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
Civil No.: B280676

After An Appeal From the Superior Court of Los Angeles County
Judge James C. Chalfant
Case Number BS166063

REAL PARTIES IN INTEREST'S OPENING BRIEF ON THE MERITS

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

Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles (hereinafter collectively referred to as "the Department") provide the following opening brief on the merits:

I. STATEMENT OF ISSUE SPECIFIED FOR REVIEW

In the Court's October 11, 2017, order granting Real Parties' Petition for Review, the Court specified the following issue to be briefed:

> When a law enforcement agency creates an internal *Brady* list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion? (See *Brady v. Maryland* (1963) 373 U.S. 83; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, §§ 832.7-832.8; Evid. Code, §§ 1043-1045.)

As discussed more fully below, because law enforcement agencies are part of the prosecution team, they have a constitutional obligation to facilitate the disclosure of *Brady* information by prosecutors to criminal defendants. Accordingly, *Pitchess* and *Brady* can only be harmonized if law enforcement agencies are permitted to provide *Brady* alerts (i.e., disclosures to the prosecution of the names and identifying numbers of officers with potential *Brady* material in their personnel files) *without* the need for a court order on a properly filed *Pitchess* motion. This is the only

reasonable outcome. Because a *Pitchess* motion (and judicial oversight) is still required for any party to obtain information contained in a *Brady* officer's personnel files, even after the prosecution receives a *Brady* alert, the *Brady* alert process properly balances a criminal defendant's constitutional right to receive *Brady* information necessary for a fair trial, against a peace officer's statutory rights to privacy in his or her personnel files.

The alternative outcome, in which a *Pitchess* motion is required at the outset for the prosecution to ascertain just the names of *Brady* officers, would be unworkable and unconstitutional. Because the prosecution's *Brady* obligations include a duty to learn about *Brady* information unknown to the prosecution that may be in the possession of the police, in order to avoid a possible *Brady* violation due to undiscovered impeachment information about an officer, a prohibition on *Brady* alerts would essentially require that *Pitchess* motions be filed by prosecutors in every single criminal case, as to every single law enforcement witness who might testify in the case. Without the benefit of a *Brady* alert, such a motion would necessarily need to be made without the requisite showing of "good cause." In turn, trial courts would be required to entertain such "fishing expeditions" because that is what due process requires. However, this unworkable outcome is completely avoidable as long as this Court reaches the correct and reasonable conclusion that law enforcement agencies may provide *Brady* alerts to the prosecution without the need for a *Pitchess* motion.

II. STATEMENT OF THE CASE AND FACTS

A. FACTUAL BACKGROUND

In an effort to best assure compliance with the Department's

constitutional due process obligations to criminal defendants under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 ("*Brady*"), and in light of this Court's decision in *People v. Superior Court ("Johnson")* (2015) 61 Cal.4th 696, and the subsequently issued opinion from the California Attorney General's office, Opinion No. 12-401 (October 13, 2015) 98 Ops.Cal.Atty.Gen. 54 ("AG Opinion"), the Department began to implement a procedure for identifying employees with potential "*Brady* material" in their personnel files and for eventually disclosing the names and employee numbers (only) of those employees to the local District Attorney's Office ("DA's Office"). Specifically, the Department convened a Commanders' Panel to evaluate individual employees' personnel records to identify those files that may contain potential exculpatory or impeachment information that could adversely impact a deputy's ability to testify at trial. (Petitioner's (ALADS') Supporting Documents and Index, filed in connection with the underlying Court of Appeal Writ Petition ("PI") 0154-0155, at ¶¶ 3-4.)

The Department identified certain Department Manual of Policy and Procedures ("MPP") sections that likely trigger the Department's *Brady* obligations, and the Commanders' Panel also examined founded administrative investigations and disciplinary actions to ascertain which Department personnel may have *Brady* material in their files that must be disclosed to prosecutorial agencies. (PI 0154-0155, at ¶ 4.) The MPP provisions the Department identified as possibly triggering *Brady* obligations included:

- 3-01/030.07 Immoral Conduct
- 3-01/030.75 Bribes, Rewards, Loans, Gifts, Favors
- 3-01/040.40 Misappropriation of Property

- 3-01/040.65 Tampering with Evidence
- 3-01/040.70 False Statements
- 3-01/040.75 Failure to Make Statements and/or Making False Statements During Departmental Internal Investigations
- 3-01/040.76 Obstructing an Investigation/Influencing a Witness
- 3-01/100.35 False Information in Records
- 3-01/121.20 Policy of Equality - Discriminatory Harassment
- 3-10/030.10 Unreasonable Force
- 3-01/030.16 Family Violence

Although now prevented from doing so pursuant to the Court of Appeal decision in *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413 ("*ALADS*"), now under review by this Court, the Department simply intended to provide prosecutorial agencies with a list of the names (and employee identification numbers) of employees with potential *Brady* material in their personnel files (i.e., a "*Brady* list"). (PI 0155, ¶ 5.) The Department is informed that approximately 22 counties within the State have already adopted similar policies. Some law enforcement agencies make *Brady* alerts to the prosecution only when a specific officer is subpoenaed as a material witness in a specific case. Other agencies provide advance notice of potential *Brady* names, regardless of witness or case status. (See Letter of *Amici Curiae* California District Attorneys Association Supporting Petition for Review, filed September 1, 2017, pp. 3, 5.)

While it was not required to do so (given that, as a member of the prosecution team, the Department has a constitutional due process obligation to disclose potentially exonerating and/or impeaching

information in criminal cases), on October 14, 2016, the Department sent a letter to approximately 300 individually affected Deputy Sheriffs notifying them that potential *Brady* material had been identified in their personnel files and that the Department intended to disclose their names and employee numbers only (i.e., no records) to the DA's Office in accordance with the law. (PI 0155, at ¶ 6; 0159-0162.) This notification triggered the instant lawsuit by Petitioner Association for Los Angeles Deputy Sheriffs ("ALADS"), the union that represents many (but not all) Deputy Sheriffs employed by the Department.

B. PROCEDURAL BACKGROUND

On November 10, 2016, ALADS filed the instant action for injunctive relief in the Los Angeles County Superior Court. (PI 0001-0026.) Through its action, ALADS sought, in part, to preclude the Department from creating a *Brady* list at all, from disclosing its *Brady* list or the name of any individual on the list to anyone outside the Department, including prosecutors, absent complete compliance with California Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045 (collectively the "*Pitchess* statutes"), and from imposing possible duty restrictions on employees who have been identified as having *Brady* material in their backgrounds.

After full briefing on ALADS' request for preliminary injunctive relief, on January 12, 2017, the trial court filed a thorough and lengthy written tentative ruling granting the preliminary injunction in part, and denying it in all other respects. (PI 0184-0195.)

While the trial court's tentative ruling indicated that the Department could not proactively release the Department's entire internal *Brady* list to prosecutors, it held that the Department was not precluded from creating a

Brady list and then issuing *Brady* alerts on individual deputies, i.e., releasing the names of employees to prosecutors on a case-by-case basis in a pending criminal case. The trial court explained:

> In sum, the Department may prepare a Brady list for internal use, and it may disclose pertinent Brady information when a deputy is involved in a criminal prosecution. Obviously, the District Attorney may prepare a Brady list of its own. But the Department may not provide its Brady list to the District Attorney or other prosecuting agency. The Department may not give prosecutors the names of deputies in compliance with its Brady duty who may be subject to a Pitchess motion until the need to do so arises.

(PI 0193.)

Elsewhere in the trial court's tentative, the court wrote:

> These names cannot be disclosed to the District Attorney absent a Brady obligation to do so. Contrary to the Department's and Attorney General's view, there is no Brady obligation for the Department to provide a list to the District Attorney before there is a need for this information in a particular criminal case. The Department is a member of "the prosecution team" with its own Brady obligation, but only when there is a prosecution.

(PI 0192-0193.)

The trial court's tentative ultimately concluded that "[t]he motion is granted in that a preliminary injunction will issue preventing disclosure of a *Brady* list to the District Attorney or any other prosecuting agency. In other respects, the motion is denied." (PI 0195.) During oral argument, the trial court clarified its tentative ruling and ultimately adopted the tentative ruling as its final ruling.

On January 27, 2017, the court issued a preliminary injunction that prohibited general disclosure of the Department's *Brady* list to prosecutors, but allowed disclosure of individual deputies' names from the list to

prosecutors, without any need for a granted *Pitchess* motion, as long as any disclosed deputy was also a potential witness in a pending criminal prosecution:

> IT IS HEREBY ORDERED that during the pendency of this action, the above-named Respondents, County of Los Angeles, Los Angeles County Sheriff's Department, Jim McDonnell, in his capacity as Sheriff of Los Angeles County and Individually, and each of them, their officers, agents, employees and representatives ("Enjoined Parties"), are enjoined and restrained from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any of the following acts:
>
> (1) Releasing to the Los Angeles County District Attorney's Office, or any person, agency, or official outside the Sheriff's Department, the Sheriff's Department's "*Brady* List" prepared, maintained, and described by the Sheriff's Department in its October 14, 2016 letter;
>
> (2) Disclosing to the Los Angeles County District Attorney's Office, or any prosecutorial agency, the fact that any individual Deputy Sheriff's name or employee number appears on the aforementioned "*Brady* List," unless a criminal prosecution is pending and the Deputy Sheriff at issue is involved in that prosecution as a potential witness, in which case the Enjoined Parties may disclose to the prosecutorial agency that the Deputy Sheriff is listed on the Sheriff's Department's "*Brady* List" and/or may have "*Brady* material" in his or her personnel file.
>
> (3) Except as permitted under paragraph (2) above, releasing the name, employee number, or other identifying information of any individual Deputy Sheriff together with any confidential information from that Deputy Sheriff's personnel file, including but not limited to discipline history information, to the Los Angeles County District Attorney's Office, or any person, agency, or official outside the Sheriff's Department, other than pursuant to a Court Order issued in response to a properly

> filed and considered *Pitchess* Motion or *Brady* Motion.
>
> For purposes of clarifying the Enjoined Parties' obligations under this injunction, the Enjoined Parties are not precluded from maintaining a "*Brady* List" internally nor are they enjoined from disclosing the fact that an individual Deputy Sheriff is listed on the Sheriff's Department's "*Brady* List" when a criminal prosecution is pending and the Deputy Sheriff at issue is involved in the pending prosecution as a potential witness.
>
> The Enjoined Parties are further not precluded from taking actions (e.g., transferring a Deputy Sheriff, changing the assignment of a Deputy Sheriff, or imposing work requirements on a Deputy Sheriff such as recording citizen contacts) as a result of a Deputy Sheriff's being placed on the Sheriff's Department's "*Brady* List." In the event a particular Deputy Sheriff believes such an action constitutes "punitive action" within the meaning of the Public Safety Officers' Procedural Bill of Rights Act ("POBRA"), Government Code section 3300, *et seq.*, he or she shall retain any right he or she may have under POBRA to challenge such an action.
>
> Finally, Respondents are not enjoined from disclosing any future developed "*Brady* List" to the Los Angeles County District Attorney's Office, or any other prosecutorial agency, provided any new *Brady* List contains only the names of non-sworn employees who are not subject to the Public Safety Officers' Procedural Bill of Rights Act ("POBRA"), Government Code section 3300, et seq."

(PI 0237-0253, 0254-0258, 0301-0305.)

On February 14, 2017, ALADS filed the underlying Petition for Writ of Mandate ("Petition") asking the Second District Court of Appeal to direct the trial court to revoke or modify portions of its January 27, 2017, preliminary injunction.

On July 11, 2017, in a 2-1 decision, the Second District Court of Appeal, Division Eight, granted ALADS' Petition, in part, ordering the trial

court "to strike from the injunction any language that allows real parties or any of them to disclose the identity of any individual deputy on the LASD's *Brady* list to any individual or entity outside the LASD, even if the deputy is a witness in a pending criminal prosecution, absent a properly filed, heard, and granted *Pitchess* motion, accompanied by a corresponding court order." The trial court was further ordered to "strike any language that purports to address real parties' power or authority with respect to a *Brady* list involving non-sworn employees." The Court of Appeal denied the petition in all other respects. (*ALADS, supra*, 13 Cal.App.5th at 448.)

In a strongly worded concurrence and dissent, Justice Grimes rejected the majority's "principal conclusion" that, when the personnel records of a peace officer who is a potential witness in a pending criminal prosecution contain sustained allegations of misconduct, the Department cannot disclose that fact to the prosecutor "absent a properly filed, heard, and granted *Pitchess* motion, accompanied by a corresponding court order." (*Id.* at 448-449.) Instead, based on case authorities, including *Johnson*, years of past practice, and "the unworkability of requiring a prosecutor to make a *Pitchess* motion merely to find out whether or not a deputy in a pending prosecution has potential *Brady* material in his personnel file," Justice Grimes concluded that "the trial court properly harmonized the *Brady* and *Pitchess* authorities in refusing to enjoin the Department from disclosing to the district attorney the identity of any deputy on the Department's *Brady* list who is a potential witness in a pending criminal prosecution." (*Id.* at 449.) In closing, Justice Grimes observed the following:

> The question presented to us is whether the *Pitchess* statutes preclude the disclosure of *Brady*-list names by the Department to the

> prosecutor in a pending prosecution. The courts have always viewed *Pitchess* "against the larger background" of the prosecution's constitutional *Brady* obligations. ([*People v. Mooc* (2001) 26 Cal.4th 1216, 1225].) We would do no more here, by finding no *Pitchess* violation in a procedure that is consonant with *Brady* obligations and that does not involve a prosecutor's perusal of any information in an officer's personnel file. For these reasons, I would affirm this aspect of the trial court's preliminary injunction.

(*Id.* at 458.)

The Department thereafter filed a Petition for Review by this Court, which the Court granted on October 11, 2017.

III. LEGAL ARGUMENT

A. THE DEPARTMENT, AS PART OF THE PROSECUTION TEAM, HAS A CONSTITUTIONAL OBLIGATION TO DISCLOSE THE EXISTENCE OF *BRADY* MATERIAL TO PROSECUTORS

It is well settled that under *Brady, supra*, 373 U.S. 83, the prosecution team has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. (*Giglio v. United States* (1972) 405 U.S. 150, 153-154.) The duty extends not only to evidence the prosecutor's office itself actually knows of and possesses, but also to evidence known to others acting on the prosecution's behalf, including the police. This constitutionally required duty to disclose "exists even though there has been no request by the accused." (*Johnson*, 61 Cal.4th 696, 854-855, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132; and *People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

///

The "prosecution team" includes both investigative and prosecutorial agencies and their personnel. (See, e.g., *In re Brown* (1998) 17 Cal.4th 873, 879, citing *United States v. Auten* (5th Cir.1980) 632 F.2d 478, 481; *People v. Jordan* (2003) 108 Cal.App.4th 349, 358.) The prosecution team's duty to disclose favorable evidence under *Brady* includes evidence that serves to impeach the testimony of a prosecution witness. (*People v. Jordan, supra*, 108 Cal.App.4th 349, 359, citing *Strickler v. Greene* (1999) 527 U.S. 263, 280-281 and *United States v. Bagley* (1985) 473 U.S. 667, 676.)

Accordingly, both prosecutors *and* investigating agencies have a constitutional obligation to disclose exculpatory evidence. (*Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078, 1087, quoting *United States v. Blanco* (9th Cir. 2004) 392 F.3d 382.) A *Brady* violation occurs when the government fails to turn over even evidence that is known only to police investigators and not the prosecutors. (*Id.*, citing *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-70, 126 S.Ct. 2188, 165 L.Ed.2d 269, and *Kyles v. Whitley, supra*, 514 U.S. at 438; *United States v. Blanco, supra*, 392 F.3d at 394 ["To repeat, *Brady* and *Giglio* impose obligations not only on the prosecutor, but on the government as a whole. As we said in *Zuno-Arce*, the DEA cannot undermine *Brady* by keeping exculpatory evidence 'out of the prosecutor's hands until the [DEA] decide[s] the prosecutor ought to have it.'"]; *United States v. Zuno-Arce* (9th Cir. 1995) 44 F.3d 1420, 1427 ["it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation."].)

Furthermore, under Penal Code section 1054.1, subdivision (e), the prosecution is required to disclose to the defense before trial "any exculpatory evidence," whether in the possession of the prosecution or in

the possession of investigating agencies, including impeachment evidence. In enacting Penal Code section 1054.1(e), the legislature codified and expanded the *Brady* rule to mandate California prosecutors to disclose exculpatory evidence to the defense without regard to materiality. (See *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; see also *People v. Bowles* (2011) 198 Cal.App.4th 318, 326.) Accordingly, potential *Brady* information in the personnel files of employees of investigating agencies is subject to disclosure, without regard to its materiality to a particular case.

The prosecution's duty under *Brady* is a continuing one that extends through *habeas* proceedings. (See, *Blumberg v. Garcia* (C.D. Cal. 2010) 687 F.Supp.2d 1074, 1135, citing *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40 and *Thomas v. Goldsmith* (9th Cir.1992) 979 F.2d 746, 749-50.) Accordingly, the prosecution's failure to disclose *Brady* information can result in the reversal of a conviction, even if the information does not first come to light until after trial. (*Id.*)

More recently, the Legislature has enacted statutes authorizing disqualification of prosecutors and requiring a report to the State Bar for deliberate and intentional withholding of relevant, material exculpatory evidence. (Penal Code § 1424.5 and Bus. & Prof. Code § 6086.7, subd. (a)(5), enacted by Stats. 2015, c. 467 (Assem. Bill No. 1328), amended by Stats. 2016, c. 59 (Sen. Bill No. 1474).) Last year, the Legislature amended Penal Code section 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).) Earlier this year, this Court approved a revised version of Rule of Professional Conduct 5-110, Special Responsibilities of a Prosecutor, adding paragraph (D), and its corresponding discussion, which went into effect on November 2, 2017. The revised Rule 5-110

provides, in part, as follows:

> The prosecutor in a criminal case shall:
>
> ...
>
> (D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ...
>
> ...
>
> Discussion:
>
> [3] The disclosure obligations in paragraph (D) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S. Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows or reasonably should know casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (D) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (D) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

In a recent highly publicized case, a State Bar judge recommended a one-year suspension for an Orange County prosecutor who was found to have committed a "willful Brady violation" by failing to turn over potentially exculpatory evidence in a child abuse case. (See *Los Angeles*

Times, "State Bar recommends a 1-year suspension for O.C. prosecutor for withholding evidence," October 12, 2017 [http://www.latimes.com/local/lanow/la-me-ln-oc-state-bar-suspension-20171012-story.html].)

In summary, the law is clear that prosecutors have a constitutional (and statutory and professional) obligation to disclose *Brady* evidence, including the names of *Brady* officers, to criminal defendants, and it is equally clear that a law enforcement agency is part of the "prosecution team" that has its own *Brady* obligations. While this Court, in *Johnson*, found that the practice of a law enforcement agency sharing with prosecutors the names of officers who have *Brady* information in their backgrounds was "laudabl[e]," the majority *ALADS* Opinion appeared to minimize the importance of the Department's obligations under *Brady* and its progeny. Since there is no doubt that law enforcement departments have *Brady* obligations independent of prosecutors, this Court must clarify that the narrowly tailored practice seemingly authorized in *Johnson*, and/or the narrower "pending case" practice authorized by the trial court, is legal, either because the practice does not violate the *Pitchess* statutes or under the reasoning that important constitutional obligations outweigh the privacy rights granted to peace officers by statute.

B. THE LEGISLATURE RECOGNIZES THE USE OF "*BRADY* LISTS," AND THEREFORE *BRADY* ALERTS CANNOT BE INCONSISTENT WITH OTHER CALIFORNIA LAW, I.E., THE *PITCHESS* STATUTES

The Legislature recognizes the use of *Brady* lists by prosecutorial agencies. Specifically, Government Code section 3305.5 prohibits public agencies from taking punitive action solely because an officer's name has

been placed on a *Brady* list, but allows agencies to take punitive action based upon the acts or omissions underlying an officer's placement on a *Brady* list. The same Legislature that was responsible for enacting the *Pitchess* statutes ultimately created section 3305.5, explicitly recognizing the use of *Brady* lists by the prosecution team.

If a prosecutor's use of such *Brady* lists, which frequently includes sharing with the defense the fact that an officer's name appears on that list (see, e.g., *Serrano v. Superior Court* (Oct. 30, 2017) --- Cal.Rptr.3d ---, 2017 WL 4875557), was in any way inconsistent or incompatible with the *Pitchess* statutes, the Legislature would never have enacted Government Code section 3305.5. If a prosecutor can share an officer's name off the prosecution's own *Brady* list with the defense, even though the fact the officer's appearance on the list may be the result of "information obtained from" an officer's personnel records, then the same logic should apply to a law enforcement agency's providing a *Brady* alert to the prosecution.

C. THE COURT OF APPEAL'S DECISION WAS INCORRECT BECAUSE IT FAILED TO PROPERLY HARMONIZE *BRADY* OBLIGATIONS WITH THE *PITCHESS* STATUTES

Brady principles and *Pitchess* procedures have long been interpreted together and in harmony. (*City of Los Angeles v. Superior Court ("Brandon")* (2002) 29 Cal.4th 1, 14 ["the '"*Pitchess* process" operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information'"]; *Mooc, supra*, 26 Cal.4th at 1225 [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"].) Given the Department's constitutional *Brady* obligations, the Court must conclude that the limited disclosure of the names of *Brady* officers from one member of the prosecution team to the other does not violate the *Pitchess* statutes.

The *ALADS* majority view that the *Pitchess* statutes bar disclosure to the prosecution of even the names of *Brady* officers is largely based upon the *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 ("*Copley Press*") line of cases. (See, also *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 73, 71 ("*Long Beach*") and *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 298 ("*Commission*") [explaining that *Copley Press* held that records of peace officer disciplinary appeals constituted confidential personnel records under Penal Code section 832.7, and it was error to order disclosure of the name of a peace officer involved in a particular matter].)

Citing *Copley Press*, the *ALADS* majority observed that "[t]he information protected by the confidentiality and disclosure procedures of the *Pitchess* statutes is broad" and "the identity of a peace officer that is derived from his or her personnel file, to the extent it connects that officer to administrative disciplinary proceedings or complaints of misconduct also contained within the protected personnel file, may not be disclosed absent compliance with the *Pitchess* procedures." (ALADS, 13 Cal.App.5th at 433.)

Although the *Copley Press* line of cases discussed the broad protections of the *Pitchess* statutes, none of those cases dealt with disclosures in the context of a member of the prosecution team's *Brady* or *Giglio* obligations. Instead, each of the cases involved inquiries from media organizations seeking disclosure of officer names or records under

the California Public Records Act ("CPRA"). While the majority in *ALADS* is apparently of the view that a law enforcement agency's disclosure of the name of a *Brady* officer to the prosecutor (its fellow prosecution team member) is no different than disclosure to the press or general public under the CPRA, this Court's decision in *Johnson* suggests otherwise. Specifically, while *Johnson* concluded that "prosecutors, as well as defendants, must comply with the *Pitchess* procedures if they seek information from confidential personnel records" (*Johnson*, 61 Cal.4th at 714, emphasis added), *Johnson* did *not* apply that same *Pitchess* procedure requirement to the *names* on the *Brady* list that were shared with the district attorney's office. In other words, this Court already implicitly recognized that names that are disclosed to the prosecutor in compliance with an agency's *Brady* obligations are not considered "information" derived from personnel records and subject to the *Pitchess* statutes.

Additionally, the *ALADS* majority's position ignores the possibility that peace officers' names could be added to an agency's *Brady* list from sources wholly independent from the deputies' personnel files, e.g., through a conviction. (See, Evid. Code § 788; Penal Code § 1054.1(d); *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1079.) In such circumstances, the names would not be confidential. (See, *Long Beach, supra*, 59 Cal.4th at 71-72.)

Yet, despite the fact that the *Pitchess* statutes and *Brady* obligations can best be harmonized simply by allowing the disclosure of names to prosecutors, the majority in *ALADS* held that the mere names of potential *Brady* officers are confidential and cannot even be shared with prosecutors to fulfill constitutionally mandated obligations. Ironically, it is this very interpretation of the *Pitchess* statutes that renders the *Pitchess* procedures

unconstitutional to the extent it hinders or prevents prosecutors and investigating agencies from fulfilling their *Brady* obligations. Accordingly, this Court should hold that the *Pitchess* statutes are harmonized with *Brady* by allowing for *Brady* alerts and even the disclosure of entire *Brady* lists, or alternatively, that constitutional *Brady* obligations supersede, to a limited extent, the privacy rights created by the *Pitchess* statutes.

D. AS THIS COURT HAS ALREADY IMPLICITLY RECOGNIZED, THE *BRADY* ALERT PRACTICE ALLOWS FOR THE *PITCHESS* MOTION PROCEDURE TO BE EFFECTIVE AND CONSISTENT WITH THE PROSECUTION TEAM'S *BRADY* OBLIGATIONS

According to the majority opinion in *ALADS*, the one and only way even mere names of peace officers with possible *Brady* material in their personnel files may be disclosed to prosecutors is through the *Pitchess* motion procedure. The majority's position ignores the glaring fact that, in *Johnson*, the law enforcement agency involved in that case had "laudably established procedures to streamline the *Pitchess/Brady* process" by providing *Brady* alerts to the prosecution, who would, in turn, notify the defense, that the officers' personnel records might contain *Brady* material. As this Court observed, "A defendant's providing of that information [i.e., that the investigating agency had advised that an officer's personnel records might contain *Brady* material] to the court, together with some explanation of how the officer's credibility might be relevant to the proceeding, would satisfy the showing necessary under the *Pitchess* procedures to trigger in camera review." (*Johnson*, 61 Cal.4th at 721.) The *Johnson* case exemplifies how *Brady* alerts from law enforcement agencies to the

prosecution *facilitate* the *Pitchess/Brady* process.

Indeed, the Court of Appeal in *Serrano v. Superior Court* (Oct. 30, 2017) --- Cal.Rptr.3d ---, 2017 WL 4875557, following *Johnson*, recently held that, when *Brady* material is already known to exist in an officer's personnel file (because the prosecutor informed the defense of such fact), a defendant seeking *Pitchess* discovery does not need to satisfy the traditional showing under *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026-27 of a "specific factual scenario" that establishes a "plausible factual foundation" in order to establish good cause to obtain in camera inspection. (*Serrano v. Superior Court, supra,* 2017 WL 4875557 at *8-9.)

Both *Johnson* and *Serrano*[1] demonstrate that a *Brady* alert, together with "some explanation of how the officer's credibility might be relevant to the proceeding" (*Johnson*, 61 Cal.4th at 721) is a viable alternative method for establishing good cause for in camera review under the *Pitchess* motion procedure. The Court should not eliminate this alternative showing, which properly harmonizes *Brady* and *Pitchess* in order to balance the constitutional rights of criminal defendants and officers' rights of privacy in their personnel records, by declaring *Brady* alerts to be a violation of the *Pitchess* statutes. Given that the *ALADS* majority opinion effectively undermined this Court's decision in *Johnson* by declaring the *Brady* alert practice to be a violation of the *Pitchess* statutes, the Court should reaffirm

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[1] In *Serrano*, the *Brady* alert from the prosecutor to the defense was based on information contained in the district attorney's office's database about the officer in question. (*Id.* at *2.) However, the result would be no different, and would mirror *Johnson*, if the *Brady* alert had instead originated from a notification by the law enforcement agency to the district attorney.

the validity of the *Brady* alert practice.

In addition to the *ALADS* majority's not fully appreciating the significance of the actual facts before this Court in *Johnson* (i.e., that names were, in fact, shared through a *Brady* list and the prosecution, in turn, shared those names with the criminal defendants), the majority in the *ALADS* Opinion went on to speculate that had this Court actually sought to "approve" of that procedure, the Court would have had to find that:

(1) The confidentiality obligations and procedures under the *Pitchess* statutes, i.e., Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 and 1045, violate *Brady* and the Constitution;

(2) *Brady* creates an affirmative and *sua sponte* constitutional obligation on the part of law enforcement agencies to disclose, to prosecutors, which of their officers have founded allegations of misconduct relevant to impeachment in their personnel files; and

(3) The Court's prior precedents in *Copley Press*, *POST* and *Long Beach* were overruled or severely restricted in criminal cases.

(*ALADS*, 13 Cal.App.5th at 443.)

The dissent took a more pragmatic view of the *Johnson* decision and its lack of discussion of the permissibility of the San Francisco Police Department's procedure under the *Pitchess* statutes. While acknowledging that an opinion does not stand for a principle that the court was never asked to decide, the dissent correctly concluded that the *Johnson* court must have considered the legality of the procedure it was discussing:

I cannot imagine the *Johnson* court could have failed to question the legality, under the very statutory scheme it was discussing, of the police department's disclosures to the prosecution, if there was any basis to do so.

The procedures the police department established in *Johnson* were appended in their entirety to the Supreme Court's opinion. The opinion specifically quotes from the police department's order summarizing the procedure: "'[T]he Department advises the District Attorney's Office of the names of employees who have information in their personnel files that may require disclosure under *Brady*. The District Attorney's Office then makes a motion under Evidence Code 1043 and 1045 for in camera review of the records by the court.'" (*Johnson, supra*, 61 Cal.4th at p. 707.) The police department's disclosure of the officer's name is the foundation of the entire procedure. The fact of that disclosure is repeated several times throughout the order appended to the Johnson opinion.

In my view, had there been any doubt as to the legality of the disclosure of the names of officers with Brady information in their files, the court would have noticed it and requested briefing on it. The author in *Johnson*, Justice Chin, is steeped in *Pitchess* procedures. He wrote the opinion in *Copley Press*, and he dissented in *Commission*, taking the view that, under Penal Code section 832.7, an officer's name cannot be disclosed to the public even if it is not linked to private or sensitive information listed in section 832.8. (*Commission, supra*, 42 Cal.4th at p. 311 (dis. opn. of Chin, J.).) In short, the *Johnson* court was supremely cognizant of the confidentiality requirements of the *Pitchess* statutes – and it premised its opinion on a procedure the linchpin of which is a disclosure by the police department of *Brady*-list names to the prosecutor.

Johnson is clear: "In this case, the police department has laudably established procedures to streamline the *Pitchess/Brady* process. It notified the prosecution, which in turn notified the defendant, that the officers' personnel records might contain *Brady* material. A defendant's providing of that information to the court, together with some explanation of how the officer's credibility might be relevant to the

> proceeding, would satisfy the showing necessary under the *Pitchess* procedures to trigger in camera review." (*Johnson, supra*, 61 Cal.4th at p. 721.)

(*ALADS*, 13 Cal.App.5th 457.)

For the reasons cited by the dissent, and the fact that *Johnson* would have extremely limited applicability if the underlying practice was prohibited by the *Pitchess* statutes, the more reasonable reading of *Johnson* is that the Court tacitly approved the practice of notifying the prosecution of the identities of its *Brady* officers or, at a minimum, took it for granted that the practice was permissible under *Pitchess*. After all, law enforcement agencies have been identifying officers with *Brady* material in their personnel files to prosecutors for years. (See *Johnson, supra*, 61 Cal.4th at 707, 725; AG Opinion, 98 Ops.Cal.Atty.Gen. 54, at *7.) Accordingly, this Court should affirm that law enforcement and prosecutorial agencies may properly utilize *Brady* alerts and enact *Brady* and *Pitchess* procedures similar to those enacted by the SFPD as discussed in *Johnson*.

E. EVEN IF THE LIMITED DISCLOSURE OF NAMES TECHNICALLY VIOLATES THE *PITCHESS* STATUTES, THIS COURT MUST HOLD THAT *BRADY* OBLIGATIONS SUPERSEDE THOSE STATUTES TO PERMIT *BRADY* ALERT DISCLOSURES TO PROSECUTORS

1. Federal Constitutional Obligations Trump Privacy Statutes Created For Peace Officers By The State's Legislature

While constitutional *Brady* disclosure obligations can be harmonized with the *Pitchess* statutes, as discussed above, to the extent there is a

"conflict," then the Court should clarify that a law enforcement agency's constitutional *Brady* obligations necessarily must take precedent over the privacy protections contained in the *Pitchess* statutes, but only minimally and to the smallest extent necessary to ensure a criminal defendant's right to a fair trial, to allow for *Brady* alerts by the law enforcement agency to prosecutors.

Because the confidentiality of peace officer personnel records under Penal Code section 832.7, *et seq.*, and the corresponding limitations on disclosure of information from such records are State-created privacy laws, under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, those laws must yield to the prosecution team's *Brady* obligations since those obligations are derived from a criminal defendant's federal constitutional right to a fair trial. Indeed, the notion that the prosecution team's *Brady* obligations may override the State's *Pitchess* procedures is not without precedent. As explained previously by this Court in *People v. Mooc, supra*, 26 Cal.4th at 1225, 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."

This interplay was exemplified in this Court's decision in *Brandon, supra*, 29 Cal.4th 1. In *Brandon*, in following the position advanced by the Attorney General appearing as *amicus curiae* in the case, observed that the *Pitchess* statutory scheme prohibits the disclosure of "complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought." (Evid. Code § 145, subd. (b)(1).) However, because

the prosecution's *Brady* obligations are not so limited, this Court held that a citizen complaint older than five years may still be subject to disclosure under *Brady*, notwithstanding the *Pitchess* procedure's five year limitation on discovery. (*Brandon, supra*, 29 Cal.4th at 13-15.)

As the AG Opinion here concluded, statutory constraints on the *Pitchess* procedures cannot be construed to prohibit the disclosure of *Brady* information. (AG Opinion, 98 Ops.Cal.Atty.Gen. 54 at *5.) Accordingly, to the extent the *Pitchess* procedures are construed as hindering the disclosure of *Brady* information to the defense, law enforcement's *Brady* obligations must be viewed as minimally overriding the privacy protections contained in the State's *Pitchess* statutes, at least with respect to the limited disclosures, i.e., *Brady* alerts, at issue here.

2. A Conclusion By This Court That the Use of *Brady* Alerts Impermissibly Violates the *Pitchess* Statutes Will Result in an Outcome that Is Unworkable and Unconstitutional

The majority *ALADS* opinion concluded that had this Court sought to actually approve SFPD's procedure in *Johnson*, such a holding would be "significant" and it did not believe the Court would make such a "sea change" ruling "implicitly by commenting, without analysis, on a procedure whose legality was never raised by the parties or expressly discussed by the court." (*ALADS,* 13 Cal.App.5th at 444.) On this point, the majority actually had it backwards.

Given that the practice of proactively disclosing *Brady* lists to prosecutors is used not only by the SFPD, but also by other law enforcement agencies throughout the State (see AG Opinion, 98 Ops.Cal.Atty.Gen. 54, at *7), the majority's decision, which now prohibits

that practice, actually represents the true "sea change."

As previously discussed, permitting the disclosure of just the identities of peace officers deemed to have *Brady* information in their personnel files or backgrounds will complement the State's *Pitchess* procedures by limiting the prosecution and defense's use of such motions only when it appears likely that there is genuine *Brady* information in a personnel file, i.e., based upon an agency's disclosure of a name (or names) to prosecutors. However, a conclusion that *Brady* alerts are impermissible absent an order on a properly filed *Pitchess* motion—the position advocated by the *ALADS* majority—will result in an outcome that is both unworkable and unconstitutional.

As Justice Grimes aptly noted in the *ALADS* dissent, the "real effect" of a holding that disclosure of names off a *Brady* list to prosecutors requires a court order on a *Pitchess* motion will be one of three possible outcomes:

(1) to prevent entirely any disclosure of the identity of a *Brady*-list officer by a law enforcement department to a prosecutor;

(2) to require a prosecutor to make *Pitchess* motions for every officer involved in a pending criminal case (even if it is doubtful that the requisite "good cause" could be shown); or

(3) to require a prosecutor to risk the consequences of possible failure to disclose exculpatory *Brady* material to the defendant.

(*ALADS*, 13 Cal.App.5th at 454.)

The dissenting opinion rightly concluded that these outcomes are an "unacceptable" and "entirely unnecessary conundrum, created by the erroneous conclusion that the disclosure permitted by the trial court violates the *Pitchess* statutes." (*Id.*)

Under the *ALADS* majority's construction of the law, a law enforcement agency may know of *Brady* evidence regarding an officer, but must not give either the prosecution or defense any means to know of or have access to it absent a *Pitchess* motion. The prosecution will not know of the potential *Brady* evidence, and thus would not have any 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. Accordingly, **the *Pitchess* statutes would risk depriving criminal defendants of *Brady* information to which they are constitutionally entitled, even though the information is known by a member of the prosecution team**, i.e., the investigating agency. Instead of harmonizing *Brady* and *Pitchess*, such a strict interpretation of the *Pitchess* statutes stands them on their heads and places the privacy rights of officers ahead of the constitutional rights of criminal defendants.

Indeed, given the prosecution team's *Brady* obligations, prosecutors cannot remain willfully ignorant but will be ***required*** to bring *Pitchess* motions in every case in which an officer may testify or run the risk of committing a *Brady* violation. As the Ninth Circuit explained in *United States v. Blanco*:

> "Because the prosecution is in a unique position to obtain information known to other agents of the government, ***it may not be excused from disclosing what it does not know but could have learned.***" *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir.1997) (*en banc*). A prosecutor's duty under *Brady* necessarily requires the cooperation of other government agents who might possess *Brady* material. In *United States v. Zuno-Arce*, 44 F.3d 1420 (9th Cir.1995) (as amended), we explained why "it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation." *Id.* at 1427.

> ***Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.***
>
> *Id.*; see also *United States v. Monroe*, 943 F.2d 1007, 1011 n. 2 (9th Cir.1991) (stating that "the prosecution must disclose any [*Brady*] information within the possession or control of law enforcement personnel") (quoting *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir.1985)).

(*United States v. Blanco, supra*, 392 F.3d 388. Emphasis added.)

Furthermore, a prosecutor "has a ***duty to learn*** of any favorable evidence known to the others acting on the government's behalf ... including the police." (*Strickler v. Green, supra*, 527 U.S. at 280-281. Emphasis added) And again, the duty to disclose *Brady* information exists even absent a request by the accused. (*Johnson*, 61 Cal.4th 696, 854-855, citing *Kyles v. Whitley*, 514 U.S. at 437.)

If law enforcement agencies are prohibited from providing *Brady* alerts to prosecutors absent a *Pitchess* motion having been filed and granted, unless a prosecutor has prior knowledge that an officer is on a *Brady* list, there would simply be no other way for the prosecution to fulfill its *Brady* obligation to ascertain whether an officer has *Brady* information in his or her personnel file than by filing a *Pitchess* motion. A prosecutor's failure to bring a *Pitchess* motion, which results in undisclosed exculpatory evidence, would result in a *Brady* violation. (See *Tennison v. City and County of San Francisco, supra*, 570 F.3d at 1087, citing *Youngblood v.*

West Virginia, supra, 547 U.S. at 869-70.)

And even if prosecutors would arguably be required to bring *Pitchess* motions in every case, the question remains whether a prosecutor can establish the requisite "good cause" to obtain in camera inspection of an officer's personnel files absent a *Brady* alert or any other reason to believe an officer actually has exculpatory or impeachment information in his or her file. Evidence Code section 1043, subd. (b)(3) specifically requires "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." Without *Brady* alerts, attempts to pursue *Brady* material through the *Pitchess* process will occur in a factual vacuum, devoid of any basis for believing an officer has *Brady* information in his or her file. Any *Pitchess* motions that are filed under such circumstances will, by definition, be "fishing expeditions." (See generally *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 93-94 [holding *Pitchess* motions must be supported by affidavits setting forth specific facts to prevent "fishing expeditions"]; see also *Serrano v. Superior Court, supra*, 2017 WL 4875557at *9 ["It would be nonsensical to require the prosecution to allege that an officer, who is part of the prosecution team and an intended witness, engaged in specific acts of misconduct"].)

As a practical matter, given that criminal defendants are constitutionally entitled to *Brady* information, in the same way prosecutors will be required to bring *Pitchess* motions for all officers who may testify, despite being completely ignorant of the existence of impeachment information in the officers' personnel records, courts may similarly have no

choice but to conduct an in camera review of the personnel records identified by every *Pitchess* motion that is filed simply because that is what due process requires. The Court can avoid this unnecessary, impractical and burdensome outcome by holding that law enforcement agencies may disclose to prosecutors names off a *Brady* list without violating the *Pitchess* statutes.

IV. CONCLUSION

For each of the foregoing reasons, Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles respectfully request that this Court take this opportunity to fully harmonize *Pitchess* and *Brady* by holding that law enforcement agencies, as members of the prosecution team, are permitted to provide *Brady* alerts without the need for a court order on a properly filed *Pitchess* motion.

Dated: November 13, 2017 LIEBERT CASSIDY WHITMORE

By: /s/*Geoffrey S. Sheldon*
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V. CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(1))

I, Alex Y. Wong, certify in accordance with California Rules of Court, Rule 8.520(c)(1) that this brief (excluding the items that are not counted toward the maximum length) contains 7,890 words as calculated by the Microsoft Word 2010 software with which it was written.

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

Executed on November 13, 2017, in Los Angeles, California.

By: */s/ Alex Y. Wong*
Alex Y. Wong
Attorney for Real Parties in Interest

VI. PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **November 13, 2017**, I served the foregoing document(s) described as **REAL PARTIES IN INTEREST'S OPENING BRIEF ON THE MERITS** in the manner checked below on all interested parties in this action addressed as follows:

Richard A. Shinee, #062767 Elizabeth J. Gibbons, #147033 GREEN & SHINEE, A.P.C. 16055 Ventura Blvd., Suite 1000 Encino, CA 91436 Telephone: (818) 986-2440 Facsimile: (818) 789-1503 Email: gsras@socal.rr.com *Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs*	Los Angeles Superior Court Dept. 85 111 North Hill Street Los Angeles, CA 90012-3117 Telephone: (213) 830-0785
Court of Appeal, State of California Second Appellate District 300 S. Spring St.,2nd Floor N. Tower Los Angeles, CA 90013	California Attorney General 300 S. Spring Street, #1700 Los Angeles, CA 90013 Telephone: (213) 897-2000

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Executed on **November 13, 2017**, at Los Angeles, California.

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

/s/ Beverly T. Prater
Beverly T. Prater