Case No. S243855

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,
Petitioner

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
Respondent

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al.,
Real Parties in Interest

On Review from the Court of Appeal for the Second Appellate District, Division 8, Case No.: B280676
After an Appeal from the Superior Court of Los Angeles County
The Honorable James C. Chalfant presiding, Case No.: BS166063

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF REAL PARTIES IN INTEREST, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; FILED CONCURRENTLY WITH *AMICUS*' MOTION REQUESTING JUDICIAL NOTICE

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APPLICATION TO FILE BRIEF OF *AMICUS CURIAE*

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.520 (f), non-profit organization California Attorneys for Criminal Justice ("CACJ") respectfully request leave to file the attached *amicus* brief in support of Real Parties in Interest, the Los Angeles Sheriff's Department et al. This brief is timely, as it is filed within 30 days after the last reply brief was filed.

STATEMENT OF INTEREST

California Attorneys for Criminal Justice is one of the two largest statewide organizations of criminal defense lawyers associated with the National Association of Criminal Defense Lawyers. CACJ has as part of its bylaws "the defense of the rights of persons as guaranteed by the United States Constitution." To the extent that criminal defendants' constitutional rights are at issue here, CACJ has a compelling interest in the matter before the Court. Further, because California based criminal defense lawyers regularly engage in litigation to obtain necessary case-related information held in peace officers' personnel files and are regularly stymied in those efforts, this matter is of significance to CACJ. CACJ has often appeared in this Court to address issues of concern to its membership like those presented in this case.

Amicus' proposed brief presents arguments that expose how the *Pitchess* process has become a promise unfulfilled. The brief will provide clear examples of the procedural injustices faced by criminal defendants when attempting to access *Brady* material in police officers' personnel files. These injustices frustrate the discovery process, interfere with defendants' speedy trial rights, and undermine the opportunity for a full and fair

litigation of criminal cases. These issues are of continuing concern to the lawyer-members of CACJ who seek to defend their clients and protect the constitutional rights of individuals by ensuring fair and fully useful criminal case litigations. These concerns establish CACJ's interest in the question presented to the Court in this case.

For the foregoing reasons, *amicus* respectfully request that the Court grant this application, and permit the below brief on the merits to be filed with the Court.[1]

Dated: May 2, 2018

Respectfully submitted,
Stephen K. Dunkle
CACJ Amicus Committee Chair
John T. Philipsborn
Alicia Virani

By: 
Alicia Virani
As Counsel for CACJ

[1] No party or counsel for any party, other than counsel for *Amicus*, have authored the proposed brief in whole or in part or funded the preparation of the brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

State Statutes

Other Authorities

I. INTRODUCTION

When this Court contemplated the issue of whether a criminal defendant can request discovery from peace officers' personnel files in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess)*, the answer from the Court was a resounding "yes". The decision of the Court seemed to comport with *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and *Giglio v. United States* (1972) 405 U.S. 150 (*Giglio*) in that material discovered from peace officers' personnel files that is also *Brady* material must be turned over to a defendant to fulfill the defendant's Federal due process right to such evidence. While the *Pitchess* case protected that defendant's due process rights, later statutory provisions rendered this protection largely illusory because they condition defendants' due process rights on other competing interests. (Pen. Code, §§ 832.7-832.8; Evid. Code, §§ 1043-1047.)[2]

In *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, the Court recently described a consensus that the *Pitchess* process is working and working in tandem with *Brady*. The Court stated that the relaxed standard of "good cause" required by the *Pitchess* process, "...[i]nsure[s] the production for inspection of all potentially relevant documents." (*Id.* at p. 711.) The Court goes on to state that, "[t]he *Pitchess* procedures the Legislature established long ago can protect defendants' interests without unduly infringing on police officers' privacy interests." (*Id.* at p. 714.)

The question before the Court in this case is narrowly focused on whether a law enforcement agency can turn over to the prosecution the name of an officer from a Brady list when that officer is a potential witness

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[2] These statutes govern the procedure that criminal defendants must follow in order to gain access to evidence relevant to their case that is contained in peace officer personnel files. Hereinafter these procedures will be referred to as the *Pitchess* process.

in a pending criminal prosecution. This brief supports the release of officers' names in this fashion and argues that it is a step in the right direction because currently the *Pitchess* process thwarts criminal defendants' ability to obtain *Brady* material in peace officers' personnel files, guaranteeing that in practice criminal defendants' due process right to *Brady* material remains unfulfilled.

While countless *Pitchess* motions are filed in criminal courts throughout the state, defendants often do not receive the *Pitchess* product in a timely manner, forcing defendants to waiver their speedy trial rights and leaving them with incomplete discovery. This prevents a defendant from employing *Pitchess* product to impeach key witnesses in a case, something that *Brady* and its progeny are meant to protect. Finally, the delays caused by the *Pitchess* process impede informed decision-making by the defense and prosecution, which can negatively impact the efficiency and most importantly fairness of the criminal legal system. In sum, *Pitchess* has devolved into a process in which peace officers' personnel files are enshrined in a shroud of secrecy that often undermines criminal defendants' right to a fair trial.

II. ARGUMENT

A. THE *PITCHESS* PROCESS FORCES DEFENDANTS TO CHOOSE BETWEEN THEIR SPEEDY TRIAL AND DUE PROCESS RIGHTS

The *Pitchess* process creates a conundrum in which criminal defendants must choose between two constitutionally protected rights: 1) the right to a speedy trial and 2) a due process right to access *Brady* material.

The right to a speedy trial is given to every criminal defendant in California by the Sixth Amendment of the United States Constitution as

well as article I, section 15 of the California Constitution. Almost every jurisdiction in the country has enacted statutes delineating what constitutes a speedy trial. The right to a speedy trial is so paramount that in California, if a defendant has asserted her speedy trial right, and her trial does not commence within the statutorily allotted time, the court *shall* order dismissal of the case. (Pen. Code, § 1382 subds. (a) (2) & (3).)

In *Brady*, the U.S. Supreme Court held that when the state suppresses favorable (exculpatory) and material evidence, defendants' due process rights are violated. (*Brady, supra,* 373 U.S. 83.) The type of evidence considered exculpatory has expanded to include impeachment evidence in the category of favorable evidence. (*Giglio, supra,* 405 U.S. 150.) In discussing *Brady* evidence, this Court has explicitly stated that "[t]he prosecution has a duty under the Fourteenth Amendment's due process clause to disclose [*Brady*] evidence to a criminal defendant." (*In re Sassounian* (1995) 9 Cal.4th 535, 543.)

A criminal defendant is entitled to both her speedy trial and due process rights—as these are two cornerstones of a fair trial. One of these rights cannot outweigh or take precedence over the other. Yet, the *Pitchess* process often forces criminal defendants to choose between these rights.[3] The following procedural obstacles codified in the *Pitchess* statutes create this situation: 1) the 16 days' notice requirement and 2) the limitation that only names, phone numbers, and addresses of witnesses are turned over pursuant to an initial *Pitchess* motion.

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[3] This court has recognized similar conundrums in other instances. See, e.g., *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 77 ("[a] criminal defendant should not be forced to choose between pursuing discovery efforts by revealing privileged information or forgoing discovery to maintain a privilege.").

1. The 16 days' notice requirement conflicts with defendants' speedy trial rights in misdemeanor, felony, and juvenile cases

In-custody misdemeanor, felony and juvenile defendants all have the right to a speedy trial either within 30 calendar days, 60 calendar days or 15 court days of arraignment, respectively. (Pen. Code, § 1382, subds. (a) (2) & (3); Welf. & Inst. Code, § 657 subd. (a) (1).) A *Pitchess* motion must be filed with 16 court days' notice to all parties, adding an additional five days to the notice requirement if the motion is served by mail. (Evid. Code, § 1043, subd. (a).; Code Civ. Proc., §1005, subd. (b).) The notice requirements for *Pitchess* motions conflict with defendants' speedy trial rights, extending beyond the speedy trial right of an in-custody minor, and coming close to reaching the in-custody statutory time frame for a misdemeanor case. Thus, defendants must choose whether to pursue the *Pitchess* process, or to exercise their speedy trial right and proceed to trial without the *Pitchess* discovery.

The conflicting time frames are exacerbated by a few factors. First, many public defenders' offices do not use a vertical representation model.[4] This means that the attorney who represents a defendant at arraignment will not be the same attorney who represents the defendant at trial (who makes

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[4]"In some California counties, for example, insufficient resources prevent public defenders from providing vertical representation, whereas vertical prosecution is common because the prosecutor's office has more funding." (American Bar Association, *Information Sheet, California*, (2005) pp. 1-2 <https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_ca.authcheckdam.pdf> [as of Apr. 30, 2018].) Both of the Web sites of the Sacramento and Contra Costa County Public Defender's Offices indicate that they use horizontal representation. (Sacramento County Public Defender Web site <http://www.publicdefender.saccounty.net/ Pages/AboutOurOffice.aspx> [as of Apr. 24, 2018].); (Contra Costa County Public Defender's Office Web site <http://co.contra-costa.ca.us/2638/About-Us> [as of Apr. 24, 2018].)

all the strategy decisions regarding what investigation to pursue and which motions to file). For a *Pitchess* motion to be heard and follow-up investigation conducted before a defendant's statutory speedy trial date, the motion would have to be filed within one or two days after a defendant's arraignment, or for a felony case within one or two days after the preliminary hearing (assuming the attorney decided to wait until after the preliminary hearing to file the motion). When criminal defendants do not have the same attorney at arraignment as they do for the other phases of their case, it is unlikely that a defense attorney would ever be able to file a *Pitchess* motion within a few days of arraignment or preliminary hearing. Even a one week delay in filing a *Pitchess* motion essentially renders the hearing on the *Pitchess* motion and the last statutory trial date on or around the same day in a misdemeanor case, requiring a criminal defendant to waive time if she wants to obtain *Pitchess* information that could contain important *Brady* material.[5]

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[5] The California Legislature has enacted legislation in California Penal Code section 1050, subdivision (a) that explicitly discourages continuances by stating,

> [c]ontinuances are generally not in the interest of any party, as the legislature has pointed out elsewhere: "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end, the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. Continuances also lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails. It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the

Second, once a *Pitchess* motion is filed and a hearing date is set, there can be a delay between the hearing on a *Pitchess* motion, the in camera hearing, and the disclosure of *Pitchess* information.[6] City attorneys are encouraged to ensure that the *Pitchess* hearing and in camera hearing remain a two-step process: "[s]ome judges need to be reminded that the statute requires a two-step process and that they cannot require you to bring either the files or custodian with you to the hearing on the motion."[7] These additional delays continue to push criminal defendants past their speedy trial dates while they pursue *Pitchess* material.

Third, there are instances in which a defense attorney must file the good cause declaration under seal with the *Pitchess* motion because the information contained within the declaration is privileged. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71-72 (*Garcia*).) The *Garcia* case outlined that in the instance when a declaration is filed under seal with a *Pitchess* motion, an initial in camera hearing must be conducted where the court determines whether filing under seal is the only feasible way to

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> prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice.

[6] In *People v. Anthony White*, Mr. White's defense counsel filed a *Pitchess* motion on June 24, 2014. The *Pitchess* motion was heard on July 17, 2014 and granted, and the in camera hearing was scheduled for July 24, 2014. At the in camera hearing, the court determined there were discoverable materials and ordered them turned over on August 7, 2014, over a month after the initial *Pitchess* motion was filed. See Def. *Pitchess* Mtn. and Ct. Min. Orders in the case of *People v. Anthony White* (Super. Ct. L.A. County, 2014 No. TA132661.), attached as exhibits to *amicus'* Motion Requesting Judicial Notice.

[7] Scott, Fundamentals of Opposing Motions for Discovery of Peace Officer Personnel Records (Pitchess Motions) (Feb. 2012) p. 5 <http://www.cacities.org/getattachment/2866733c-d868-4ab2-8e17-6904f865ec78/Pitchess-Motion-Fundamentals-for-League-Webinar-Pa.aspx> (as of April 25, 2018).

protect the privileged information. (*Id.* at p. 73.) If a court were to determine that the declaration need not have been filed under seal, defense counsel would have to re-file the *Pitchess* motion with another 16 days' notice further prolonging the process.

Finally, it is often the case that defense counsel must wait for other discovery before filing a *Pitchess* motion. In order for defense counsel to carry the burden of showing good cause for a *Pitchess* motion, counsel must allege a specific factual scenario establishing a "plausible factual foundation" for alleged misconduct connected to the defendant. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86.) This plausible factual foundation is a "...scenario of officer misconduct...that might or could have occurred" suggesting that defense counsel must allege specific facts, and not only a mere denial of what is in the police report. (*Warrick v. Superior* Court (2005) 35 Cal.4th 1011, 1026.) The specific factual scenario that contradicts or supplements a peace officer's report is often supplied to defense counsel by her client or it may be clear from the police report. However, there are times when a criminal defendant might not remember or may not recognize when misconduct or an unlawful action has occurred. This then would require defense counsel to conduct independent investigation of percipient witnesses and to review any body-worn camera, dashboard cameras, and other documentation of an incident. The latter category is discovery that is provided to the defense by the prosecution and it is rare that defense counsel would receive such discovery at arraignment.[8]

[8] The San Diego County Public Defender's Web site indicates that "[w]ithin a day or a few days after the arraignment, the prosecutor usually starts sending to our office some of the police reports, laboratory reports, and copies of evidence items regarding your case. These reports and evidence items are called "discovery". Sometimes it takes a long time to get all the discovery." (San Diego County Public Defender Web site

Thus, defense counsel would have to wait for the discovery to be turned over by the prosecution, review the discovery (often times it is hours of body-worn camera or dashboard camera footage) and then write a *Pitchess* motion providing the 16 days' notice. Again, this would push many criminal defendants past their speedy trial date.

2. The limited initial *Pitchess* disclosures require extensive and time-consuming follow-up investigation that exceeds defendants' speedy trial rights

It is common practice for courts, pursuant to an initial *Pitchess* motion, to only turn over the names, phone numbers, and addresses of complaining or percipient witnesses.[9] City attorneys encourage this limited disclosure as they see it as their duty to uphold the privacy of the officers, and thus tend to oppose the release of anything other than the names, telephone numbers, and addresses of witnesses.[10]

<https://www.sandiegocounty.gov/content/sdc/public_defender/arrested.html> [as of Apr. 24, 2018].)

[9] See, e.g., *City of Azusa v. Superior Court* (1987) 191 Cal.App.3d 693, 696 (stating that pursuant to an initial *Pitchess* motion "...plaintiffs were entitled, at most, to the names and addresses of other persons who complained the two officers had used excessive force in the course of arrests within five years preceding the plaintiffs' arrest"); see also *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84 ("[a]s a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or 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.").

[10] Scott, Pitchess Motions and Brady Disclosures, How Hard Can You/Should You Push Back? (2005) pp. 10, 12 ("...there is still one more challenge to be made by you, and that is to the scope and extent of materials and/or information which can/should be released to the defendant...", "[i]t is the city attorney's role in these proceedings to protect the officers' privacy interests...").

Once defense counsel receives the witnesses' basic information, they must then locate and attempt to talk with these witnesses.[11] If the defense team is unable to find a witness, a witness fails to remember the details of the alleged misconduct, or a witness refuses to talk with the defense team, a subsequent *Pitchess* motion must be filed seeking further discovery.[12] A defense attorney is required to give the same 16 court days' notice for the subsequent *Pitchess* motion, supplemented by another declaration asserting good cause. (*City of Tulare v. Superior Court* (2008) 169 Cal.App.4th 373.)

In order to show good cause to obtain further discovery, the defense team must include in their declaration facts to indicate to the court that the original disclosures were inadequate. The diligent investigation required to show that the original *Pitchess* disclosures were inadequate results in an intervening time period between the two *Pitchess* motions. If two *Pitchess* motions are required to obtain *Pitchess* material, the time required for the two motions would far exceed an in custody *and* out of custody misdemeanor defendant's speedy trial right, can often exceed felony in custody speedy trial rights and thus forces defendants to waive their speedy trial right in order to access *Pitchess* discovery. Such a scenario would also leave a minor in custody at least 17 court-days past the speedy trial date

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[11] See *Strickland v. Washington* (1984) 466 U.S. 668, 680, ("[t]he court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options.").

[12] See, e.g., *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 828-829 (stating that if the initial information about witnesses proves inadequate that a defendant may move for further discovery); see also *Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1113 (stating, "...petitioner's ability to investigate...has been stymied by Deputy Summer's refusal to cooperate. The only way petitioner can effectively investigate this matter *before trial* is to be given the deputy's statements.").

afforded her by statute.[13] The Los Angeles County Bar Association Task Force on the State Criminal Justice System highlighted this as an issue in a 2003 report, "[b]y the time the second *Pitchess* motion is noticed and heard, and the information finally obtained, defendants may have very little time in which to review the information before the start of trial."[14]

The procedural hurdles of *Pitchess* frequently require defendants to waive their speedy trial rights, as laid out above. The evidence sought via *Pitchess* motions is known to law enforcement, is potentially ***Brady*** material, and could be provided to the prosecution or defense up front. Providing the prosecution with Brady lists is a more limited way of making disclosures at the initiation of a case. However, currently both Brady alerts and the substantive *Brady* evidence are withheld, setting into motion a process that is so time-consuming and ridden with obstacles that defendants are forced into choosing between two rights fundamental to a fair trial. This forced choice does not constitute the protection of a defendant's due process interests as considered by *Pitchess* and reiterated in ***Johnson***, particularly when it leads to defendants accepting plea offers because they do not wish to wait for the entire *Pitchess* process to be completed.[15]

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[13] Studies of the harm of juvenile detention have shown the increased rate of suicide for detained youth, diminished future earnings and ability to remain in the workforce once youth are incarcerated, and that incarceration of youth is linked to higher recidivism rates. (Holman & Ziedenberg, The Dangers of Detention; The Impact of Incarcerating Youth in Detention and Other Secure Facilities (2006), < http://www.aecf.org/m/resourcedoc/ aecf-dangers_of_detention_report-2007.pdf> [as of Apr. 27, 2018].)

[14] L.A. County Bar Assn. Task Force on the State Crim. Justice System, A Critical Analysis of Lessons Learned, Recommendations for Improving the California Criminal Justice System in the Wake of the Rampart Scandal (Apr. 2003) p. 11 <https://web.archive.org/web/20120610055949/ http:/www.lacba.org/Files/Main%20Folder/News/HomepageArticles/Files/ LACBA%20Task%20Force%20Report1.pdf> (as of Apr. 30, 2018).

[15] See Exhibit A, Declaration of Harvey Sherman, Deputy Public Defender IV, Los Angeles County Public Defender's Office ("[f]requently, because

B. THE *PITCHESS* PROCESS INTERFERES WITH A DEFENDANT'S ABILITY TO OBTAIN *BRADY* EVIDENCE THAT CAN HAVE A MATERIAL IMPACT ON HER CASE

The due process rights afforded to criminal defendants by *Brady* and its progeny are not simply that a defendant has the right to know whether or not a given witness has impeachment or other exculpatory material related to them, but to actually be able to obtain the *substance* of that evidence. *Brady* itself made that very clear when it stated that "suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment." (*Brady, supra*, 373 U.S. at p. 86.) The confession referenced, was that of Brady's co-defendant, which Brady was not made aware of until "after he had been tried, convicted, and sentenced, and after his conviction had been affirmed." (*Id.* at p. 84). The *Brady* decision clearly refers to the content of the confession and not simply the fact of the existence of the confession. It is only the content that could ever be considered material in order to find a *Brady* violation if such evidence was suppressed.

The substance of the *Pitchess* material is important because it can be used to impeach prosecution witnesses. California case law and statutes impress upon all parties in the criminal justice system how important witness credibility is, suggesting that the ability to ascertain, impeach, or bolster a witnesses' credibility is fundamental in our adversarial system.[16]

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of the length of time it takes to file *Pitchess* motions and investigate *Pitchess* disclosures, my clients will decide that they do not want to wait for the outcome of the investigation and they accept a plea offer.").

[16] See, e.g., *People v. Wheeler* (1992) 4 Cal.4th 284, 295 (the Court acknowledged that witnesses can be impeached by conduct as "[m]isconduct involving moral turpitude may suggest a willingness to lie."); see also, *Giglio supra*, 405 U.S. at p. 154 (where the Court held that *Brady* material encompassed impeachment evidence because of its use in

And yet due to the *Pitchess* process and the in camera limitation of a review of an officer's personnel file at the moment of the hearing, a defendant may not be able to obtain the substance of important *Brady* evidence that exists for a given peace officer.

1. There is no mechanism to ensure that all *Brady* material is turned over for the in camera hearing

When a civilian complaint is lodged or an internal affairs investigation takes place regarding a particular peace officer, it is unclear at what point the documents involving the investigation are considered part of a personnel file that would then be brought to court for the in camera review pursuant to a *Pitchess* motion.[17]

If a *Pitchess* motion is filed after the alleged misconduct of an officer, but before the close of an investigation into the misconduct, the records regarding the internal affairs investigation may not be presented by the custodian of records to the court in an in camera review. Yet, the very fact that an investigation was taking place, supplemented by a witnesses' testimony regarding an officer's misconduct is *Brady* material. It is admissible information that could be used as impeachment of the officer's

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calling into question the testimony of a witness upon whom "the Government's case depended almost entirely..."). Further, Evidence Code section 786 allows for evidence of a witness's dishonesty, in the form of conduct, to be introduced against that witness, and Evidence Code section 788 allows for felony convictions to be introduced to attack a witness's credibility.

[17] In *People v. Mooc* (2001) 26 Cal.4th 1216, the trial court did not order disclosure after an in camera review of police officer personnel files prompted by defense counsel's *Pitchess* motion. However, when the Court of Appeal ordered the production of the officer's entire personnel file, the court commented that "[n]ot surprisingly, more than one reference was found in the *complete* file which a court could deem to be potentially relevant." (*Id.* at p. 1224.)

credibility if she were testifying in a criminal case. It does not matter to a criminal defendant whether or not the investigation has been completed with internal affairs. The conduct alone could be used for impeachment and any documents related to a civilian complaint and/or an ongoing investigation should be included in the personnel file brought to the in camera hearing. However, the instances below indicate that it is often untrue that *Pitchess* functions to "...[i]nsure the production for inspection of all potentially relevant documents". (*Johnson, supra,* 61 Cal.4th at p. 711.)

The Los Angeles Times uncovered Los Angeles Sheriff Department ("LASD") internal investigations documents that illustrate that investigations of officers' misconduct sometimes went on for years after the initial incident.[18] A 2006 report completed by an Independent Monitoring Team of the Oakland Police Department ("OPD") found that "[t]he overwhelming majority of OPD's internal investigations are not being completed within the 120-day (150-day for Division Level Investigations) deadline for completion of the investigative process...."[19] Ten years later in the 31st report of the Independent Monitoring Team, it found that 60% of investigations for a certain class of complaint were being completed within

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[18] For example, Deputy Andrea Cecere of the Los Angeles Sheriff's Department was found to have made false statements about an incident involving use of force. The use of force occurred on August 3, 2009, immediately after which Deputy Cecere wrote a report documenting the incident. The Department's Internal Investigations made a finding on March 16, 2011, almost two years later, that the report filed by Deputy Cecere in August 2009 contained false statements. (Los Angeles Sheriff's Department, letter to Deputy Andrea Cecere (Dec. 19, 2011) p. 1, at <http://documents.latimes.com/andrea-cecere-letter-discipline> [as of Apr. 20, 2018].)

[19] *Eighth Status Report of the Independent Monitor, Delphine Allen v. City of Oakland* (May 30, 2006) Westlaw, 2006 WL 2189274.

170-179 days.[20] Both the LASD and OPD instances described call into question whether *Pitchess* motions filed before an investigation comes to a close would have resulted in the disclosure of this investigative material at an in camera hearing.

Further, there is a history of law enforcement agencies either inadvertently or purposely excluding relevant information from the personnel files brought to court for the in camera hearing. In January 2014, Richmond Police Department began an internal affairs investigation into then Richmond Police Officer Joe Avila regarding his failure to turn over five pounds of marijuana collected from a UPS store.[21] Mr. Avila failed to log the seizure of this evidence and was later found to be in possession of marijuana from this seizure as well as several others. In the fall of 2014, after the internal affairs investigation had begun, Mr. Avila was identified as the main witness in a criminal case. The public defender filed a *Pitchess* motion with Officer Avila as the subject, but it resulted in no disclosures.[22] The criminal defendant was convicted, and the impeachment information regarding Mr. Avila was never introduced at trial for a jury to consider. The impeachment evidence could have been material for this defendant. However, without any mechanism to ensure that all documentation of relevant misconduct is being brought to an in camera hearing, this

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[20] *Thirty-First Report of the Independent Monitor for the Oakland Police Department, Delphine Allen v. City of Oakland* (Apr. 18, 2016) <www.cand.uscourts.gov/filelibrary/1737/ 2016-04-monitoring-report.pdf> p. 6 (as of Apr. 24, 2018).

[21] Yesko, *Officer Caught with Pot Allowed to Testify Against Others,* Richmond Confidential (Dec. 8, 2014) <*http*://richmondconfidential.org/ 2014/12/08/officer-caught-with-pot-allowed-to-testify-against-others/> (as of Apr. 23, 2018).

[22] *Ibid.*

defendant was denied the ability to obtain impeachment material known to the police department, who are a part of the prosecution team.[23]

The Independent Monitoring Team of OPD also recognized this as an issue when they "identified 86 cases that were not identified in the City's Pitchess responses, even though they appear to fit the City's criteria for identification."[24] Also in 2006, David Elliot Wise, an attorney for defendant Wallace Batiste, filed a motion with the San Francisco Superior Court alleging that he "learned of two new *Pitchess* witnesses not disclosed to the defense in its *Pitchess* motion, but instead by way of an article in the San Francisco Chronicle newspaper."[25] Matt Sotorosen of the San Francisco Public Defender's Office also noted that "...an officer may, for example, have committed an act of moral turpitude or suffered a conviction that is not contained within his/her personnel file[.]" and encourages defense attorneys to conduct Google searches of officers to find impeachment material not contained within personnel files.[26]

These instances are concerning as they indicate how *Brady* material is often not discovered through the *Pitchess* process because of a lack of accountability and oversight into what a custodian of record brings to the in

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[23] See, *In re Brown* (1998) 17 Cal.4th 873, 879 (concluding that the prosecution team consists of investigative and prosecutorial personnel).
[24] *Eighth Status Report of the Independent Monitor, Delphine Allen v. City of Oakland* (May 30, 2006) Westlaw, 2006 WL 2189274 at p. 23.
[25] The defense attorney also stated upon information and belief that "...last year a committee was formed to review Pitchess motions due to the fact of Police Legal selecting out complaints for the Pitchess magistrate to review, thus omitting potential witnesses from judicial scrutiny." (Def. Motion to Continue, 2006 WL 5359617, *People of the State of California v. Wallace Batiste*, (Feb. 9, 2006) No. 196234 .)
[26] Sotorosen, *Dirt on Cops: The Defendant has a Right to Discovery Under Both Pitchess and Brady* (2012) California Defender, pages 66-69, <http://www.cpda.org/CaliforniaDefender/2012-Spring.pdf> (as of April 27, 2018).

camera hearing. If the Court rules to allow the sharing of a Brady list in limited circumstances, this could potentially alleviate the problem, in that defense counsel in receipt of a Brady alert, would know that they should be receiving disclosures pursuant to an in camera hearing.

2. The *Pitchess* process denies defendants access to the substance and utility of *Brady* material related to a given peace officer

Andy Bouvier-Brown, a long-time criminal defense attorney in Los Angeles was quoted as saying the following regarding *Pitchess* disclosures, "I can count on one hand – and I don't need any fingers – the number of times I've gotten useful information that made a difference in the outcome..."[27] Mr. Brown's statement is not different from other defense attorneys who have been practicing for lengthy amounts of time. Rourke Stacy of the Los Angeles County Public Defender's Office ("LACPD") stated that she has had a *Pitchess* witness testify in trial only once in her 17 years of practice.[28] Harvey Sherman, also a public defender with LACPD, stated that his office tracks the number of *Pitchess* motions filed. Since 2001, LACPD attorneys have filed over 17,000 *Pitchess* motions. And yet, on average, there are only two to three cases countywide per year in which an attorney from his office requests to call a *Pitchess* witness to testify at trial, and those witnesses are often excluded from testifying on the grounds of relevance or undue consumption of time.[29]

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[27] Stoltze, *The California Law That Keeps Police Misconduct a Secret* (Dec. 27, 2017) <http://www.scpr.org/news/2017/ 12/27/79302/california-s-pitchess-laws-keep-police-misconduct/> (as of Apr. 23, 2018).
[28] Interview with Rourke Stacy, Training Director, Juvenile Division, Los Angeles County Public Defender's Office (April 24, 2018.)
[29] See Exhibit A, Declaration of Harvey Sherman, Deputy Public Defender IV, Los Angeles County Public Defender's Office.

The fact that the results of *Pitchess* disclosures are often of no use to defense attorneys should be astonishing given that, for example, 277 officers of the Los Angeles County Sheriff's Department ("LASD") have been placed on a Brady List.[30] These 277 LASD officers have been identified as potential witnesses in 62,000 felony cases alone between 2000 and 2014.[31] Sixty-nine percent of the officers identified had documented dishonesty as the type of misconduct, conduct that could be used to impeach an officer testifying in a trial.[32] And yet, it is unlikely that even a fraction of those 62,000 criminal defendants were able to obtain the *Brady* material of the officers on the Brady List, let alone utilize the *Brady* material to impeach the credibility of those officers, which could potentially change the outcome of a case. In fact, many of these cases resulted in convictions and Elizabeth Gibbons, an attorney for the Association for Los Angeles Deputy Sheriffs openly questioned, "[d]o we go back and overturn every conviction now?"[33]

Given the importance of impeachment in our adversarial legal system, and the mandates of *Brady* and *Giglio* that require the disclosure of impeachment material to defense counsel, it cannot then be determined that the *Pitchess* process comports with *Brady* when actual *Brady* material is known to exist, and yet criminal defendants are often convicted without ever obtaining or being able to utilize this evidence at trial.

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[30]Lau et al., *Inside a Secret 2014 List of Hundreds of L.A. Deputies with Histories of Misconduct*, L.A. Times (Dec. 8, 2017) <http://www.latimes.com/local/la-me-sheriff-brady-list-20171208-htmlstory.html> (as of Apr. 20, 2018).

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

3. Original documentary evidence from peace officers' personnel files is often protected from disclosure

If an initial witness's contact information is "inadequate" in obtaining *Brady* discovery, then a defendant can file a supplemental motion and obtain actual witness statements. (*People v. Matos* (1979) 92 Cal.App.3d 862, 868.) However, the case law is silent on what is inadequate, beyond defense counsel establishing the unavailability of witnesses. For example, if defense counsel through her own investigation obtains statements from a witness disclosed pursuant to an initial *Pitchess* motion, is the independently obtained investigation the outer limits of a defendant's due process rights under *Brady*? The answer should be no. The inability to access the specific statements recorded in the course of an internal affairs investigations or the civilian complaint process is in fact inadequate discovery and violates defendants' due process rights under *Brady* because it deprives defendants of their right to impeachment evidence and a full cross-examination of the witnesses against them.

Under Evidence Code section 791, subdivision (b), and section 1236, defense counsel on re-direct rightfully has the opportunity to rehabilitate a witness with a prior consistent statement when "[a]n express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive...." Yet because the *Pitchess* process may prevent defense counsel from obtaining the previously recorded statements of a witness, if the prosecution attacks the credibility of a *Pitchess* witness, defense counsel would be unable to rehabilitate her witness with the prior consistent statement because it was protected from disclosure.

Further, without the original statement, when defense counsel attempts to cross-examine an officer about his prior misconduct and the officer minimizes, deflects, or denies the misconduct, counsel would have

no ability to impeach the officer with any prior inconsistent statements he may have made during an investigation. Thus, the only way to impeach the officer would be through a defense witness who can testify to the officer's past misconduct. Yet if that witness's testimony is discredited as described above, defense counsel essentially has nowhere to turn. Counsel cannot point to the officer's prior inconsistent statement to impeach the officer and counsel's impeachment witness now herself has credibility issues. This scenario cannot possibly be viewed as comporting with *Brady* when the totality of evidence "necessary for effective cross-examination" exists, but just outside of the reach of defense counsel. (*Pitchess, supra,* 11 Cal.3d at p. 537.)

C. THE *PITCHESS* PROCESS COMPROMISES DECISION MAKING AND CREATES INEFFICIENCIES IN THE CRIMINAL LEGAL SYSTEM

Contrary to the court's ruling in *Johnson,* prosecutors should have access to the content of the *Brady* information contained in peace officers' personnel files because possessing this knowledge up front and having the ability to turn it over to defense counsel at the earliest point possible in a criminal case will lead to better informed, more fair decision making in the criminal legal system by all parties.

1. If prosecutors have *Brady* material up front this can have marked effects on charging decisions

If prosecutors are made aware of the content of the *Brady* material in officers' personnel files up front, it could affect their charging decisions. Depending on the gravity of the *Brady* material in an officer's file, the prosecutor may choose not to file certain cases. Often times when *Brady* material is discovered through a defense-initiated *Pitchess* motion, and then

disclosed to the prosecution, the case is dismissed by the prosecution. For example, prosecutors in Jacksonville, Florida dismissed 41 cases after three detectives who would have testified in those cases were arrested.[34]

This exercise of prosecutorial discretion also reduces the number of cases in the court system and ensures that people do not experience the negative consequences of the criminal legal system (pretrial incarceration, payment of money bail, pleading guilty, or being convicted and sentenced) for cases that would have not been filed in the first place. While allowing for the release of a Brady list of the names of officers who could be witnesses in pending litigation could assist in achieving the goals of efficiency via reduced caseloads, it would be even more effective if prosecutors had the full content of the *Brady* material up front.

2. If criminal defendants have access to *Brady* material at an earlier stage of the proceeding, they can make better informed decisions

One of the most important interactions a defense attorney has with a client is the conversation regarding the client's options such as pleading guilty, filing a number of pretrial motions or proceeding to trial. Proceeding to trial is often a risk as the criminal legal system is designed in a way that rewards early guilty pleas and often punishes people with heftier sentences if convicted after trial.[35] Thus, it is a careful decision that a criminal

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[34] Conarck, *State Attorney's Office Keeping Tabs on Problematic Cops in Jacksonville, Across First Coast*, The Florida Times-Union, (Jul. 13, 2017) < http://www.jacksonville.com/news/public-safety/florida/2017-07-13/state-attorney-s-office-keeping-tabs-problematic-cops> (as of Apr. 20, 2018).

[35] There is plenty of literature documenting this fact of a "trial tax" or "trial penalty". See, e.g., Yoffe, *Innocence is Irrelevant,* The Atlantic (Sep. 2017) <https://www.theatlantic.com/magazine/ archive/2017/09/innocence-is-irrelevant/534171/> (as of Apr. 25, 2018); see also Human Rights Watch, An Offer You Can't Refuse (Dec. 5, 2013) <https://www.hrw.org/report/

defendant makes because the outcome and impact on her life is potentially substantial. The more informed a criminal defendant can be about the strength or weakness of the case against her, the better for her decision making and for the fairness of our criminal legal system.

The Court in *Pitchess* reflected this value, stating that "...the information which defendant seeks may have considerable significance to the *preparation* of his defense...." (*Pitchess*, *supra*, 11 Cal.3d at pp. 537-538, italics added.) Further, the American Bar Association has instituted standards ("ABA Standards") that apply to defense counsel's obligation to conduct as much pretrial investigation as possible likely because the more information defense counsel has before trial, the sounder the legal advice.[36] Specifically, "[t]he lawyer needs to know as much as possible about the character and background of witnesses to *take advantage of impeachment*," and "[f]ailure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel."[37]

When a client and her defense attorney weigh whether or not to proceed to trial, they are really assessing the *strength* of the case. In determining the strength of the case, the defense team analyzes the credibility of each witness on both the defense and prosecutor's witness lists, among other criteria. If the defense is aware of impeachment material that could attack the credibility of a prosecution witness, particularly the only witness for the prosecution, this awareness might bolster a defendant's desire to proceed to trial. If obtaining *Pitchess* material at the initiation of a

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2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> (as of Apr. 25, 2018]) (finding that, "[f]ederal drug offenders convicted after trial receive sentences on average three times as long as those who accept a plea bargain.").

[36] See ABA Stds. For Crim. Justice Pros. Function and Def. Function (3d ed. 1993) standard 4-4.1, pps. 181-183.

[37] *Id.* at p. 183, italics added.

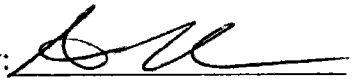
case means the difference between a defendant exercising her constitutional right to a trial versus pleading guilty, certainly the disclosure of information as early as possible would help to facilitate such important decisions that bear on the fundamental constitutional rights of life and liberty.

III. CONCLUSION

"Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense..." (*Pitchess*, *supra*, 11 Cal.3d at p. 535.) The *Pitchess* case got it right. But, over time, due to the enactment of statutes and development of case law, law enforcement officers have been granted what is in practice a virtual wall around their personnel files, severely limiting how and what evidence a defendant can obtain and make use of as they attempt to locate important *Brady* material to impeach law enforcement witnesses. Releasing a Brady list to prosecutorial agencies would take one brick out of this wall and would be a step in the right direction. But, in order for criminal defendants to access the full breadth of their due process rights to *Brady* material without giving up other rights fundamentally important to a fair trial, the onerous *Pitchess* process would need to be dismantled all together.

Dated: May 2, 2018

Respectfully submitted,
Stephen K. Dunkle
CACJ Amicus Committee Chair
John T. Philipsborn
Alicia Virani

By: 
Alicia Virani
As Counsel for CACJ

DECLARATION OF HARVEY SHERMAN,
DEPUTY PUBLIC DEFENDER,
LOS ANGELES COUNTY PUBLIC DEFENDER'S OFFICE

I, Harvey Sherman, declare as follows:

1. I am an attorney licensed to practice law in the State of California. I have personal knowledge of the facts contained in this declaration, and if called upon to testify I could and would testify competently as to the truth of the facts stated herein.
2. I am currently a Deputy Public Defender IV with the Law Offices of the Los Angeles County Public Defender's Office ("LACPD").
3. I have been a Deputy Public Defender for over 23 years.
4. I have been training attorneys and investigators in *Pitchess* litigation and investigations since 2001.
5. Along with one of my colleagues in our Appellate Branch, I developed a four part training program for *Pitchess* motion writing and litigating for new Deputy Public Defenders.
6. I participated on the development and implementation team that spearheaded the electronic service of *Pitchess* motions with the Los Angeles Sheriff's and the Los Angeles Police Department.
7. I oversaw the tracking of *Pitchess* motions our office filed countywide from 2001 through 2015.

8. Between 2001 and 2018, LACPD attorneys have filed over 17,000 *Pitchess* motions.

9. On average, each year, there are two to three cases in which an attorney requests to call a *Pitchess* witness at trial. Frequently these requests are denied by the court on relevance or undue consumption of time grounds.

10. I have personally filed and litigated over 80 *Pitchess* motions throughout my career on felony, misdemeanor, and juvenile cases.

11. On almost every occasion where there are disclosures pursuant to my initial *Pitchess* motion, I have had to ask my clients to waive their speedy trial right so that I can conduct investigation, and frequently so that I can file a subsequent *Pitchess* motion, which then also requires further investigation.

12. Assuming the client is willing to waive time, I file supplemental *Pitchess* motions in every case where initial discovery is disclosed. Because peace officers will not speak to my investigators due to agency policy or union protocol, a supplemental *Pitchess* motion is required to obtain statements made by witness officers.

13. Frequently, because of the length of time it takes to file *Pitchess* motions and investigate *Pitchess* disclosures, my clients will decide that they do not want to wait for the outcome of the investigation and they accept a plea offer.

14. In juvenile cases, the time required for *Pitchess* motions and investigation is particularly problematic especially with our in custody juvenile clients. Even when our office files motions to shorten time in conjunction with *Pitchess* motions in juvenile cases, the time frame needed to litigate and investigate exceeds the speedy adjudication time frames for detained clients. This often discourages juvenile clients from wishing to pursue *Pitchess* investigations.

15. I have occasionally received a *Brady* alert by the prosecution while litigating a *Pitchess* motion and then not received any *Brady* information as a disclosure from the court after an in camera hearing.

16. Overall, the *Pitchess* process frustrates our clients, as they have to wait an extraordinarily lengthy period of time for attorneys to litigate the motions and conduct investigations.

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

Dated: April 30, 2018

Respectfully submitted,

Harvey Sherman
Deputy Public Defender
Los Angeles Public Defender's Office

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), I certify that this brief contains 9,168 words, including footnotes and the exhibit. In making this certification, I have relied on the word count function of the Microsoft Word 2016 computer program used to prepare the brief.

Dated: May 2, 2018

Respectfully submitted,
Stephen K. Dunkle
CACJ Amicus Committee Chair
John T. Philipsborn
Alicia Virani

By: 
Alicia Virani
As Counsel for CACJ

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Association for Los Angeles Deputy Sheriffs v. Superior Court

Case No.: S243855

I declare:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to this matter; my business address is 405 Hilgard Avenue, Los Angeles, California 90095.

On May 2, 2018, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF REAL PARTIES IN INTEREST, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; FILED CONCURRENTLY WITH *AMICUS*' MOTION REQUESTING JUDICIAL NOTICE

and

MOTION REQUESTING JUDICIAL NOTICE ACCOMPANIED WITH EXHIBITS OF THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS *AMICUS CURIAE*, FILED CONCURRENTLY WITH *AMICUS* BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT

on the interested parties in this action, addressed as follows:

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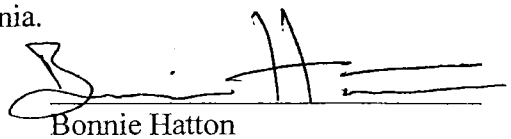
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 2, 2018, at Los Angeles, California.



Bonnie Hatton