IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, *Petitioner* vs. **SUPERIOR COURT OF LOS ANGELES COUNTY,** *Respondent.*	**No. S243855**
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, *et al.,* *Real Parties in Interest*	

Second Appellate District, Division Eight, No. B280676
Los Angeles County Superior Court, No. BS166063
Honorable James C. Chalfant, Judge

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The California District Attorneys Association (CDAA) as amicus curiae respectfully requests permission to file the attached brief in support of the position of real parties in interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles.

CDAA has been in existence since 1910 and was incorporated as a non-profit corporation in 1974. It has over 2,700 members including all of California's 58 district attorneys, the Attorney General of California, city attorneys engaged in criminal prosecutions, deputy district attorneys, deputy attorney generals, and deputy city attorneys. CDAA is dedicated to promoting justice through enhanced prosecutorial excellence. CDAA advocates the highest professional standards for prosecutors, including education and training, effective advocacy, integrity, and compliance with constitutional and other legal mandates. CDAA provides training seminars, educational publications, and legislative advocacy on issues affecting the criminal justice system. CDAA has more than 35 committees, which use and coordinate the resources of prosecutorial agencies throughout the state to address cases that may have major statewide impact on the prosecution of criminal cases.

The current case involves the validity of a Los Angeles County Sheriff's policy relating to peace officer personnel records, and disclosure of certain aspects of those records to prosecutors. The LA Sheriff's policy shares the essential characteristics of policies used by many jurisdictions

throughout the state to harmonize procedures under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, with the government's obligations under *Brady v. Maryland* (1963) 373 U.S. 83, to disclose favorable information to criminal defendants. Under these policies, law enforcement agencies provide the district attorney with the names of officers whose personnel files may contain information relevant to dishonesty or moral turpitude. In some counties, the alerts are given in reference to a specific case prosecution in which the officer will be a witness; in other counties, the alerts are given in advance of the officer being subpoenaed as a witness. The prosecution then provides these "alerts" to the defense so that it may make a *Pitchess* motion; the prosecution may also bring a *Pitchess* motion. We are informed and believe that some 22 counties have such policies: Alameda, Amador, Calaveras, Contra Costa, Fresno,[1] Inyo, Marin, Monterey, Nevada, Placer, Sacramento, San Francisco, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Solano, Sonoma, Tuolumne, Ventura, Yolo and Yuba. Affirmance of the ruling of the Court of Appeal in this case would prohibit the use of these widespread policies.

The parties in the lawsuit at bar represent two stakeholders in this issue: the association representing peace officers, and the Sheriff (as management of the law enforcement agency and employer of the peace officers). Statewide, there are at least two additional stakeholders significantly affected by this controversy: prosecutors who are required by the United States Constitution to provide defendants material exculpatory evidence, and criminal defendants who are constitutionally entitled to receive such evidence in order to receive a fair trial. So while the case comes to the Court as a significant labor issue between peace officers and

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[1] The Fresno County District Attorney's Office has an informal agreement with some law enforcement agencies in its jurisdiction.

their employer, the impact on the participants in the criminal justice system for cases in which the officers are witnesses is at least as significant.

CDAA has an interest in this case, since its outcome will have a significant impact upon the ability of prosecutors throughout the state to comply with our duties under *Brady* and to ensure that defendants are afforded due process of law.

CDAA has knowledge and expertise with the issues in this case. CDAA provides periodic training addressing criminal discovery. CDAA developed and proposed a policy for the California Highway Patrol similar to that addressed in the current case. (98 Ops.Cal.Atty.Gen. 54 at *1 (2015).[2]) CDAA filed amicus briefs regarding the prosecution's *Brady* obligations in both the Court of Appeal and the Supreme Court in the recent case of *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696. CDAA also wrote an amicus letter in support of the grant of review in the present case.

The proposed amicus curiae brief submitted herewith will assist the court in deciding the matter because it is based on our experience throughout the state with policies and practices substantially similar to the one challenged in the current proceeding. (Cal. Rule of Court 8.520(f)(3).)

The prosecutors who wrote the proposed amicus brief have extensive expertise regarding *Brady*. All have taught courses for CDAA, law enforcement, and other audiences on ethical standards of prosecution, *Brady* and criminal discovery. They have written and administered *Brady* policies for their offices, have written appellate briefs on the subject, and have served on and/or chaired CDAA committees including the Appellate Committee, Legislation Committee, Training and Publications Committee,

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[2] Although the Attorney General opinion upheld the legality of such a policy, the CHP has not implemented it.

and ad hoc *Brady* Committee. Between them, they have published in scholarly journals on these topics,[3] and taught in law schools to advance the values of ethical prosecution to the next generation of California criminal litigators.

The following disclosures are made pursuant to California Rule of Court 8.520(f)(4): No party or counsel for a party authored the proposed amicus brief in whole or in part, nor did any party or counsel for a party make a monetary contribution intended to fund the preparation or submission of the brief. The brief was authored in whole by the undersigned. No person or entity other than amicus curiae, its members and its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

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[3] See Coleman and Lockey, *Brady "Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It* (2016) 50 U.S.F. L. Rev. 199.

Accordingly, your amicus requests that this Court grant this application, and file the amicus curiae brief submitted herewith.

DATE: May 3, 2018

Respectfully submitted,

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ARGUMENT

I. THIS COURT SHOULD ADDRESS THE RELATIONSHIP BETWEEN *BRADY* AND *PITCHESS*

A. Background of *Brady, Pitchess*, and "Alert" Systems

"*Brady* and *Pitchess* are not perfectly congruent." (98 Ops.Cal.Atty.Gen. 54 at *5.) Under *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny, prosecutors have an affirmative duty, with or without a defense request, to disclose information in possession of the prosecution or investigating agencies that bears on the credibility of prosecution witnesses. (See *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, at p. 709.) Under *Pitchess*,[4] the prosecution is not in actual possession of personnel information of investigating agencies; the defense or prosecution must bring a motion and show good cause for disclosure; and often only the date of incident, witness names, and contact information are provided. (*Id.* at p. 713; Evidence Code, § 1043; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

This Court has examined the intersection of *Brady* and *Pitchess* in the past, finding them essentially in harmony. "[T]he "'*Pitchess* process' operates in parallel with *Brady* and does not prohibit the disclosure of

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[4] We use *Pitchess* interchangeably to refer to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to the statutes that codify *Pitchess* motions (Penal Code § 832.7; Evidence Code §§ 1043-1047), and to motions made pursuant to these provisions.

Brady information." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.) But 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." (*Ibid.*) While this Court has upheld the validity of the *Pitchess* statutes in general, it has reserved the issue of whether the exclusivity of the *Pitchess* statutes "would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*." (*Id.* at p. 12, fn. 2; see also *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1047, fn. 6: "To the extent a prosecution-initiated *Pitchess* motion yields disclosure of such information, the prosecutor's obligations, as in any case, are governed by constitutional requirements in the first instance.")

Working in this legal landscape, district attorneys in approximately 22 California counties, working with law enforcement agencies (LEAs), have adopted policies to reconcile *Pitchess* and *Brady*. The LEA with knowledge of misconduct by officer employees – culled by review of their personnel files and the maintenance of *Brady* lists internal to the LEA – willingly provides the prosecutor with an "alert" or "tip" that an officer's personnel file contains potential *Brady* information, with no further information provided. The prosecution provides that "alert" to the defense. Then, the defense and/or the prosecution brings a *Pitchess* motion so the court may determine whether information from the file should be provided. Such policies incorporate the essential protections of the *Pitchess* process, including in camera review by a judicial officer and a protective order for any information provided.

These "alert" or "tip" policies fall into two categories. In some jurisdictions, alerts may be given in advance of any specific prosecution, as

to officers with such misbehavior in their history (hereinafter describe as "in advance" notice, alert or tip). Such alerts have been in use in Ventura, San Francisco, Sacramento, and other counties for many years. Just such a system was at issue in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, which this Court unanimously found to be "laudabl[e]" (at p. 721). In fact, this Court in *Johnson* included the implementation order from the San Francisco Police Department as an appendix to its opinion, as a model for other LEAs. Such a system was the precise model that real party in interest the Los Angeles County Sheriff's Department tried to implement. In fact, the Sheriff in announcing the policy specifically referred to this Court's *Johnson* opinion, and the subsequent Attorney General Opinion finding such a procedure "legally valid." (98 Ops.Cal.Atty.Gen. 54 (2015) at *2 - *4.)

Another variation on LEA *Brady* alerts is when the agency makes no alert to the prosecutor until a specific officer has been subpoenaed in a specific case. In such a system, the subpoena triggers a review of personnel files by the LEA, and then the LEA responds to the DA, a process repeated in every case for every officer (even repeatedly for the same officer in each new case, as he/she may have suffered a new investigation for misconduct in the interim since the last time her/she was subpoenaed). Such a system will be referred to hereafter as a "case specific" notice, alert or tip system.

Under either system, following a *Pitchess* motion, the superior court in those counties reviews the materials in camera, after notice to the officer in keeping with *Pitchess* protections (Evidence Code, § 1043(a); *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 56.) These policies allow defense attorneys and prosecutors to efficiently obtain relevant *Brady* material, subject to court protective orders (Evidence Code § 1045(e)), so they can be both informed and prepared on their pending cases.

B. The Type of Alert System Adopted by Real Parties in this Case, the Rulings Below, and Issues for this Court to Address

Real party Los Angeles County Sheriff adopted an "in advance" *Brady* alert system. Petitioner, the Association for Los Angeles Deputy Sheriffs, then began this litigation by seeking an injunction in superior court prohibiting the Sheriff's use of the alert system. The superior court disapproved the "in advance" alert system as a violation of the *Pitchess* statutes. But the superior court ruled in favor of, and the dissent in the Court of Appeal supported, a "case specific" alert or notice, albeit on different rationales. The superior court approved a "case specific" alert system, not based on a construction or interpretation of the *Pitchess* statutes (which the superior court felt prohibited even "case specific" alerts), but rather based on the overriding constitutional obligation of *Brady*. The Court of Appeal dissent would have approved a "case specific" alert system, as being permitted by its interpretation of the *Pitchess* statutes. But the Court of Appeal majority reversed the superior court and allowed no LEA alert system, holding that any alert system would violate the *Pitchess* scheme.

Real party in interest, the Sheriff, did not seek an interlocutory writ to challenge the superior court's ruling against the "in advance" alert system, so the validity of that ruling is not strictly before this Court in the current proceeding. Petitioner did seek a writ in the Court of Appeal to challenge the superior court's ruling allowing a "case specific" alert system, which led to the Court of Appeal's ruling prohibiting that system, and now brings the matter to this Court.

This Court, in accepting review, has asked if a law enforcement agency may disclose to the prosecution the name and ID number of an officer having relevant impeaching/exonerating material, when that officer is a potential prosecution witness in a pending criminal trial. Essentially,

your Court is asking if a "case specific" alert system is permissible. As noted, for the procedural reasons set out above, that is the precise issue presented in the current litigation.

But your amicus notes that this Court need not find the answer to this question in a limited analysis, based on a narrow rationale. It may be answered with an analysis and rationale which covers both "in advance" and "case specific" alert systems, since if an "in advance" alert system is valid (through either interpretation of the *Pitchess* statutes or the overriding constitutional *Brady* obligation), then a fortiori a "case specific" alert system will be valid. Should this Court decide the issue employing a rationale that has a broader application to the various *Brady* alert systems actually in use in California, the ruling would avoid ongoing, piecemeal litigation by any criminal justice stakeholder or participant seeking to exploit perceived chinks in the armor of earlier opinions (as Petitioner has done with *Johnson* here). Such an opinion would also promote the efforts of courts, the defense bar, and prosecutors to ensure that the government meets its *Brady* obligations that are required for fair trials.

II. IMPEACHMENT EVIDENCE IN POLICE OFFICER PERSONNEL FILES MAY BE EXCULPATORY EVIDENCE WITHIN *BRADY* AND CALIFORNIA DISCOVERY RULES

The Los Angeles County Sheriff's policy at issue here includes eleven administratively-founded categories of misconduct by law enforcement officers that real party proposed to share with the Los Angeles County District Attorney, until petitioner sued to enjoin disclosure of this misconduct. (*Association for Los Angeles Deputy Sheriffs v. Superior Court* [hereafter *ALADS*], slip opinion, p. 8.) The United States Supreme Court has made it clear that impeachment evidence is covered under *Brady*. *Giglio v. United States* (1972) 405 U.S. 150, 154-155; *Youngblood v. West*

Virginia (2006) 547 U.S. 867, 869-870. Legal precedent establishes that each of these categories is disclosable under *Brady* or *Pitchess*, and/or constitutes moral turpitude (and accordingly is impeachment evidence subject to prosecution discovery under *Brady*): [5]

(1) immoral conduct (*People v. Castro* (1985) 38 Cal.3d 301, 315 [witness may be impeached by crime involving "moral depravity"]; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 181 ["any 'dishonest or immoral' act" is moral turpitude]; *People v. Jaimez* (1986) 184 Cal.App.3d 146, 150 [prostitution, pimping are crimes of moral turpitude]; *People v. Ballard* (1983) 13 Cal.App.4th 687, 691 [indecent exposure is crime of moral turpitude]);

(2) bribes (*In re Rothrock* (1940) 16 Cal.2d 449, 454 [bribery is crime of moral turpitude]; *In re Crooks* (1990) 51 Cal.3d 1090, 1101 [same]);

(3) misappropriation of property (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1021 [misappropriation of client's funds is moral turpitude]);

(4) tampering with evidence (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1027 [evidence of planting evidence may be sought via *Pitchess*]; *Price v. State Bar* (1982) 30 Cal.3d 537 [tampering with evidence is moral turpitude]);

(5) false statements (*People v. Wheeler* (1992) 4 Cal.4th 284, 288, superseded on another point as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1460 [incidents of dishonesty may be admitted to

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[5] For purposes of this brief, we consider impeachment evidence and exculpatory evidence to be constitutionally indistinguishable and use the terms essentially interchangeably. (See *United States. v. Bagley* (1985) 473 U.S. 667, 676: "Impeachment evidence... as well as exculpatory evidence, falls within the *Brady* rule... Such evidence is 'evidence favorable to the accused...."; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 433.)

impeach credibility]); *People v. Jordan* (2003) 108 Cal.App.4th 349, 362 [must disclose conduct showing dishonesty, including misdemeanors, whether or not they led to conviction]; see *People v. Steele* (2000) 83 Cal.App.4th 212, 221–223 [witness may be impeached with misdemeanor conviction for providing false information to a police officer]);

(6) making false statements during internal affairs investigations (see *People v. Wheeler, supra*; *People v. Jordan, supra; People v. Steele, supra*);

(7) obstructing an investigation/influencing a witness (see *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1230-1232 [*Brady* error to suppress prior interview of child suggesting coaching or pressure that might affect courtroom testimony]; see *Banks v. Dretke* (2004) 540 U.S. 668, opinion on remand, *Banks v. Thaler* (5th Cir. 2009) 583 F.3d 295, 300 [defendant entitled to appeal on *Brady* grounds prosecution's failure to produce prior "practice sessions" with witness leading to "closely rehearsed" testimony]; see *People v. Williams* (1999) 72 Cal.App.4th 1460, 1465 [deterring, preventing or resisting officer by use or threat of force or violence in violation of Penal Code § 69 is a crime of moral turpitude];

(8) providing false information in records (*Warrick v. Superior Court, supra,* 35 Cal.4th 1011, 1027 [evidence of fabricating police reports may be sought via *Pitchess*]);

(9) discriminatory harassment (Evidence Code, § 780(f) [bias may be considered regarding witness credibility]; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-508 [evidence of racial bias is relevant to credibility]);

(10) unreasonable force (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86 [history of excessive force may be sought via *Pitchess* and may be admissible]); and

(11) family violence (*People v. Rodriguez* (1992) 5 Cal.App.4th 1389 [domestic violence under Penal Code § 273.5 is moral turpitude]).

With respect to discovery standards, it is worth noting that *Brady* and *Pitchess* have different standards of "materiality." (*City of Los Angeles v. Superior Court (Brandon), supra*, 29 Cal.4th 1, 14.) Under *Pitchess* the evidence must be material (i.e., relevant) "to the subject matter involved in the pending litigation." (*Id.*, at pp. 9 – 10). *Brady* materiality requires a showing that the evidence will likely affect the outcome of the trial. (*People v. Roberts* (1992) 2 Cal.4th 271, 330). Thus, the *Brady* standard is narrower than *Pitchess*: all evidence that meets the *Brady* standard will also meet the *Pitchess* standard, but not vice versa. (*Brandon, supra*, 29 Cal.4th at p. 14.) In terms of timing, however, evidence can be disclosed under *Brady* even if it goes beyond the five-year time limit of *Pitchess*. (Evidence Code § 1054(b)(1); *Abatti v. Superior Court, supra,* 112 Cal.App.4th 39; *Johnson, supra*, 61 Cal.4th at p. 720.) Also, the Criminal Discovery Act requires the prosecution to provide the defense "any exculpatory evidence," a standard that does not have the *Brady* materiality requirement. (See Penal Code § 1054.1(e); *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.)

In summary, these authorities establish that the categories of evidence in the Sheriff's policy are categories which may be exculpatory evidence, as defined in *Brady*, its progeny, the *Pitchess* framework, and California criminal discovery law.

III. PEACE OFFICER PERSONNEL RECORD INFORMATION IS HELD BY THE "PROSECUTION TEAM" FOR *BRADY* PURPOSES

The prosecution is responsible for disclosing to the defendant *Brady* evidence in a criminal prosecution, when that evidence is held not just by

the prosecutor, but by other persons or entities associated with what has come to be called the "prosecution team." (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1476.) The prosecution team includes not just the prosecutor's office, but also investigative agencies and personnel. (*Id.* at p. 1476; *Youngblood v. West Virginia*, *supra*, 547 U.S. at p. 870.) "The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police 'suppression of the material information, the state's failure is not on that account excused." (*Barbee v. Warden* (4th Cir. 1964) 331 F.2d 842, 846.)

While the reach of the government's responsibility for disclosure certainly extends to the investigative file in the specific criminal case at issue, the U.S. Supreme Court has indicated that it is not limited to just that material. Thus, in *Kyles v. Whitley*, *supra*, the Court held that impeachment evidence about an informant's criminal conduct in a different crime was part of the evidence deemed to be *Brady* material. (514 U.S. at pp. 428-429, and 442, fn. 13.)

Petitioner places great reliance on *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, for the proposition that the personnel records of an LEA should not be considered as covered by the prosecution team rules for *Brady* purposes. *Barrett* involved a defendant, an inmate charged with an in-prison murder, who sought 73 categories of Department of Corrections (CDC) information from the District Attorney, 17 of which became at issue in the Court of Appeal. The information sought included not only items specific to the crime investigation in that case, but also administrative information not related to that case, such as memos regarding a change in prison cell "celling" policies, memos regarding weapons found in the prison over a four-year period, the percentage of life inmates and the prison over a four-year period, and for a six-month period both prison yard policies and investigation packages from all in-prison

assaults. (80 Cal.App.4th 1309 – 1310.) The Court of Appeal held that CDC had a dual status with respect to the District Attorney's obligations. With respect to investigative material on the specific murder, the D.A. was obligated under Penal Code § 1054.1 to gather and disclose those materials. With respect to the various categories of administrative materials, however, the Court held that CDC was a third party as to both the D.A. and the defense. Therefore the D.A. was not obligated to provide those materials, though the defense could seek them on its own through a subpoena directed to CDC. *Barrett* noted that the defendant was better positioned to make his own discovery claims and present his own theories as to the relevance of the wide range of CDC administrative materials sought. (80 Cal.App.4th at pp. 1318 – 1321.)

Petitioner's simplistic equating of the CDC administrative records in *Barrett* with the officer personnel records held by the sheriff in this case does not stand up to careful analysis. The posture of the LEA, the prosecutor, the criminal defense, and the information at stake is sharply different in the case at bar. *Barrett* dealt with administrative records that were not only extensive (in an agency the size of CDC), but also had no immediately apparent connection or relevance to the murder investigation, so it would not be obvious or even knowable to the prosecutor, CDC, or the superior court what defense theory might make such evidence important to the defendant's case. To sweep such records into the *Brady* prosecution team category would expand, to a wholly impractical extent, what the prosecutor was responsible to search out and provide to the defense.

The officer personnel records at issue here, however, are a discrete class of administrative records, further limited for present purposes by the specific categories of misconduct listed as *Brady* relevant in the Sheriff's policy. When an officer is identified as having a role in a case which merits a subpoena, it is a relatively simple matter to check his/her personnel file,

or a list of officers derived from personnel files, to determine if the officer's background includes *Brady* impeachment misconduct. To recognize such information as being within the prosecution team for *Brady* purposes makes practical sense. Indeed, it seems that such alert policies are just the type of "... procedures and regulations [that] can be established ... to insure communication of all relevant information on each case to every lawyer who deals with it" that the U.S. Supreme Court advocated in *Giglio*, *supra*. (405 U.S. at p. 154.) It is much different than the nearly limitless scope that would result if the types of administrative records at issue in *Barrett* were swept within the prosecution team.

The alternative would mean that an officer who has suffered sustained administrative discipline for bribes, misappropriation, evidence tampering, false statements or reports, obstruction of investigation, or other clearly serious impeachment conduct, could remain entirely in the shadows. The officer, whose involvement with the particular case would make him/her a part of the prosecution team for that case, would know of their own misconduct and discipline. The employing LEA, which had investigated the misconduct and dealt with it as a personnel matter, would know. But the District Attorney and the defense attorney could be left completely in the dark. This Court should not adopt such an unwarranted and limiting view of the "prosecution team" that would impede *Brady* disclosure.

IV. WITHOUT AN ALERT SYSTEM, THE *PITCHESS* PROCESS IS INADEQUATE TO COMPLY WITH *BRADY* AS TO PEACE OFFICER PERSONNEL RECORDS

The exclusive means for either the prosecution or the defense to obtain information from a peace officer's personnel file is through a *Pitchess* motion. (Penal Code, § 832.7(a); *Johnson*, 61 Cal.4th at pp. 704,

712-713.)[6] For the preliminary step of getting the personnel file before a judge for in camera review, good cause must be shown. (Evidence Code § 1043(b)(3).) Traditionally, this has required a showing of a "specific factual scenario" which establishes a "plausible factual foundation." (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1020.) An alternative good cause showing is the existence of a *Brady* "alert" under a policy like that at issue here, and "some explanation of how the officer's credibility might be relevant to the proceeding." (*Johnson*, 61 Cal.4th at p. 721; *Serrano v. Superior Court, supra*, 16 Cal.App.5th at p. 774.) This alternative means of satisfying the *Pitchess* standard for review or access for officer personnel records would be eliminated by the rule advocated by petitioner and pronounced by Court of Appeal opinion in *ALADS*.

Without some sort of alert system, the *Pitchess* process is inadequate to ensure that the prosecution is able to provide, and the defense is able to receive, material impeachment evidence for peace officer witnesses. In the vast majority of criminal cases, it will not be the prosecution's position, and the prosecution will not have a basis to allege, that the officer is dishonest or has engaged in misconduct. Defense counsel, based upon discussions with the defendant and the defense's own investigation, may be able to make such allegations. But this shifts the burden to the defense, in conflict with the well-established principle that the prosecution has an affirmative duty to provide impeachment evidence with or without a defense request. (*In re Ferguson* (1971) 5 Cal.3d 525, 532-533; *People v. Kassim* (1997) 56

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[6] The one exception to the exclusivity of the *Pitchess* process is for investigations of officers or their employing agencies conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Penal Code, § 832.7(a).) This exception has no application here, since your Court has held it does not authorize district attorney access peace officer personnel files for routine purposes of *Brady* compliance. (*Johnson*, 61 Cal.4th at pp. 713-714.)

Cal.App.4th 1360, 1379.) Also, there will be cases where, depending on the facts and the officer's role in the case, neither the prosecution nor the defense has any basis to state on information or belief that an officer engaged in misconduct in that specific case, yet relevant *Brady* evidence exists in the officer's personnel file nonetheless.

Thus, for many situations, the Court of Appeal created a Catch-22 for police agencies, prosecutors, and the defense. Under the Court of Appeal's construction of the law, the police agency may know of *Brady* evidence as to an officer but may not advise the parties of it in the absence of a *Pitchess* motion. The prosecution will not know of the potential *Brady* evidence, and thus will have no reason to bring a *Pitchess* motion, and no good cause to set forth in such a motion in any event. The defense will be in the same situation as the prosecution. If the *Pitchess* procedure is to be interpreted and applied as the Court of Appeal would do, then a member of the prosecution team – the police agency – having possession and knowledge of the information, must not give either the prosecution or the defense any means to know of or have access to it. Instead of harmonizing *Brady* and *Pitchess*, the Court of Appeal stands them on their heads.

Even if the prosecution or the defense could somehow overcome the hurdle of a good cause showing require by *Pitchess*, without an alert system it would be necessary to make a *Pitchess* motion in every case to determine whether the officer's personnel file contains impeachment or other exculpatory evidence. The resulting burden on the prosecution, law enforcement, the defense, and the trial courts would be not only inconvenient but substantial, and perhaps in many instances practically impossible. Simple cases like driving on a suspended license, reckless driving, public intoxication, etc., would be bogged down by *Pitchess* motions. Yet without an alert system, the vast majority of these motions will be fruitless exercises. And if *Pitchess* motions are denied due to a lack

of sufficient good cause showing, because the absence of an alert system has denied the defense the ability to show good cause that may nonetheless exist but of which the defense and prosecution are ignorant, then the statutory protection for peace officers' privacy will override the prosecution's constitutional duty to provide impeachment and other exculpatory evidence with or without a request by the defense.

The Court of Appeal majority opinion defended its result by saying that by requiring the defense to use a *Pitchess* motion to access the records, it was doing no more than the U.S. Supreme Court required of the defendant in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39. (See slip opinion below, at pp. 33 – 34.) *Ritchie* involved a case where the defendant knew about the existence of the records he wanted to examine (Child and Youth Services records), and issued a subpoena for them. It did not involve, and did not address at all, the standard for when a prosecutor, or the prosecution team, would be required to give the defendant notice of the existence of records, under *Brady*. The *Ritchie* opinion did place a burden on the defense to make a plausible showing the records might support his claim before an in camera judicial examination of the records would be required. (480 U.S. at p. 58, fn. 15.) This would support California's similar *Pitchess* procedure, requiring a showing of good cause before the court conducts an in camera examination of what officer personnel records should be disclosed. But *Ritchie* in no way addresses procedures under which the prosecutor or LEA gives a defendant notice of the existence of *Brady* records, so that the defendant knows to take the step of bringing a *Pitchess* motion.

Petitioner erroneously suggests that the position of real party will result in the filing of more, not fewer, *Pitchess* motions. (Answer Brief on the Merits, pp. 64 – 66.) This is incorrect, belying both mathematical logic and practical reality. The vast majority of law enforcement officers have

little or no *Pitchess* or *Brady* in their personnel files, so if an alert system is used, no motions need be filed on them. But if there is no *Brady* alert system, so prosecutors and defense attorneys do not have any idea if an officer has *Brady* information in his/her personnel file, the competent defense attorney and prudent prosecutor may feel obligated to file a *Pitchess* motion on all officers, even though the majority of officers will have no *Pitchess/Brady* information in their personnel files.

If the Court of Appeal opinion in this case is affirmed, the prosecution and the defense may go through trial completely ignorant as to dishonesty or moral turpitude conduct having a bearing on an officer witness's credibility, even though the officer and the employing agency are fully aware of it. This outcome is contrary to the principle that prosecutors are required to provide the defense with impeachment and other exculpatory evidence, even if the information is in the hands of the police and not in the hands of the prosecution. (*People v. Whalen* (2013) 56 Cal.4th 1, 64, overruled on another point in *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17; *Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078, 1087.)

V. THE COURT OF APPEAL'S OPINION CONFLICTS WITH *JOHNSON* AND OTHER AUTHORITY

The Court of Appeal in the present case ruled it would violate *Pitchess* for the sheriff to provide the district attorney with the names of deputies "whose personnel files contain sustained allegations of misconduct allegedly involving moral turpitude or other bad acts relevant to impeachment." (*ALADS,* slip opinion, p. 4.) The majority further held that *Brady* did not require such disclosure. (*Id.*, at pp. 30-35.)

The policy at issue here is in material respects the same policy your Court called "laudably established" in *Johnson.* (61 Cal.4th at p. 721.) In

that case, this Court addressed the policy of the San Francisco Police Department and San Francisco District Attorney's Office and held that "the prosecution fulfills its *Brady* duty as regards the police department's tip if it informs the defense of what the police department informed it, namely, that the specified records might contain exculpatory information." (*Id.* at pp. 705, 715, 716.) *Johnson* went on to explain that either the defense or the prosecution may make a *Pitchess* motion based upon the tip (*id.* at pp. 718-719), and describes the allegations that must be made for the tip to constitute good cause for in camera review. (*Id.* at p. 721.) While your Court may not have explicitly stated that the underlying policy is lawful, the use of the policy is an underlying assumption of the opinion. The Court of Appeal's majority opinion, and the position of petitioner, is contrary to the procedure approved in *Johnson.*

Based on *Johnson*, the Attorney General of California concluded that a proposed policy for the California Highway Patrol, which is conceptually identical to that addressed in *Johnson*, is "legally valid." (98 Ops.Cal.Atty.Gen. 54 at *2.) The Court of Appeal here rejected that conclusion. (*ALADS* slip opinion at pp. 42-44.)

The viability of such a practice was accepted by another division of the Second Appellate District in *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759. In that case, the defendant brought a *Pitchess* motion, relying solely on an LEA alert advisement as to a particular officer. The trial court held this was an insufficient showing of good cause for *Pitchess* purposes, because the motion did not include an allegation of officer misconduct in the specific case. The Court of Appeal reversed, holding that a criminal defendant need not allege officer misconduct in the case in which the motion is made, when the moving party can show notification by the police department pursuant to its "laudably established procedures...that the officers' personnel records might contain *Brady*

material...together with some explanation of how the officer's credibility might be relevant to the proceeding." (*Id.*, at pp. 774 - 776.)

The authority of *Johnson* and *Serrano* make perfect sense in light of the *Brady* obligations of both the prosecutor and the LEA. The ruling of the Court of Appeal here conflicts with those authorities.

VI. PUBLIC RECORDS ACT CASES CONSTRUING *PITCHESS* ARE DISTINGUISHABLE

The Court of Appeal relies upon *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, and other cases construing the California Public Records Act (Government Code § 6250 et seq.). In those cases, a media publishing company was invoking the PRA to learn the name of an officer. The court in *Copley Press* relied in part on the provisions of Penal Code §832.7, applied to PRA through Government Code section 6254(k), to hold that the name of an officer associated with the civil service appeal of discipline was a personnel record made confidential under section 832.7. Limiting public access to peace officer civil service appeals records personnel files made sense in that context, because once an exemption for a record is waived as to anyone under the PRA, any member of the public would be entitled to that record. (Government Code § 6254.5.)

But the context of the disclosure of officers' names in the current case is much different. It is one thing to conclude that personnel records are not subject to disclosure to any curious member of the public who asks for it. It is quite different to rule that neither the prosecution nor the defense in a criminal case is entitled to that information in order to comply with the mandates of *Brady*, in a context where the full protections of the *Pitchess* procedures will be in play. Unlike PRA disclosure, any disclosure of the actual information in a peace officer's personnel file under a *Pitchess* motion pursuant to an LEA alert policy must be limited to use in that

particular case. (Evidence Code, § 1045(e); *Alford v. Superior Court*, *supra*, 29 Cal.4th 1033, 1040-1043.) As noted elsewhere in this brief, a contrary holding will block the ability of the prosecution to satisfy its *Brady* obligations to the defense. That factor alone works in favor of an interpretation of the *Pitchess* framework that allows the alert system at issue here. We urge this Court to interpret Penal Code § 832.7 in this context in a manner that will harmonize *Brady* and *Pitchess*, and allow, not impair, the ability of the prosecution and the court to provide the defense with impeachment evidence required under *Brady*.

VII. FAILURE TO ALLOW DISCLOSURE OF OFFICER IMPEACHMENT EVIDENCE IN PERSONNEL FILES WILL LEAD TO LATER VACATING OF CONVICTIONS

Prohibiting *Brady* tips will be creating a dilemma, not only for the prosecution, but for future courts. If the prosecution and defense are prohibited from learning impeachment evidence in an officer's personnel file, but the information later comes to light after a conviction in which the officer was a witness, how will the court rule when the conviction is challenged on habeas corpus? There are a number of scenarios under which the defense might eventually learn of information regarding a previously undisclosed law enforcement internal investigation, including disclosures during civil litigation arising from the incident, disclosures by another officer or a civilian who was involved in the incident, disclosures by officers who learned of the investigation while it was pending, etc. If the information is material, on habeas corpus review a court will have no choice but to vacate the conviction, perhaps years after the trial. It would be unfair to the district attorney (and the People of the state we represent) to vacate a conviction if Supreme Court precedent had prohibited the prosecution and the defense from learning the information in the first place.

VIII. NEITHER THE PUBLIC SAFETY OFFICERS BILL OF RIGHTS NOR THE EXISTENCE OF THE LOS ANGELES DA'S ORWITS SYSTEM SUGGEST THAT THE LOS ANGELES SHERIFF CANNOT MAINTAIN AN INTERNAL *BRADY* LIST BASED ON OFFICER MISCONDUCT

Petitioner, in its Answer Brief Argument (section IV, pp. 41 – 44), cites a portion of the Public Safety Officers Bill of Rights Act (POBRA) (Government Code § 3305.5) to argue that *Brady* lists are contemplated by statute to be a tool for prosecutorial agencies, not for law enforcement agencies. This argument misconstrues the statute.

Section 3305.5 provides that an employer LEA cannot discipline or an officer "solely" because the officer's name has been placed on a "*Brady* list." The statute then defines "*Brady* list," for purposes of this rule, as a list "maintained by a prosecutorial agency or office." Thus, the statute prevents an LEA from basing an officer personnel action solely on a determination made by a different agency (to wit, a prosecuting agency). The use of a statute-specific definition to define the limits of the rule created in the statute does not by any means imply that what might generically be called a "*Brady* list" outside of the POBRA context is somehow disfavored, or not permitted. Indeed, statutory specific definitions are legion, a common drafting practice to clearly define the reach of a particular statutory rule. However, in the absence of a specific prohibition, the fact that a statute uses a "*Brady* list" definition for one purpose does not mean that an LEA is prevented from compiling its own list for purposes different than the ones addressed in the specific statute.

As part of this same argument (Answer Brief at pages 43 – 44), petitioner misconstrues the significance of the Los Angeles District Attorney's computerized "Officer and Recurring Witness Information

Tracking System," or ORWITS. Petitioner contends that the ORWITS *Brady* list, by its very terms, is derived not from police personnel files, but rather from other information made known to the prosecutor (i.e., items in the DA's own filed cases and investigations, court dockets and files in civil cases, public news reports, etc.). (Answer Brief, pages 43-44). Petitioner's argument is unavailing, for two reasons.

First, updated recent versions of the LADA's ORWITS policy, promulgated in February, 2017, (available http://da.co.la.ca.us/sites/default/files/Revised%20Brady%20Policy.pdf) have specific reference to advisement or alerts from an LEA that have origins in the agency's police personnel files. See Los Angeles District Attorney's Special Directive 17-03, section 14.06.01. Thus, the LADA contemplates receiving and acting on LEA alerts or advisements of possible *Brady* information about an officer that the LEA makes based on evidence in an officer's personnel file.

Second, and in any event, even if the information in the ORWITS database is internal to the LADA's office (although its source information may have either internal or external origins), that fact would not support Petitioner's position. Petitioner seems to be arguing that because the LADA has ORWITS for its internal use derived from sources other than officer personnel files, there is no place for the Sheriff to compile his own list of officers based on what the Sheriff knows about officer misconduct documented in officer personnel files, about which the DA may have no knowledge. The fact that the LADA uses ORWITS to satisfy some aspects of the *Brady* obligation does not mean that it cannot, or does not, use alerts from the Sheriff about officer misconduct in police personnel files to satisfy other aspects of the *Brady* obligation, specifically those that arise out of records of officer misconduct in police personnel files. By contending that the existence of ORWITS somehow amounts to a concession that the *Brady*

obligation can only be satisfied through that system, Petitioner misconstrues both ORWITS and the *Brady* obligation.

IX. AMICUS URGES THIS COURT TO ADDRESS WHAT LEA *BRADY* ALERT POLICIES ARE PERMITTED

This court, in accepting review, has asked if a law enforcement agency may disclose to the prosecution the name and identification number of an officer having relevant impeaching/exonerating material, when that officer is a potential witness in a pending criminal trial. Essentially, the court is asking if the case-specific alert system is constitutionally permissible. As noted in argument section I B above, the procedural history of this case makes that the precise question before the Court. Your amicus respectfully suggests answering so as to best serve public policy and the development of the law in a fashion protecting due process rights and fair trials for criminal defendants with a ruling which gives the stakeholders in criminal trials guidance on how *Brady* obligations may be satisfied in California.

In recent years, the courts, the public, and the Legislature have given increased attention to the issues of peace officer misconduct and *Brady* disclosures. One jurist has gone so far as to claim there is an "an epidemic of *Brady* violations abroad in the land." (*United States v. Olsen* (9th Cir. 2013) 737 F.3d 625, 626 (Kozinski, J., dissenting from denial of rehearing en banc.)[7] More recently, the Legislature enacted statutes authorizing disqualification of prosecutors and requiring a report to the State Bar for deliberate and intentional withholding of relevant, material exculpatory

[7] While we agree that compliance with *Brady* obligations is important, we do not agree there is an "epidemic" of violations. (See Coleman and Lockey, *Brady "Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It* (2016) 50 U.S.F. L. Rev. 199.)

evidence. (Penal Code, § 1424.5 and Business & Professions Code, § 6086.7(a)(5), enacted by Stats. 2015, c. 467 (Assem. Bill No. 1328), amended by Stats. 2016, c. 59 (Sen. Bill No. 1474).) The Legislature amended Penal Code § 141 to make it a felony for a prosecutor to intentionally and in bad faith withhold exculpatory information. (Stats. 2016, c. 879 (Assem. Bill No. 1909).) In addition, the State Bar proposed, and your Court approved in part, amendment of rule 5-110 of the Rules of Professional Conduct regarding Special Responsibilities of a Prosecutor.

While CDAA does not agree with all of the criticism that has sometimes been leveled against police or prosecutors, we are cognizant of the heightened emphasis on compliance with *Brady* responsibilities. We are sincere in our desire to comply with these responsibilities, both to ensure that defendants receive due process, and to safeguard the validity of convictions. The Court of Appeal opinion in the current case takes a step backwards by limiting the ability of both the prosecution and the defense to access information bearing on the credibility of officer witnesses.

Prosecutors and LEAs have made much progress in ensuring that *Brady* information is provided to the defense. More progress can be made, especially in jurisdictions or counties still grappling with fashioning procedures to ensure impeachment evidence from police personnel records is properly evaluated and disclosed when appropriate. But a result which affirms the ruling of the Court of Appeal, or clouds the issues, will hinder, not help further progress.

To this end, your amicus urges this Court to resolve the issues in this litigation in a manner that both addresses the relationships between *Brady* and *Pitchess*, and allows for the various procedures by which law enforcement agencies may alert the prosecution of officers whose personnel files may contain impeachment material so that a focused *Pitchess* motion may be made. an opinion would encourage policies and practices statewide

advancing compliance with the prosecution's constitutional obligations and defense reception of evidence fully sufficient to support fair trials.

CONCLUSION

In its attempt to reconcile *Brady* and *Pitchess*, the Court of Appeal has deprived the prosecution and the defense of a viable means of learning information favorable to the defense for purposes of impeaching the credibility of prosecution law enforcement witnesses. We urge the Court to reverse the Court of Appeal, and rule that *Brady* "alert" systems by law enforcement agencies to ensure compliance with the constitutional mandates of *Brady* are permitted.

DATE: May 3, 2018

Respectfully submitted,

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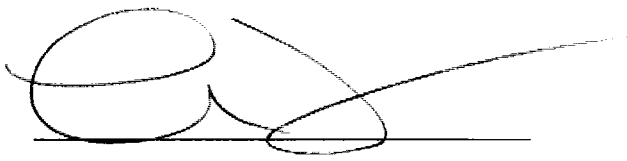
CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204 and 8.520(c), I certify that this amicus curiae brief was prepared using a computer, that it is proportionally spaced, that the type is 13 point, and that the word count is 6,949 words as determined by the word count feature of the word processing system.

DATED: May 3, 2018



Mark Zahner

DECLARATION OF SERVICE

I, Laura Bell, declare:

I am 18 years of age or older and not a party to this matter. On May 3, 2018, I served the within

"APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST"

in this matter by placing a true and correct copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named below, addressed as follows:

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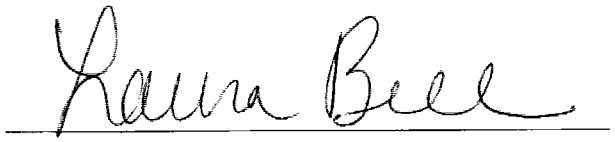
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 3, 2018, at Sacramento, CA.



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