in camera and thereafter any records this Court deems appropriate and necessary to disclose, that disclosure should be subject to a Protective Order.

II.

ARGUMENT

A. *Pitchess* Discovery May Only Be Ordered by the Trial Court on a Showing of Materiality and Good Cause.

"Good cause for discovery exists when the defendant shows both "'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought." *(Warrick v. Superior Court* (June 3, 2005) 35 Cal.4th 1011 citing to *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

The defendant's burden of showing *materiality* under Evidence Code § 1043(b)(3) is shown by averring a scenario which "presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial." *Warrick,* 35 Cal.4th 1011 at 1026.

Furthermore, "[t]o determine whether the defendant has established *good cause* for in chambers review of an officer's personnel records, the trial court looks to whether the defendant has established the *materiality* of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? " (*Warrick* 35 Cal.4th 1011 at 1026-1027).

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III.

A. Police Personnel Records Are Privileged and May Be Disclosed Only When the Defense Has Satisfied the Requisite Evidentiary Showing.

The Ninth Amendment to the United States Constitution reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." This Amendment was construed to establish a "right of privacy" for United States citizens. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In response to the federal government's explicit declaration of a right of privacy, the California Constitution was amended in 1972 to state a right of privacy on behalf of California citizens. Cal. Const., Art. I, § 1 and Historical Note. California state law makes explicit a Police Officer's privacy right in his or her own personnel records. *City of Santa Cruz v. Municipal Court*, 49 Cal.3d 74, 84 (1989); *Michael v. Gates*, 38 Cal.App.4th 737, 742-743 (1995).

Further, the Police Department has a claim of privilege as to any "official information." Cal. Evid. Code § 1040(b). "Official information" is "information acquired by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Cal. Evid. Code § 1040(a). Information held by the LAPD Custodian of Records in an Officer's personnel file is official information. It is acquired in confidence, as it cannot be disclosed except pursuant to a properly-brought *Pitchess* motion. Cal. Penal Code § 832.7. The information is not to be disclosed prior to the claim of privilege. *Id.*

The Department acknowledges that outside of a compelling countervailing interest, Defendant has a right to information "pertinent" to the defense (*Michael v. Gates*, 38 Cal.App.4th at 742-743), as well as a right to "exculpatory" information under the Fifth Amendment (*Brady v. Maryland*, 373 U.S.83 (1963)). But as an Officer's privacy interest is a protection created by the U.S. Constitution, that interest is not "trumped" automatically by the Defendant's request for discovery.

The information sought here is privileged. It may be disclosed only once the scale containing Defendant's interest in using the information to prepare his or her defense -- balanced against the Officer's and the Department's interest in the confidentiality of the information -- tips in favor of

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disclosure. This balancing is to be performed by the Court in accordance with the cases and codes outlined below.

B. <u>The Court Is neither Statutorily nor Constitutionally Required to Review Complaint Information More than Five Years from the Date of this Incident</u>.

1. Defendant Is Statutorily Barred from Receiving Peace Officer Personnel Complaint Information Older than Five Years from the Date of the Incident Giving Rise to this Litigation.

Defendant has requested access to peace officer personnel information pursuant to the statutory protocol set forth in Evidence Code § 1043, *et seq.*, which provides the exclusive statutory means by which to obtain such information. (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1423.) Defendant enjoys the benefit of satisfying a "relatively low threshold showing" of materiality to obtain peace officer personnel information under this statutory scheme (*City of Santa Cruz v. Superior Court* (1989) 49 Cal.3d 74, 83-84), and he is consequently limited to the statutory time period within which such information, *based on the aforementioned showing*, may be obtained.

California Evidence Code § 1045(b)(1) provides, "In determining relevance the court shall examine the information in chambers in conformity with § 915, and **shall** exclude from disclosure: Information consisting of complaints concerning conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought." Evidence Code § 1045(b)(1). [Emphasis added.] "Shall" is mandatory and "may" is permissive. Cal. Evid. Code § 11. Therefore, this Court is prohibited from disclosing complaints beyond the five-year limitation. If the Court orders disclosure of complaints more than five years old, the privacy rights of the Officers will clearly be violated.

The California Supreme Court has recently indicated that it agrees with this view. In *City of Los Angeles v. Superior Court (Brandon)*, (2002) 29 Cal.4th 1, the Court affirmed the constitutionality of the statutory five-year limitation on disclosure of confidential peace officer personnel information. (*Brandon, supra*, at pp. 8-9.) Specifically, the Court stated:

> ". . . we perceive no fundamental principle of justice that is offended by [Section 1045(b)(1)'s] prohibition against disclosing citizen complaints

> of officer misconduct that were filed 'more than five years' before the proceeding in which disclosure is sought." (*Brandon, supra*, at pp. 10-11.)

Nothing in the *Brandon* opinion changes the statutory scheme or any of its requirements, and as such, disclosure made pursuant to this scheme must be limited to information within a five-year period.

These privacy rights were very carefully protected by the Legislature after engaging in a painstaking balancing process. "The statutory scheme . . . carefully balances two competing interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense." *City of Santa Cruz*, 49 Cal.3d at 84. The court shall exclude from disclosure facts sought to be disclosed which are so remote as to make disclosure of little or no practical benefit. Cal. Evid. Code § 1045 (b)(3). In light of Evidence Code §§ 11, 1045 (b)(1) and 1045(b)(3), and case law, this Court should not disclose information from personnel records that is beyond the five-year limitation. Despite any authority Defendant may cite to the contrary, the five-year limitation is still the law in the State of California.

2. The Court Should Refrain from Reviewing Old Personnel Complaints.

Although the *Brandon* Court found that the trial court's review of a 1990 personnel complaint was not improper, the Court made clear that its ruling should not be viewed as a mandate to bench officers to conduct reviews of complaints more than five years old.

> "We do not suggest that trial courts ***must routinely*** review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady, supra*, 373 U.S. 83 requires its disclosure. Rather, we conclude only that the trial court here did not act improperly in evaluating the 1990 citizen complaint mentioned in a personnel document. . . ." (*Brandon, supra*, at p. 15, fn. 3 (emphasis added).)

Brandon has thus vested trial courts with some degree of discretion to undertake examinations of old personnel complaints. However, in exercising such discretion, this Court should be mindful that it is not simply looking for complaint information which is or might be "relevant" to the subject matter of the prosecution, or that is impeachment of the officer's character for truthfulness and veracity. That standard is applicable only to complaint information *within* the five-year period.

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As the *Brandon* Court noted, the five-year period "may well reflect legislative recognition that after five years a citizen's complaint of officer misconduct has lost considerable relevance." (*Brandon, supra*, at p. 10.) If the complaint information is of *marginal* relevance due to its age, then it is almost certain that it would not meet the standard of 'materiality' required under *Brady* and required by the California Supreme Court in *Brandon* for personnel complaint information more than five years old. (See Discussion, *infra.*)

3. This Court Cannot Disclose Personnel Information Beyond Five Years Unless It Satisfies the Standard of "Materiality" Articulated and Applied by the Supreme Court in *Brady* and Its Progeny.

If this Court is inclined to engage in a review of peace officer personnel complaint records beyond five years, the Court must evaluate any post five-year complaint information using the standard for such disclosure required by the Supreme Court in *Brandon, supra.* Early in its decision, the *Brandon* Court acknowledges that "[A]lthough *Brady* and *Pitchess* both require disclosure of material evidence, they employ different standards of materiality." (*Brandon, supra*, at p. 4.) According to the Court, this distinction is critical, as it is only where the post five-year old complaint information meets the standard for materiality articulated in *Brady v. Maryland, supra*, and its progeny, that disclosure would be proper.[1]

Under *Brady*, the due process rights of a criminal defendant are offended only by the nondisclosure of evidence which is both favorable to the defense and material to either guilt or punishment. (*Brady v. Maryland, supra,* at 86-87.) Therefore, even where evidence is 'favorable,' either because it is exculpatory in nature or valuable for impeachment, it must also be 'material' - meaning, the evidence is of such a significant value, that "there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different." (*Brandon,*

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[1] It is important to remember that in *Brandon*, the defendant made a motion for access to peace officer personnel information under both *Pitchess* and *Brady*, he sought allegations of misconduct including those relating to truth and veracity, and the declaration filed in support of the motion indicated that a defense 'may' be that the civilian witnesses (including the child victim) were coached by responding officers in order to fabricate evidence and suborn perjury. (See *Brandon, supra*, at p. 2.) None of these factors, alone nor in the aggregate, were sufficient to warrant the disclosure of the 1990 personnel complaint for failing to report misconduct.

supra, at pp. 4-5, quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985).) A 'reasonable probability' is one sufficient to put the whole case in such a different light, as to undermine confidence in the outcome or verdict. (*Strickler v. Greene*, 527 U.S. 263, 290 (1999), citing *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).) Also critical to this analysis is the recognition that while a personnel complaint which meets the *Brady* standard of materiality will necessarily meet the relevance standard for *Pitchess* disclosure, (see *Brandon, supra*, at p. 8), the reverse is frequently not the case.

In order to determine whether a given piece of personnel information is "material" to the underlying criminal case for purposes of a *Brady* analysis, this Court must have sufficient knowledge of the instant case, including a general understanding of the People's evidence and any potential defenses. This is so because the materiality of evidence cannot be identified in the abstract; its exculpatory value is apparent only in relation to a "particular criminal case" and a "specific defendant." (*Brandon, supra*, at pp. 10, 12.) In fact, the *Brandon* Court expressly rejected the argument that a *sustained* complaint of officer misconduct "possesses exculpatory value to any particular case in which that officer is a material witness." (*Brandon, supra*, at p. 11.)

In *Brandon,* although the 1990 sustained personnel complaint against Officer C. called his veracity into question, it did not involve coaching witnesses to fabricate evidence - the allegation made by defense counsel in the declaration accompanying the *Pitchess* motion.

> "Officer C.'s failure to report his partner's use of mace cannot be considered constitutionally material to the charge in this case of lewd conduct on a seven-year-old boy. In other words, it is not reasonably probable that a 10-year-old complaint of failing to report another officer's improper use of mace would alter the outcome of defendant's trial."

(*Brandon, supra*, at pp. 15-16, citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).)

Based on the foregoing, Real Party in Interest urges this Court to conduct a review of the involved officers' personnel complaint records only within a five-year period of time. Any review outside the five-year period, and any disclosure therefrom, should only be undertaken pursuant to the standard of materiality first articulated in *Brady v. Maryland, supra*, and affirmed by the California Supreme Court.

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C. **Although the Standard for Granting a *Pitchess* Motion Is Low, It Is Not Non-Existent.**

A motion by a criminal defendant to discover peace officer personnel information -- known commonly as a *Pitchess* motion -- must be supported by an affidavit establishing "good cause" for the production of the information requested. *Cal. Evid. Code* § 1043(b)(3). "Good cause" is shown by averring a "specific factual scenario" supported by a "plausible factual foundation." *California Highway Patrol v. Superior Court (Luna)*, 84 Cal.App.4th 1010, 1020 (2000); *City of Santa Cruz v. Municipal Court*, 49 Cal.3d 74, 85-86 (1989). The court in *Luna* illustrated this principal with the example of a "specific factual scenario" being a defendant alleging in his or her *Pitchess* motion that excessive force was used against the defendant in the arrest, and the "plausible factual foundation" which supports this allegation being the police report disclosing that force was used in the arrest. *Luna*, 84 Cal.App.4th at 1020, citing *City of Santa Cruz*, 49 Cal.3d at 85-86. Accordingly, a court may wish to perform an item-by-item analysis of whether good cause is met as to each allegation raised by a defendant. See *Lemelle v. Superior Court*, 77 Cal.App.3d 148, 157-167 (1978). As the *Luna* Court of Appeal reasoned:

> "A showing of good cause must be based on a discovery request which is tailored *to the specific officer misconduct* which is alleged. Thus, when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officer is overly broad. . . . [O]nly documentation of past officer misconduct which is *similar to* the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery." *Luna*, 84 Cal.App.4th at 1020 (citations omitted; emphasis added).

Real Party in Interest acknowledges that the burden for establishing good cause is low. *City and County of San Francisco v. Superior Court*, 21 Cal.App.4th 1031, 1035 (1993). But it is not non-existent. The showing made by the defendant must "establish some cause for discovery other than a mere desire for the benefit of all information which has been obtained. . . ." *Id.*, (internal quotes and citations omitted). There are occasions when a defendant's request for information fails to meet even this lax standard. (See, *e.g., Id.*)

The key cases in the area of *Pitchess* law, and specifically on the issue of good cause, involved motions supported by declarations which made affirmative allegations of fact as to what Defendant did

and did not do. *See Pitchess v. Superior Court*, 11 Cal.3d 531, 534 (1974) (affirmative assertion defendant acted in self-defense in response to the use of excessive force by sheriffs); *Santa Cruz,* 49 Cal.3d at 79 (allegation that officers grabbed defendant by the hair, threw him to the ground, and stepped on his head); *People v. Hustead*, 74 Cal.App.4th 410, 416-417 (2000) (admission by defendant that he evaded a pursuing officer, but took a "different route" than alleged in the arrest report); *Luna*, 84 Cal.App.4th at 1015-1016 (detailed allegations that officers slapped defendant while he was restrained in the back of a police vehicle); *Alford v. Superior Court,* 89 Cal.App.4th 356, 363-364 (2001) (highly detailed narrative by defendant as to how what "actually" happened differed from police version of events). These allegations were detailed as to how the officers behaved during the arrest, which officers behaved in what manner, and what defendant did in response to the officer behavior. *Id.;* see also *Larry E. v. Superior Court*, 194 Cal.App.3d 25, 28 (1987). Excluding the area conceded to above, the instant motion does not have the type of specificity found in the seminal cases which define this body of law.

D. <u>The Court Should Follow the Legislature's Balancing of Interests (Officer Privacy V. Defense Need) and Limit the in Camera Review Sought by Defendant</u>.

With respect to those issues listed above as to which the Motion is factually devoid, Defendant's Motion is more of a "fishing expedition" than a "*Pitchess*" motion. A *Pitchess* motion brought for the purpose of going on a "fishing expedition" is properly denied. *Luna*, 84 Cal.App.4th at 1021; *Reyes v. Municipal Court*, 117 Cal.App.3d 771, 776 (1981); see also *City and County of San Francisco v. Superior Court*, 21 Cal.App.4th 1031, 1035 (1993) ("mere desire" for the information is insufficient as a matter of law).

A criminal defendant is entitled to all information <u>pertinent</u> to his or her defense, but the Defendant's interest must be balanced against a peace officer's privacy interest in the confidentiality of the information in his or her personnel file. See, e.g., *Michael v. Gates*, 38 Cal.App.4th 737, 742-743 (1995); *City of Santa Cruz v. Municipal Court,* 49 Cal.3d 74, 84 (1989). The Courts also engage in such balancing in determining whether or not a *Pitchess* motion should be granted, or whether certain information should be disclosed pursuant to such a motion. See, e.g., *Pitchess*, 11 Cal.3d 531 (balance of legitimate government interest with the value of the information to the defendant); *Luna*, 84

Cal.App.4th 1010 (California Supreme Court approved the *Pitchess* statutory scheme because it balances criminal defendant's need for information with legitimate concerns of peace officers that confidential information not essential to the defense or obtainable from another source will be disclosed); *Lemelle v. Superior Court*, 77 Cal.App.3d 148, 165 (1978) (burden on prosecution of production of information must be balanced against defendant's demonstrated need for the information). Some analysis into the intrusiveness of the information requested may also be appropriate. See, e.g., *Davis v. City of Sacramento*, 24 Cal.App.4th 393, 401 (1994).

Language from the *Lemelle* court's discussion of the psychotherapist-patient privilege is equally applicable in the context of a court's duty to effectuate a balancing of interests on a *Pitchess* motion:

> "Unless its resolution of the matter is unconstitutional, and no claim of unconstitutionality is here made or, so far as the record indicates, was made in the trial court, the Legislature's resolution of the competing interests is binding on the courts. Courts are not authorized to create exceptions to a statute not made by the Legislature. [Citations.]" 77 Cal.App.3d at 160-161 (footnote omitted).

In the instant case, the Court should consider the intrusiveness of disclosing information where the request for the information has no factual support in the Motion or Declaration. As the Defendant has not properly requested the information, it would be improper to infringe on the Officers' privacy interests.

E. <u>Information Disclosed to Defendant Is Limited by Statutory and Case Law.</u>

Assuming *arguendo* this Court determines that good cause exists to proceed to an *in camera* review of the personnel files, and finds certain information responsive to the Defendant's request, such disclosure is limited under statutory and case law.

1. Defendant Is Not Entitled to Receive More Than the Names, Addresses and Telephone Numbers of Complainants and Witnesses.

Police officers have a constitutionally protected right to the privacy of their personnel records. The State Legislature has created a multitude of safeguards in furtherance of our State's commitment to, and acknowledgment of, that privacy right. See, e.g., *Cal. Penal Code* §§ 832.5, 832.7 & 832.8; Cal. Evid. Code §§ 1043-1047. Indeed, the courts also have followed suit, releasing limited

information to allow a defendant the essentials to afford him a fair trial. See, e.g., *Kelvin L. v. Superior Court,* 62 Cal.App.3d 823 (1976); *City of Azusa v. Superior Court,* 191 Cal.App.3d 693 (1987); *Carruthers v. Municipal Court,* 110 Cal.App.3d 439 (1980).

There is no absolute right to discovery of peace officer personnel records. Penal Code §§ 832.5, 832.7, 832.8, together with Evidence Code §§ 1043-1046, "impose rather careful restrictions upon the disclosure of information from records of citizen complaints against peace officers." *County of Los Angeles v. Superior Court (Kusar)*, 18 Cal.App.4th 588, 599 (1993). "These statutes set forth detailed and careful procedures to insure that the sensitive information contained in records relating to allegations of police misconduct will be disclosed only upon a showing of manifest necessity." *Id.*, at 600 (emphasis added).

The cases of *Kelvin L. Carruthers* and *City of Santa Cruz* guide the court in its release of information from an officer's personnel file, should it find good cause and relevance. *Kelvin L.* established the now well-settled rule that only the names, addresses, and telephone numbers of complainants and witnesses are discoverable. 62 Cal.App.3d at 828-29. In *Kelvin L.*, the defendant was charged with battery on a police officer. In preparation of a claim of self-defense, the defendant made a motion for discovery of prior complaints against the arresting officers concerning use of excessive force and racial prejudice. *Id.*, at 823. The court held that the motion should have been granted but clarified that not all records in the personnel file were discoverable. *Id.*, at 828-29. Because admissible evidence could only come through the testimony of actual witnesses against the officers, the court held that unless and until the defendant could show that he had a need for further information, he should be limited to the names, addresses and telephone numbers of any persons who could provide testimony relating to the officers' prior use of excessive force. *Id.* The court concluded that the defendant's motion as presented was too broad. *Id.*, at 829.

Similarly, in *Carruthers*, 110 Cal.App.3d at 441-42, the appellate court upheld the trial court's order that only the names, addresses and telephone numbers of complainants were discoverable. The defendants in *Carruthers* were charged with battery on police officers. They moved to discover the records of the involved officers. They sought, among other things, three categories of records: (1) statements; (2) documents from the actual investigative package; and (3) records from disciplinary

proceedings. The appellate court, focusing on *Kelvin L.*, stated that the trial court was entirely correct by denying the defendants' request for statements, documents from the actual investigative package and records from disciplinary proceedings and ordering instead that only the names, addresses and telephone numbers be released. *Id.*, at 442. The court also noted that the defendant did have a right to seek additional discovery if the initial information provided proved inadequate. *Id.*

Additionally, the California Supreme Court in *City of Santa Cruz,* 49 Cal.3d 74, affirmed a municipal court order limiting *Pitchess* discovery to names, addresses and telephone numbers. In that case, the defendant was charged with resisting arrest and exhibiting a knife. He subsequently filed a motion for discovery of all prior complaints of excessive force or violence involving the arresting officers. At the hearing on the motion, the municipal court ruled that the defendant had made a sufficient showing of good cause to justify an *in camera* review, but stated that any disclosure would be limited to the names, addresses and telephone numbers of complainants and witnesses and to the dates of the prior incidents. *Id.*, at 80. The court explicitly declined to disclose any documents, records of copies of reports, and any information relating to disciplinary proceedings or investigations of the police department. *Id.*

In affirming the municipal court's order, the Court discussed the balance between "two directly conflicting interests," the officer's right to confidentiality and the defendant's interest in all the information pertinent to his defense. *Id.*, at 84. The Court stated:

> "As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports of records of any kind from peace officer personnel files, ordering instead (as the municipal court directed here) that the agency reveal only the name, address, and phone number of any prior complainants and witnesses and the dates of the incidents in question." *Id.*, (emphasis added).

Clearly, the statutory scheme governing the confidentiality, review and disclosure of peace officer personnel records, and the case law interpreting those statutes, do not suggest that information beyond the names, addresses and phone numbers of complainants and witnesses should be summarily released, absent an additional showing by the Defendant that such initial information proved inadequate. Therefore, this Court should deny Defendant's request for disclosure of any additional

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information regarding complaints, such as discipline imposed, all statements and evidence, as well as the text of such complaints, and internal investigations.

2. Defendant Is Not Entitled to All Documents that May Relate to Any Discipline Imposed on the Identified Personnel.

Official information includes "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." Cal. Evid. Code § 1040(a). A public entity may refuse to disclose official information where "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Evid. Code § 1040(b)(2); *People v. Walker*, 230 Cal.App.3d 230, 236 (1991) (rev. den. August 21, 1991). Accordingly, no such information should be disclosed.

F. <u>A Limited Protective Order Should Be Imposed by the Court</u>.

Evidence Code § 1045(e) states, "The court shall, in any case or proceeding permitting the disclosure or discovery of any peace officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any other purpose other than a court proceeding pursuant to applicable law." (Emphasis added.) This final language of the statute indicates the disclosure order must comply with the other *Pitchess* statutes, particularly Evidence Code § 1043, which requires that a motion must be brought before such information may be disclosed.

If this Court interprets section 1045 to mean that the information's use should not be limited to this specific proceeding, then there would be no need for Evidence Code §§ 1043 through 1047, and Penal Code § 832.7. A proposed protective order is filed concurrently herewith.

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IV.

CONCLUSION

For the foregoing reasons, Real Party in Interest requests that the motion be denied. However should an in camera take place and disclosure ordered: 1) that it be limited to incidents within five years of the date of the instant incident; 2) be limited to names, addresses and telephone numbers; and 3) that the Court issue a protective order limiting the use of the information to the instant case only (*Evidence Code* section 1045(e)).

Dated: April 1, 2016

Respectfully submitted,

MICHAEL N. FEUER, City Attorney
CARLOS DE LA GUERRA, Managing Assistant City Attorney
ANNETTE Y. LEE, Interim Supervising Deputy City Attorney

By: _____

JEFFREY STEVEN BLUMIN, Deputy City Attorney
Attorneys for Real Party in Interest
THE LOS ANGELES POLICE DEPARTMENT
CUSTODIAN OF RECORDS

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business is 201 N. Los Angeles Street, Space 301A, Los Angeles Mall, Los Angeles, CA 90012.

On April 4, 2016 I served the foregoing document described as:

OPPOSITION TO MOTION FOR PRETRIAL DISCOVERY (*PITCHESS* MOTION); MEMORANDUM OF POINTS AND AUTHORITIES

on the interested party(ies) in this action by placing the true copy(ies) thereof enclosed in sealed envelope(s) addressed as follows:

GRAHAM E. BERRY, ESQ.
3384 McLAUGHLIN AVENUE
LOS ANGELES, CA 90066-2005

TELEPHONE: (310) 745-3771

[] **BY ELECTRONIC MAIL** - I caused such documents to be transmitted to the offices of the addressee via e-mail at DOSullivan@pubdef.lacounty.gov prior to 5:00 p.m. on the date specified above.

[X] **BY MAIL** – I caused each envelope with postage fully prepaid, to be placed in the United States Mail at Los Angeles, California. I thereafter caused such envelope to be deposited in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

[] **BY LA CITY ATTORNEY'S DOCUMENT SERVICES** – I caused each envelope to be sent via messenger, 200 No. Main Street, 8th Floor, City Hall East, Los Angeles, CA 90012.

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

Executed on April 4, 2016 at Los Angeles, California.

Stephanie Hansell