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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ERICA K. VOLPE, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, APPELLATE DIVISION Respondent;	D051960 (San Diego County Super. Ct. Nos. 37-2007-00078158 and M999899)
THE PEOPLE, Real Party in Interest.	

Petition for writ of mandate from an order of San Diego County Superior Court, Appellate Division, Peter C. Deddeh, Judge. Petition granted with directions.

In this misdemeanor criminal action, defendant Erica K. Volpe petitions for a writ of mandate directing respondent Appellate Division of the San Diego County Superior Court (the appellate division) to vacate its October 30, 2007 order denying her petition

for a writ of mandate in that court, and to enter a new order granting her petition.[1] Essentially, Volpe had sought mandamus relief in the appellate division to direct the trial court to set aside its order denying her hybrid *Pitchess/Brady*[2] motion for review of a police officer's records, and to enter a new ruling granting her requested discovery.

Volpe specifically contends the appellate division's denial of her petition for writ of mandate was "clearly erroneous under the law" because the trial court abused its discretion in refusing to permit at the motion hearing the testimony of a former prosecutor regarding the police officer's prior misconduct and removal from the DUI Enforcement Team, and in denying her request for in camera review of the officer's personnel records for evidence of discipline for fabricating evidence and falsifying reports, as well as his training records regarding his qualification and certification under Title 17 of the California Code of Regulations for impeachment purposes. Relying on this court's decision in *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39 (*Abatti*), Volpe appears to argue that because the five-year limitation on disclosure of information in police officer personnel files (Evid. Code, § 1045, subd. (b)(1)) is not an absolute bar to disclosure of *Brady* information in those files, her counsel's declaration, together with her moving papers and her counsel's argument at the hearing, was sufficient to show the

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1 "An order of the superior court denying a petition for writ of mandate directed to [the trial court in a misdemeanor matter] is not appealable, but may be reviewed on petition for writ of mandate. (Code Civ. Proc., § 904.1.)" (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 3.)

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 (*Pitchess*); *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

materiality of those records to this case, including the materiality of the testimony of the former prosecutor who could provide evidence of the officer's history of fabricating reasons for DUI stops. Volpe, therefore, claims the trial court abused its discretion in denying her pretrial discovery motion because good cause and a plausible factual foundation for information in the officer's records were shown.

The People, represented by the criminal division of the San Diego City Attorney's Office (City Attorney), and the civil division of that office, which represents the San Diego Police Department (SDPD), have filed separate responses. Basically, City Attorney contends the procedural and representational "muddling" of the proceedings warrant denial of Volpe's petition. City Attorney maintains that Volpe's naming of the "People" as the real party of interest in this case and not the SDPD is fatal to her request for relief because even though City Attorney had notice of the hybrid discovery motion and hearing, it did not file any opposition, and only the SDPD appeared to litigate the motion. City Attorney suggests that this case is best handled by remanding it to the trial court and allowing Volpe to seek appellate relief after trial.[3]

In its return to the petition, SDPD also notes the procedural problems in only naming the People, or as used in this case, City Attorney, as the real party in interest, but

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3 Although our Supreme Court in *Alford v. Superior Court* (2003) 29 Cal.4th 1033 (*Alford*) held that the People have no standing to be heard in the "special instance of third party discovery" provided by *Pitchess* proceedings (*id*. at p. 1045), such holding does not bar City Attorney's appearance in this case, where, as the background facts will show, City Attorney's input is relevant to Volpe's hybrid motion requesting *Brady* material. (See *Alford, supra*, 29 Cal.4th at p. 1057, fn. 8, dis. opn. of Baxter, J.; *Abatti, supra,* 112 Cal.App.4th at p. 43, fn. 2.)

waives any defect in doing so in the interests of economy. Although the SDPD concedes that Volpe is entitled to certain certificates of course completion earned by the police officer in question, it maintains those must be obtained from City Attorney under Penal Code section 1054.5 and not under the *Pitchess* motion. As to information in its administrative files, the SDPD essentially counters that the trial court properly denied Volpe's hybrid *Pitchess/Brady* motions, as well as the appellate division in turn properly denied her petition for a writ of mandamus, because she failed to show good cause and materiality under either *Brady* or *Pitchess* for the alleged 15-year old complaint against the police officer or the appraisal type training records of the officer covered under *Pitchess*, and the trial court did not have an obligation to permit the former prosecutor to testify at the hearing on the matter.

Although defense counsel's presentation was marginal, we will conclude the trial court abused its discretion in failing to find materiality and good cause for some of the information sought under the hybrid *Pitchess/Brady* motion in this case. Accordingly, we grant the petition, ordering the appellate division to set aside its October 30, 2007 order, and to enter a new order granting the petition and directing the trial court to conduct an in camera review of the officer's personnel files in accordance with the views expressed in this opinion to ascertain whether they contain information required to be disclosed to Volpe under *Brady, supra*, 373 U.S. 83.

PROCEDURAL AND FACTUAL BACKGROUND

On September 20, 2006, City Attorney issued a criminal complaint charging Volpe with two misdemeanor counts of driving under the influence. Specifically, she

was charged in count 1 with driving a vehicle "while under the influence of an alcoholic beverage or a drug or under their combined influence, in violation of Vehicle Code section 23152(a)." In count 2, she was charged with driving a vehicle "while having 0.08 percent or more, by weight, of alcohol in [her] blood, in violation of Vehicle Code section 23152(b)."

On July 5, 2007, Volpe filed a hybrid *Pitchess/Brady* motion under Evidence Code sections 1043 through 1046, Penal Code section 1054, subdivision (e) and "*Brady*[, *supra*,] 373 U.S. 83,. . . *Kyles v. Whitley* (1995) [514 U.S. 419], *Izazaga v. Superior Court* (1991) 54 Cal.3d 356 and *Abatti*[, *supra*,] 112 Cal.App.4th 39" seeking the inspection and disclosure of certain peace officer personnel records of San Diego Police Officer Thomas Broxtermann, who had been identified by the City Attorney on the criminal complaint. Broxtermann had stopped Volpe in the early morning hours of August 17, 2006, after he purportedly saw her roll through a stop sign at San Rafael Place and Mission Boulevard. According to his report, because "Volpe exhibited alcoholic breath, bloodshot, watery, droopy and HGN eyes, [and had] slurred, soft, quiet, rapid and talkative speech" he administered a series of field tests, including "perform[ing] ABC's, number count, one leg stand, and walk and turn test," during which "she swayed, had unsteady gait and lax face/jaw, was sad and crying and remorseful, and had dilated and slow pupils." Broxtermann also had Volpe take a single-blow breath test at the scene and then at the station had her blow into a breath machine.

By such motion, Volpe specifically sought evidence of misconduct by Broxtermann in his personnel file, including any and all documents showing instances of

false arrest, fabrication of charges, reports, and evidence, dishonesty, improper tactics, neglect of duty or other instances of conduct unbecoming a police officer; evidence of any discipline imposed on Broxtermann as a result of any internal affairs investigation; all training records or certificates of completion pertaining to the administration of field sobriety tests; all tort claims filed against Broxtermann from January 1, 1990 through the present; any and all complaints against him made by any deputy city attorney or deputy district attorney regarding malfeasance in office during that time; and all salary and overtime records of Broxtermann between those dates.

In support of the motion, Volpe filed points and authorities and the declarations of her counsel. In her points and authorities, Volpe alleged that Broxtermann had fabricated his police report, denied that she had rolled through the intersection, claimed that Broxtermann failed to administer and properly advise her of the field sobriety tests as required by protocol, and generally denied that she was under the influence at the time of driving the night she was stopped by Broxtermann. Volpe sought an in camera inspection of Broxtermann's personnel records mentioned above because her "proposed defense[s] is that Officer Broxtermann lied about the basis of the stop, as he many times does, was not trained properly or performed incompetently during training on how to conduct field sobriety tests, failed to inform [her] of [her] right to decline taking these tests, and failed to provide [her] the choice of blood or breath test."

On information and belief, counsel's declaration alleged that Broxtermann had conducted the walk and turn test on Volpe incorrectly, that he has not been able at DMV hearings to outline the requirements of Title 17 of the California Code of Regulations,

which are to be followed when administering breath tests, and that he had been kicked off the DUI Enforcement Task Force "some 10-15 years ago" for falsifying police reports of DUI stops and otherwise being known as a "carbon copy cop." Counsel had information that former deputy city attorney Gary Brozio, now an Administrative Law Judge (ALJ), had engaged in an investigation of numerous complaints about Broxtermann's incomplete and false reports, and as a result of the investigation, administrative action was taken against Broxtermann and he was removed from the task force.

Counsel noted in paragraph 10 of her declaration that Broxtermann "denied being a carbon copy cop, falsifying his reports, and instead he claimed he was simply the target of a rogue city attorney who had it in for him." Counsel also noted that Broxtermann had been inconsistent in his testimony in several criminal cases as to whether any administrative actions had been taken against him, sometimes admitting such actions and other times denying them. In paragraph 11, counsel commented she had seen multiple reports written by Broxtermann in the past 10 months "where he claimed individuals always roll through the same stop sign. I am informed and believe that when he was on the DUI task force long ago, his reports consistently focused on individuals all rolling through the same stop sign and the same intersection as Ms. Volpe. I am informed and believe another pattern is emerging of him arresting multiple people per night so as to secure a great amount of overtime in the future by having to testify in court." Although counsel believed the "Office of the City Attorney has expunged itself of all damning documentation pertaining to Officer Broxtermann before he was brought back from the

dead to again become a carbon copy cop," she believed the information in some form had been retained by the SDPD or other City departments.

Attached to counsel's declaration was a letter from an attorney for the SDPD in response to a subpoena duces tecum counsel had served requesting all reports authored by Broxtermann "from 6-1-06 to 9-15-06," advising that the request was defective and that the information requested must be sought from the prosecutor in Volpe's case pursuant to the discovery methods in Penal Code section 1054, et seq. In an additional declaration filed August 2, 2007, counsel noted that the trial court had granted a suppression motion the week before in another criminal matter after finding Broxtermann's testimony about the stop in that case was not credible. The motion and supporting documents were served on the City Attorney and SDPD.

SDPD responded on its behalf and that of Broxtermann's in opposition to the *Pitchess* motion, arguing the request was overbroad and failed to show good cause. SDPD claimed the request sought review of more types of misconduct than the allegations in the declaration justified, asking the court to limit the scope of its review and disclosure to only those narrow categories of misconduct alleged to have taken place in this particular case if good cause were found. As for good cause, SDPD noted that, even if the allegations that Broxtermann did not follow proper procedure when conducting several of the field sobriety tests were true, such would not support a cognizable defense to the DUI charges against Volpe because evidence of "the procedures used by an officer are not per se determinative of whether or not an officer had probable cause that an individual was or was not driving intoxicated at a given time."

SDPD additionally noted that Broxtermann's inability to recite "all the legal intricacies of the California Code of Regulations" is not relevant to whether "easy-to-use breath test devices are functioning properly" and that the allegation he is a "carbon copy cop" lacks plausibility because of the specificity surrounding Volpe's arrest in his 10-page police report in this misdemeanor traffic matter. SDPD generally noted that if the court were to find good cause to review Broxtermann's personnel records, the scope of potential disclosure would be limited by among other things, the five year cut-off in Evidence Code section 1045, subdivision (b)(1) and a protective order under subdivision (e) of that section.

At the August 3, 2007 hearing on the motion, Volpe's counsel apprised the court she had a witness for the motion, ALJ Brozio, a former deputy city attorney at the time Broxtermann was removed from the DUI task force whom she had subpoenaed for the hearing because he declined to be interviewed by her. Counsel made an offer of proof that Brozio might be able to clarify why Broxtermann was removed from the task force 10 to 15 years ago. Counsel sought clarification because Broxtermann had given counsel different versions during DMV hearings and various other criminal trials of why he was removed from the DUI Unit, claiming at times that "a rogue city attorney" (Brozio) had it in for him and had gotten him kicked off, and at other times, Broxtermann had said he was accused of being "too good of a cop because he arrested so many people but he didn't have time to fill out reports . . . [s]o the city attorney's office wasn't able to prosecute any of the arrests because his reports were too thin and deficient of facts." Counsel argued that Brozio could testify that the history of Broxtermann reporting that everyone was

rolling through the stop sign at Mission and San Rafael was "happening again" and that "they pulled him off the unit."

When the court questioned the relevance of Broxtermann being pulled off the DUI unit 10 to 15 years ago, counsel replied, "[b]ecause he is back doing the same acts that caused him to be removed back then. We need to develop that. What I suspect happened, he was pulled off the DUI Enforcement Team, sanitized probably, his jacket, and now he is back." Counsel also cited her own experience from 1992 when she was a deputy public defender who encountered reports from Broxtermann where he "whited-out" names in the reports and filled in different names as well as a notice from the public defender's office at that time to "watch out for this guy."

In response to the court's inquiry about the "five-year rule" if Brozio hypothetically "has things to offer to the court," counsel explained that it was necessary to have him testify so she could "develop that which was probably expunged from [Broxtermann's] record by the only means I can in order to show the court that this is again the carbon copy cop coming back again and doing the same thing." The attorney representing the SDPD opined that Brozio's testimony was not relevant to the *Pitchess* matter or admissible at trial, and that Volpe was merely using it as a "fishing expedition." The court denied the request to have Brozio testify, stating it did not think this was "the proper forum for that under the guise of the *Pitchess* motion. [¶] You may have issues that need to be addressed at trial in limine motions at the time of trial."

When the court then turned to the merits, asking Volpe's counsel whether she had anything else to add to her *Pitchess* motion, it noted that she had made "a strong

argument under *Brady*. *Brady* is a discovery motion." The court then commented that although Volpe's version of the events differed from Broxtermann's version, she still needed to articulate good cause for the court to grant the *Pitchess* motion, and only after that would the court conduct an in camera review and come back to say if anything needed to be disclosed and if so, do a protective order. The court noted that under the leading authority of *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), Volpe had "the burden to show a logical connection between the charges and the proposed [defense]."

Volpe's counsel argued that other cases besides *Warrick, supra*, 35 Cal.4th 1011, were pertinent to her motion, and again explained that because Broxtermann had "historically [said] people rode through the very same stop sign that my client did and she did not. And we suspect many of them did not as well. With that being said, he lies about it consistently, about the same corner all the time. It goes to his credibility." Counsel also noted, as in her additional declaration, that the week before the hearing, Broxtermann was found not credible by another trial judge during a suppression motion because he fabricated the reasons for a vehicle stop. Counsel explained that she was going to bring a suppression motion based on the fact that Broxtermann "lied about the basis for [Volpe's] stop which was the rolling stop through San Rafael and Mission Boulevard." Counsel said she was dealing with a line of cases concerning credibility issues, not with the defense at trial, and at that point was essentially concerned with the suppression motion and Broxtermann's credibility as well as his failure to comply with training requirements.

SDPD's attorney countered that the proposed defense of Broxtermann lying about the stop was not in counsel's declaration supporting the motion and requested the court to follow the recent case of *Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312 (*Giovanni*), which he represented held that simply alleging a police officer lied about things is not good enough to explain the proposed defense for showing good cause for an in camera review of the officer's personnel records. SDPD's attorney also argued, consistent with his opposition papers, that even if Broxtermann had administered some of the field sobriety tests improperly and could not recite "Title 17 chapter and vers[e]," such was not misconduct or a defense to the DUI charges in this case.

Volpe's counsel disagreed, saying that an officer commits perjury when he signs a document saying he conducted the tests in accordance with Title 17 and then cannot say what those requirements are and that the holding in *Giovanni, supra*, 152 Cal.App.4th 312, supported Volpe's position because in this case there was no other independent basis for the stop as in *Giovanni*. Counsel further explained why Volpe was entitled to training records to show Broxtermann historically violated his training.

The court found there was no basis for discovery of training records under Evidence Code section 1054[.1], noting that counsel could cross-examine Broxtermann at trial on his training and experience. The trial judge then stated:

> "[B]ased on the motion and argument of counsel . . . I find that the pleadings fail to present a factual scenario that are read in light of the documents, makes it reasonable to believe that the alleged misconduct could have occurred. [¶] The biggest issue there, you are giving me all this information about what occurred 10 or 15 years ago. And you have to tie it specifically to the events involving [Broxtermann] and Ms. Volpe. Also, I don't have an explanation of

> how the alleged misconduct, if there was misconduct, and the agency's confidential personnel file will assist the party in proving a disputed issue or fact or a valid theory as to how they identify personnel files and how it might be admissible in trial. [¶] So the request is over broad. And, accordingly, I will deny the *Pitchess* motion at this point in time."

Volpe filed a petition for writ of mandate and request for immediate stay in the appellate division. On October 30, 2007, the appellate division denied the petition and found the request for a stay moot.

Volpe filed the instant petition for a writ of mandate on November 8, 2007. On November 26, 2007, we stayed all proceedings in the trial court pending further order of this court, and directed the real party in interest to file an informal response to the petition.[4] After reviewing the informal response from the SDPD, on January 9, 2008, we issued an order to show cause (OSC) why the relief requested should not be granted. On February 20, 2008, SDPD filed its return to the petition and City Attorney filed an answer to the petition. SDPD also requested oral argument on the matter. Volpe subsequently filed a traverse to both SDPD's and City Attorney's responsive pleadings.[5]

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[4] When it was brought to the court's attention that the original order was inadvertently served on the wrong entity, a copy of the order was served on the City Attorney and SDPD on December 13, 2007.

[5] By separate order, we have granted SDPD's motion to strike the eight exhibits (Exhibits 3-10) attached to Volpe's traverse that had not been presented to the trial court below on the motion.

DISCUSSION

At the outset, we acknowledge the procedural and representational defects in this case due to Volpe naming the "People of the State of California" as the real party of interest in her petition, but reject any suggestion by City Attorney that such is fatal to her request for mandamus relief.[6] Generally, "[c]ourts have . . . consistently 'decline[d] "to draw a distinction between different agencies under the same government [for purposes of discovery obligations], focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel." ' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 879, fn. omitted.) Because this is a misdemeanor action, the City Attorney is the prosecutorial agency for Volpe's case and was served the original hybrid *Pitchess/Brady* motion below as well as the mandamus petitions filed before the appellate division and this court. Although the City Attorney is in the unique position of having two different divisions of its office representing different agencies under the City of San Diego, i.e., the criminal division representing "the People" in the prosecution of misdemeanors and the civil division representing the SDPD and its custodian of records in, among other things, *Pitchess* matters, both divisions and agencies had notice of Volpe's hybrid motion and had the opportunity to appear to litigate it.

Moreover, even though Volpe may possibly have other avenues for seeking relief, such as bringing a renewed hybrid *Pitchess/Brady* motion or seeking appellate relief after conviction, because it is doubtful from this record that the trial court would change its

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6 As noted earlier, SDPD has waived any procedural defects in this regard.

ruling even if another motion more narrowly and specifically seeking relief were brought, "writ review is appropriate because [Volpe] has sought relief from a discovery order which could undermine [her] right to present a defense because appellate remedies are not adequate to cure the erroneous denial of disclosure of information, and general guidelines appear to be necessary for the lower court [in this case]. [Citation.] In reviewing the discovery order, we apply the abuse of discretion standard, 'keeping in mind that "[t]rial courts are granted wide discretion when ruling on motions to discover police officer personnel records." [Citation.]' [Citation.]" (*Abatti, supra,* 112 Cal.App.4th at p. 49.) A trial court's exercise of its discretion, however, is not unlimited and must be governed by the controlling legal principles. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.)

A. *The Controlling Law*

In *Abatti, supra,* 112 Cal.App.4th 39, this court set out at length the statutory background for *Pitchess* motions which were codified in California in 1978 to provide a criminal defendant the limited right to discovery of a police officer's personnel records. (*Abatti, supra,* at pp. 49-51.) Under such statutory procedures, a defendant generally must file a motion, stating the records sought, and submit declarations on information and belief "showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3); *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 86-93 (*City of Santa Cruz*).) If the materiality or good cause showing is made, the trial court then conducts an in camera review of an officer's personnel records to determine whether

any are relevant to the litigation. (Evid. Code, § 1045, subd. (b).) The specific procedures for conducting an in camera review, if warranted, are set out in *People v. Mooc* (2001) 26 Cal.4th 1216, at pages 1228 to 1230 (*Mooc*).

To show good cause for an in camera review, a defendant must demonstrate both a "specific factual scenario" establishing a "plausible factual foundation" for the allegations of officer misconduct (*City of Santa Cruz, supra*, 49 Cal.3d at pp. 85-86; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020), and that the misconduct would, if credited, be material to the defense (*Warrick, supra*, 35 Cal.4th at p. 1016). Since our decision in *Abatti*, the California Supreme Court in *Warrick* has "clarified that the materiality element requires the defendant to establish a logical link between the pending charge and the proposed defense. [Citation.] Accordingly, defense counsel's supporting declaration must propose a defense, and articulate how the requested discovery may be admissible as direct or impeachment evidence in support of the proposed defense, or how the requested discovery may lead to such evidence. [Citation.] Thus, a defendant meets the materiality element by showing (1) a logical connection between the charges and the proposed defense; (2) the requested discovery is factually specific and tailored to support the claim of officer misconduct; (3) the requested discovery supports the proposed defense or is likely to lead to information that will do so; and (4) the requested discovery is potentially admissible at trial. [Citation.]" (*Giovanni, supra*, 152 Cal.App.4th at p. 319.)

Additionally, the court in *Warrick* also recognized that in some cases the good cause materiality showing will be based not only on counsel's declaration, but also on a

reading or consideration of the declaration in conjunction with a police report, witness statements and other pertinent documents. (*Warrick, supra*, 35 Cal.4th at p. 1025.) Further, the proposed defense may pertain to a motion to suppress rather than strictly pertaining to a defense at trial. (See *Giovanni, supra*, 152 Cal.App.4th at p. 319-321; *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 108-109 (*Brant*).)

In *Abatti, supra*, 112 Cal.App.4th 39, this court also addressed the constitutional requirement under *Brady, supra*, 373 U.S. 83, 87, that " 'the prosecution must disclose to the defense any evidence that is "favorable to the accused" and is "material" on the issue of either guilt or punishment. Failure to do so[, regardless of the good faith of the prosecution,] violates the accused's constitutional right to due process. [Citation.]' [Citation.]" (*Abatti, supra*, at p. 52.) We noted that evidence is generally " 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses.' [Citations.] 'Evidence is material under the *Brady* standard "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [Citation.]' [Citation.] 'A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." [Citation.]' [Citations.] Impeachment of a witness can make the difference between acquittal and conviction, especially where credibility is the major issue in a case and evidence at trial will consist of opposing stories presented by the defense and the prosecution witnesses. [Citations.]" (*Ibid*.)

We further examined our Supreme Court's decision in *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1 (*City of Los Angeles*), which explored the interplay

between the requirements under *Brady* and the statutory *Pitchess* procedures, specifically noting that the court in the *City of Los Angeles* had found that the five-year statutory time limitation of Evidence Code section 1045, subdivision (b)(1) was not an absolute bar to disclosure "because '[o]ur statutory scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady* . . . . Unlike, *Brady*, California's *Pitchess* discovery scheme entitles a defendant to information that will "facilitate the ascertainment of the facts" at trial [citation], that is, "all information pertinent to the defense" [citation].' [Citation.]" (*Abatti, supra*, 112 Cal.App.4th at p. 55.) In finding the " ' "*Pitchess* process" operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information,' " the court in *City of Los Angeles* commented that it had "recently explained in [*Mooc, supra*, 26 Cal.4th at page 1225, that] the *Pitchess* 'procedural mechanism for criminal defense discovery . . . must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial.' [Citation.]" (*City of Los Angeles, supra*, 29 Cal.4th at p. 14.) The court in *City of Los Angeles* relied on the United States Supreme Court's decision in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, to conclude that "a trial court that in response to a criminal defendant's discovery motion undertakes an in-chambers review of confidential documents can, if the documents contain information whose use at trial could be dispositive on either guilt or punishment, order their disclosure. [Citation.]" (*City of Los Angeles, supra*, at p. 15.)

B. *Application of the Law To This Case*

Based upon the above principles regarding *Pitchess*, *Brady*, and their interaction, we believe the trial court abused its discretion in this matter. Basically, in determining that Volpe had not provided the necessary factual scenario to establish a plausible factual foundation for any claim of police misconduct and had not tied it to any proposed defense at trial, the trial court failed to appreciate that her hybrid *Pitchess/Brady* motion is a "normal discovery motion," which we specifically approved in *Abatti, supra,* 112 Cal.App.4th 39, and that *Pitchess/Brady* "discovery is appropriate when a defendant seeks information to assist in a motion to suppress. [Citation.]" (*Brant, supra*, 108 Cal.App.4th at pp. 108-109; see also *Giovanni, supra*, 152 Cal.App.4th at pp. 319-321.)

Although far from being a model for asserting the right to *Brady* disclosure or *Pitchess* discovery, we believe Volpe's motion was sufficient to satisfy the "relatively low" threshold showing of good cause under *Pitchess* for a limited in camera hearing (Evid. Code, § 1043, subd. (b)(3); *Warrick, supra*, 35 Cal.4th at p. 1019; *Abatti, supra,* 112 Cal.App.4th at p. 59), as well as showing materiality under *Brady, supra*, 373 U.S. 83. Volpe was charged with driving under the influence after Broxtermann stopped her for rolling through a stop sign and she failed several field sobriety tests. Under her factual scenario of police misconduct gleaned from her counsel's declaration, which alleged on information and belief that Broxtermann had falsely stopped numerous motorists in the past at the same stop sign for the same reason, her points and authorities

and her counsel's arguments at the hearing,[7] contrary to Broxtermann's police report, she did not roll through the stop sign at San Rafael Place and Mission Boulevard on the night in question. This denial was sufficient in this case to constitute the required factual scenario. (*Warrick, supra*, 35 Cal.4th at pp. 1024-1025.)

Although we concluded in *Giovanni, supra,* 152 Cal.App.4th 312, that the defendant in that case had not shown good cause for a similar in camera review of police officer personnel records by merely alleging that his arresting officer had lied about one of the reasons he had been detained, here nothing in Broxtermann's report suggested an alternative, objectively verifiable reason for him as a police officer to have initially stopped Volpe that night. Clearly, whether Broxtermann fabricated the reason for stopping Volpe was material to the issue of whether he had probable cause for the stop.[8] Because the trial court found otherwise, appearing to ignore Volpe's points and

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[7] We asked the parties to address at oral argument whether the trial court could properly consider counsel's representations at the hearing and in her points and authorities supporting the hybrid *Pitchess/Brady* motions to supplement her declaration for purposes of showing good cause and materiality. SDPD has acknowledged that *Warrick* permits the trial court to do so.

[8] Although Volpe did not expressly allege that her defense was that Broxtermann did not have probable cause to stop her, such is readily inferred from her assertion that he lied about the stop and the information sought was relevant to his credibility for a suppression motion. As noted above, the five-year limitation of Evidence Code section 1045 for disclosure of complaints or the exclusion of conclusions of investigations of those complaints in police officer records is not an absolute bar to information sought in older police officer records. (*City of Los Angeles, supra,* 29 Cal.4th at p. 16.) Although the SDPD has a policy of destroying complaints five years after the investigations of those have been completed, SDPD acknowledges that complaints 10 to 15 years old may still be in Broxtermann's file, depending on the severity of any discipline in his past.

authorities and the reasonable inferences from counsel's argument at the motion hearing, and did not address the *Brady* aspect of the motion, except to say that it had some merit, it abused its discretion in denying Volpe's *Pitchess/Brady* motion without conducting an in camera hearing to examine Broxtermann's personnel records to determine whether they contain information relevant to such limited issue.[9] (*City of Los Angeles, supra*, 29 Cal.4th at p. 9; *Mooc, supra*, 26 Cal.4th at p. 1229; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1143.)

In light of finding an abuse of discretion, we grant Volpe's petition for relief, directing the appellate division to vacate its October 30, 2007 order denying her hybrid *Pitchess/Brady* motion and to enter a new order granting her petition and directing the trial court to conduct an in camera review of Broxtermann's personnel records in accordance with the procedures set forth in *Mooc, supra*, 26 Cal.4th 1216, 1228-1230, to

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9 Volpe had essentially sought information contained in Broxtermann's personnel records that reflected instances of misconduct by him concerning false charges or fabricated reports, specifically involving stops based on rolling through the same intersection that she was alleged to have rolled through as well as any fact of discipline imposed as a result of any internal affairs investigations which could be used to impeach him at a proposed pretrial suppression motion.

To the extent Volpe also sought training records, however, even though SDPD concedes that City Attorney may be required to disclose certain training certificates regarding the use of breath testing equipment (see *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278), the trial court did not abuse its discretion in denying disclosure of those training records covered by privilege because the fact any of the field sobriety tests may have been improperly performed according to Broxtermann's training has no relevance to Volpe's purported defense that he lied about the initial stop for the suppression motion.

ascertain whether they contain any of the limited information required to be properly disclosed to Volpe under *Brady*.

In light of our determination, we find it unnecessary to discuss whether the trial court also abused its discretion in refusing to permit Volpe's counsel to present ALJ Brozio as a witness for the *Pitchess/Brady* motion.

DISPOSITION

Let a writ issue directing the appellate division of the superior court to vacate its order of October 30, 2007, and to enter a new order consistent with this opinion. The stay issued by this court on November 26, 2007, will be vacated when this opinion is final as to this court.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.