In the Supreme Court of California

Association for Los Angeles Deputy Sheriffs, Petitioner, v. **Superior Court of California for the County of Los Angeles,** Respondent.	No. S243855 Second District Court of Appeal No. B280676 Los Angeles County Superior Court No. BS166063 SUPREME COURT FILED
Los Angeles County Sheriff's Department, et al., Real Parties in Interest.	JUN 22 2018 Jorge Navarrete Clerk Deputy

Application of the San Francisco Public Defender's Office to Appear as *Amicus Curiae*

And Brief in Support of Real Parties Los Angeles Sheriff's Department and County of Los Angeles
(Rule 8.520(f))

Jeff Adachi (SBN 121287)
Public Defender, City and County of San Francisco
Matt Gonzalez
Chief Attorney
Dorothy Bischoff (SBN 142129)
Deputy Public Defender
555 Seventh Street
San Francisco, CA 94103
(415) 575-6316
dorothy.bischoff@sfgov.org

RECEIVED

MAY - 4 2018

CLERK SUPREME COURT

In the Supreme Court of California

Association for Los Angeles Deputy Sheriffs, Petitioner, v. **Superior Court of California for the County of Los Angeles,** Respondent.	No. S243855 Second District Court of Appeal No. B280676 Los Angeles County Superior Court No. BS166063
Los Angeles County Sheriff's Department, et al., Real Parties in Interest.	

Application of the San Francisco Public Defender's Office to Appear as *Amicus Curiae*

And Brief in Support of Real Parties Los Angeles Sheriff's Department and County of Los Angeles
(Rule 8.520(f))

Jeff Adachi (SBN 121287)
Public Defender, City and County of San Francisco
Matt Gonzalez
Chief Attorney
Dorothy Bischoff (SBN 142129)
Deputy Public Defender
555 Seventh Street
San Francisco, CA 94103
(415) 575-6316
dorothy.bischoff@sfgov.org

Issue presented

Is a law enforcement agency prohibited from creating an internal *Brady* list, disclosing to the prosecution names and badge numbers *only* of officers who may have exonerating or impeaching material in their confidential personnel file? Or can this identifying data only be disclosed by court order after a *Pitchess* motion?

The San Francisco Public Defender urges this Court to hold that the practice this County has employed for years, which this Court called "laudable" in its 2015 *Johnson* decision—the police department providing a list of officers who may have *Brady* information in their file to the prosecution, who then notifies the defense of that possibility—does not violate any statutes or offend privacy concerns protected by *Pitchess*; and at the same time it furthers *Brady* obligations. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696.)

But, if the Court decides that providing *Brady* lists to the prosecution cannot be harmonized with statutory law, it must hold that constitutional due process prevails over statutes restricting prosecution access to the personnel files. One way

or another, this Court must facilitate the *Brady* discovery due process demands—requiring defense *Pitchess* motions in all cases with police witnesses subverts the burden and will clog the trial courts with motions and in camera reviews.

Application to Appear as *Amicus Curiae*

The San Francisco Public Defender requests leave to file the attached *amicus curiae* brief supporting Real Parties Los Angeles Sheriff's Department and County of Los Angeles. (Cal. Rules of Court, Rule 8.520.)

This case raises an important statewide issue: whether law enforcement agencies may disclose to prosecutors, without a formal *Pitchess* motion, the identities of peace officers whose personnel files contain evidence that may affect their credibility as prosecution witnesses.

The decision here will either promote the goals of *Brady*—as law enforcement agencies around the state have tried to accomplish in the first place by creating *Brady* lists—or take an unnecessary step backwards to a place where *Brady* material goes undiscovered, sometimes for decades, with tragic and preventable results.

The issue is particularly important to San Francisco Public Defender, Jeff Adachi, whose office is charged with effectively representing thousands of criminal defendants per year. As part of that representation, public defenders are charged with ensuring that the accused are afforded due process, including the discovery of *Brady* material. The *ALADS* decision below threatens to undermine laudable prosecution efforts to fulfill their duty under *Brady* and its progeny. Also, as attorneys for Real Party in Interest Daryl Lee Johnson in the 2015 *Johnson* decision, this office has a continuing interest in the issues raised here. (*Johnson, supra,* 61 Cal.4th 696.)

The San Francisco system will, in all likelihood, be scuttled if the Court of Appeal's decision stands; in that, it is anticipated that police cooperation will cease if this Court finds that *Brady* alerts violate California statutory law.

Thus, we request status as amicus to file the below brief.

Topical Index

Table of Authorities

Cases

Statutes/Rules

In the California Supreme Court

Association for Los Angeles Deputy Sheriffs, Petitioner, v. **Superior Court of California for the County of Los Angeles,** Respondent.	No. S243855 Second District Court of Appeal No. B280676 Los Angeles County Superior Court No. BS166063
Los Angeles County Sheriff's Department, et al., Real Parties in Interest.	

Brief in Support of Real Parties

Introduction

Amicus, the Public Defender of San Francisco, respectfully submits this brief in support of Real Parties Los Angeles Sheriff's Department and County of Los Angeles.

The decision under review unnecessarily weakens the ability of prosecutors and law enforcement to achieve their *Brady* obligations and it conflicts with this Court's 2015

Johnson decision. (*Brady v. Maryland* (1963) 373 U.S. 83; *Johnson, supra,* 61 Cal.4th 696.)

In *Johnson,* this Court called efforts to streamline the *Brady* process—the practice the lower court here condemns—laudable. (*Id.* at 721.) As this Court appeared to recognize, the process adopted in San Francisco represents a balanced approach to the unremitting challenges in providing *Brady* material pretrial, so that a person is not convicted now, only to learn later—sometimes *years* later—that there was a *Brady* violation calling for reversal. At the same time, the practice of releasing only names and badge numbers to the prosecution does not disclose any personal information in an officer's file.

Because the Court of Appeal's decision represents a step backward from this progress, amicus urges this Court to reverse the judgment.

1. The twin goals of providing *Brady* information and protecting officers' confidential information are best achieved by the current protocol using a *Brady* list.

The goal under *Pitchess* has always been to protect substantive information *contained in* an officer's personnel file—not the mere identities of officers who might have

information in their file, to which the defense is constitutionally entitled. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

Here, the court below has incorrectly expanded that protection to include the mere identifying information—names and star numbers—of officers whose files *might* contain *Brady* information. It made this expansion based largely on *Copley Press*. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1297-1299.) But *Copley* is not persuasive, because it involved disclosure of identifying information to the media, not to a fellow law enforcement agency for the purpose of fulfilling their *Brady* obligations, where any further dissemination is tightly controlled by the trial court. The alert system both harmonizes the prosecution's due process *Brady* duty and the statutory police protection under the Police Officer's Bill of Rights.

And the lower court's expansion creates a significant and unnecessary burden on prosecutors who are trying to fulfill their *Brady* obligation, threatening the rights of defendants to *Brady* material which, if not provided pretrial, will result in reversals down the line, not to mention unjust imprisonment.

2. *Brady* lists promote due process and their use is consistent with *Pitchess*, the state's *Brady* obligations, and California statutes.

This Court can harmonize the *Pitchess* statutes with the prosecution's need to access basic identifying information of officer-witnesses who may have *Brady* material in their confidential files. As Real Party notes, the Department instituted a policy and practice that approximately 22 counties within this State had already adopted. (Real Party's Opening Brief on the Merits, at 10.) San Francisco is one of those counties.

This Court's *Johnson* decision called this practice laudable—the lower court here finds it unlawful. True, the practice was not challenged in *Johnson*, but common sense informed the Court that this workable system facilitates *Brady* discovery and does not improperly invade any private information—until and unless a trial court authorizes disclosure in a given case, nothing is disclosed.

Merely knowing the name and star number of an officer who may have *Brady* in his confidential personnel file does not disclose anything confidential or substantive. Only upon a

proper showing of materiality and subject to protective orders will the prosecutor, let alone a defendant, get the substantive, confidential material *Pitchess* statutes protect.

And the officers' names and star numbers in any particular case are not private information—they are pasted all over the police reports provided in discovery. What the *Brady* lists do is merely avoid the necessity of bringing a *Brady* motion in every case, as to every officer, by the prosecution or the defense, a burden on all the parties, not the least on trial courts.

A. The *Pitchess* statutes and due process under *Brady* can be harmonized.

The *Pitchess* statutes and due process under *Brady* can be harmonized, at the very least as applied to the alerts revealing an officer's name and star number. The prosecution merely learning which of its officer-witnesses has potential *Brady* material does not *disclose* the file in the criminal proceeding; and amicus urges that neither would a prosecutorial inspection of an officer's personnel file for *Brady* purposes. The legislative history of the statutes does not support a construction that would deem the receipt of identifying

information, or an actual prosecutorial inspection for that matter, a breach of confidentiality within the meaning of section 832.7(a). Either way, it only facilitates potential disclosure upon proper trial court review.

Though the *Pitchess* statutes specify procedures for the "disclosure" of confidential materials in criminal proceedings, they do not prohibit the prosecutor, as the head of the prosecution team, from performing the constitutionally mandated role of identifying *Brady* materials in the personnel files. There is no good reason to stretch the meaning of "disclosure" to cover a mere *Brady* alert. Rather, a more reasonable interpretation of a "disclosure" is when officer records are introduced in evidence, turned over to the defense, or otherwise used in litigation. (See *Michael v. Gates* (1995) 38 Cal.App.4th 737, 743.)

There is a crucial distinction between prosecutorial access to a personnel file to identify *Brady* material and *public disclosure* of that material. Construing Penal Code section 832.7(a) to afford the prosecution team the ability to review confidential peace officer personnel files so it can comply with

its obligation to identify *Brady* material in its possession harmonizes the statute with due process.[1]

Also, requiring the District Attorney to maintain the nonpublic nature of the files and seek judicial review before any disclosure to the defendant via a Section 1043 motion prevents the premature disclosure of anything that might actually involve personal or sensitive information. The most efficient process would be for the prosecutors to be tasked with review and disclosure of all records subject to an *Alford* order (*Alford v. Superior Court* (2003) 29 Cal.4th 1033 [addressing trial court concerns about efficiency]), an option rejected by this Court in *Johnson*. Or, as occurs in San Francisco, notify the defense of the possibility of *Brady* material in a particular officer's file, providing a basis for the defense to bring the motion. Either way, nothing is disclosed absent trial court approval and protection.

In sum, amicus asks this Court to reconsider the proposition that a prosecutorial inspection of an officer's

---

[1] This argument tracks those articulated in the *Johnson* court of appeal decision, now unpublished, and which in part this Court rejected.

personnel file for *Brady* purposes is not a *disclosure* of the file within the criminal proceeding and does not breach any confidentiality within the meaning of section 832.7(a). And as to the alert system invalidated below, the mere identification of which officers may have *Brady* information likewise provides no disclosure and breaches no confidentiality.

B. If the Court agrees that merely providing identifying information to the prosecution violates the *Pitchess* statutes, it should find that those statutes violate due process and task the prosecution with sifting through its police witnesses' files for *Brady* material.

If the Court allows the lower court's *ALADS* decision to stand, the San Francisco Police Department (and likely most others) will pull out of the system that is currently producing notice that an officer-witness may have *Brady* information in his personnel file. This system, though not perfect, allows the prosecution to fulfill its *Brady* duty and facilitates court-protected discovery.

Constitutional due process must override Penal Code section 832.7 and any other state statute that would preclude prosecution access to basic identifying information, which will

not publicly disclose anything from a confidential personnel file absent court approval and related protective orders.

Amicus urges that, if it allows this limited avenue of *Brady* discovery to fail—if *Brady* alerts are *de facto* invalidated—the Court should go a step further and find that, as construed, Penal Code section 832.7's barring of prosecutorial access to officer personnel files for *Brady* purposes is unconstitutional.

California should be tearing down roadblocks to what due process minimally requires—in San Francisco, notice that a particular officer may have *Brady* information relevant to a charged crime—not building walls.

Conclusion

Practically speaking, if the *ALADS* decision stands, the result will be a *Brady* motion in every case. We can anticipate that any competent lawyer advising a police officer's association or police management will advise that no further alerts need occur, as they are protected under the lower court's opinion. But, defendants simply cannot be denied

existing *Brady* material. One way or another, *Brady* material must come to light, and its pretrial disclosure is crucial.

The *Pitchess* statutes and the due process demands under *Brady* can and must work in harmony. The lower court's decision here does not allow that. This Court must assure defendants have some way to receive *Brady* information.

Respectfully, the Court should find that the laudable *Brady*-alert system comports with *Pitchess* statutes and due process, and reverse the Court of Appeal's decision; and further find that the due process right to *Brady* material trumps the privacy statutes, allowing the prosecution to review personnel files for that material and release it via discovery orders.

Dated: May 1, 2018

Respectfully submitted,

Jeff Adachi
Public Defender

/S/ Dorothy Bischoff

By: Dorothy Bischoff
Deputy Public Defender

Certificate of Word Count

I, Dorothy Bischoff, counsel for amicus curiae the San Francisco Public Defender, hereby certify that the word count of the attached application to file amicus brief and brief of amicus curiae in support of Real Party is 1,925 words as computed by the word-count function of Word, the word processing program used to prepare this brief.

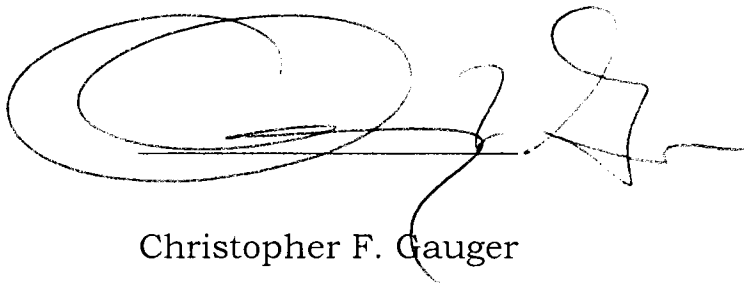
Dated: May 1, 2018

/S/ Dorothy Bischoff

Dorothy Bischoff
Deputy Public Defender
California State Bar No. 142129

Proof of Service

I declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 555 Seventh Street, San Francisco, California 94103; and that on May 3, 2017, I served the attached amicus from the Office of the San Francisco Public Defender (for California Supreme Court Case No. S243855) by U. S. Mail on the parties in the service list below and page 13.



Christopher F. Gauger

1 Hillary Potashner
Federal Public Defnder
Alyssa D. Bell
Deputy Federal Public Defender
3121 East 2nd St.
Los Angles CA., 90012

SERVICE LIST

California Supreme Court Case No. S243855

Elizabeth J. Gibbons The Gibbons Firm, PC 811 Wilshire Boulevard, 17th Floor Los Angeles, CA 90017	Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs
Douglas G. Benedon Benedon & Serlin, LLP 22708 Mariano Street Woodland Hills, CA 91367	Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs
Judith E. Posner Benedon & Serlin, LLP 22708 Mariano Street Woodland Hills, CA 91367	Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs
Frederick Bennett Superior Court of Los Angeles County 111 North Hill Street, Room 546 Los Angeles, CA 90012	Attorney for Respondent Superior Court of Los Angeles County
Geoffrey Scott Sheldon Liebert Cassidy Whitmore 6033 West Century Boulevard, 5th Floor Los Angeles, CA 90045	Attorneys for Real Party in Interest Los Angeles County Sheriff's Department Attorneys for Real Party in Interest Jim McDonnell Attorneys for Real Party in Interest County of Los Angeles
James Edward Oldendorph, Jr. Liebert Cassidy Whitmore 6033 West Century Boulevard, 5th Floor Los Angeles, CA 90045 Alexander Yao-En Wong Liebert Cassidy Whitmore ~~6033 West Century Blvd 5th fl~~ Loa Angles CA 90045	Attorneys for Real Party in Interest Los Angeles County Sheriff's Department Attorneys for Real Party in Interest Jim McDonnell Attorneys for Real Party in Interest County of Los Angeles Attorneys for Real Party in Interest Los Angeles County Sheriff's