In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,

Respondent,

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT et al.,

Real Parties in Interest.

Case No. S243855

SUPREME COURT
FILED
MAY 04 2018
Jorge Navarrete Clerk
Deputy

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

RECEIVED
MAY 04 2018
CLERK SUPREME COURT

BRIEF FOR THE ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
*AIMEE FEINBERG (SBN 223309)
Deputy Solicitor General
PETER D. HALLORAN
Supervising Deputy Attorney General
MICHAEL CHAMBERLAIN
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550
Telephone: (916) 210-6003
Fax: (916) 324-8835
Email: Aimee.Feinberg@doj.ca.gov
Attorneys for the Attorney General

TABLE OF CONTENTS

Page

Statement of Interest 7
Introduction 8
Argument 10
Conclusion 26

TABLE OF AUTHORITIES

Page

CASES

Amado v. Gonzalez
(9th Cir. 2014) 758 F.3d 1119 20

Barnett v. Superior Court
(2010) 50 Cal.4th 890 13

Brady v. Maryland
(1963) 373 U.S. 83 ..... *passim*

Carrillo v. County of Los Angeles
(9th Cir. 2015) 798 F.3d 1210 13

City of Los Angeles v. Superior Court (Brandon)
(2002) 29 Cal.4th 1 ..... 10, 21

City of Santa Cruz v. Municipal Court
(1989) 49 Cal.3d 74 ..... 15, 18, 19

Commission on Peace Officer Standards & Training v. Superior Court
(2007) 42 Cal.4th 278 ..... 15, 23, 24

Copley Press, Inc. v. Superior Court
(2006) 39 Cal.4th 1272 ..... 15, 23

Giglio v. United States
(1972) 405 U.S. 150 10

Hurd v. Superior Court
(2006) 144 Cal.App.4th 1100 14

In re Brown
(1998) 17 Cal.4th 873 ..... 11, 12, 14

In re Steele
(2004) 32 Cal.4th 682 13

TABLE OF AUTHORITIES
(continued)

Page

Kyles v. Whitley
(1995) 514 U.S. 419 ..... 11, 14, 20, 21, 25

Long Beach Police Officers Assn. v. City of Long Beach
(2014) 59 Cal.4th 59 ..... 15, 23

Milke v. Ryan
(9th Cir. 2013) 711 F.3d 998 10

Owens v. Baltimore City State's Attorneys Office
(4th Cir. 2014) 767 F.3d 379 ..... 12, 13

People v. Gaines
(2009) 46 Cal.4th 172 10

People v. Jacinto
(2010) 49 Cal.4th 263 ..... 13, 14

People v. Masters
(2016) 62 Cal.4th 1019 12

People v. Mooc
(2001) 26 Cal.4th 1216 ..... 17, 21

People v. Superior Court (Barrett)
(2000) 80 Cal.App.4th 1305 14

People v. Superior Court (Johnson)
(2015) 61 Cal.4th 696 ..... *passim*

People v. Zaragoza
(2016) 1 Cal.5th 21 20

Pitchess v. Superior Court
(1974) 11 Cal.3d 531 ..... 8, 14

Serrano v. Superior Court
(2017) 16 Cal.App.5th 759 18

TABLE OF AUTHORITIES
(continued)

Page

Turner v. United States
(2017) __ U.S. __, 137 S.Ct. 1885 21

United States v. Bagley
(1985) 473 U.S. 667 ..... 10, 20, 25

United States v. Bracy
(9th Cir. 1995) 67 F.3d 1421 20

United States v. Blanco
(9th Cir. 2004) 392 F.3d 382 ..... 12, 13

Walker v. City of New York
(2d Cir. 1992) 974 F.2d 293 13

Warrick v. Superior Court
(2005) 35 Cal.4th 1011 ..... 17, 18, 19

Wearry v. Cain
(2017) __ U.S. __, 136 S.Ct. 1002 (*per curiam*) 12

Weatherford v. Bursey
(1977) 429 U.S. 545 10

Yarris v. County of Delaware
(3d Cir. 2006) 465 F.3d 129 13

Youngblood v. West Virginia
(2006) 547 U.S. 867 (*per curiam*) 11

STATUTES

Evidence Code
§ 1043 ..... 14, 17, 24
§ 1043, subd. (b)(3) 15, 17
§ 1045, subd. (b) 15

TABLE OF AUTHORITIES
(continued)

Page

Penal Code
§ 832.7 ..... 15, 17, 23, 24
§ 832.7, subd. (a) 14, 16, 22
§ 832.8 15

COURT RULES

California Rules of Court
Rule 8.520, subd. (f)(8) 7

OTHER AUTHORITIES

91 Ops.Cal.Atty.Gen. 11 (2008) 15

98 Ops.Cal.Atty.Gen. 54 (2015), 2015 WL 7621362 14

STATEMENT OF INTEREST

This case presents the question whether a law enforcement agency may disclose to prosecutors, for the purpose of complying with *Brady v. Maryland* (1963) 373 U.S. 83, a peace officer's name and the fact that his personnel records contain potential impeachment information. The Court's answer to this question will have a significant effect on the day-to-day operations of prosecuting offices, law enforcement agencies, and trial courts throughout the State. As the State's chief law officer, the Attorney General has a unique perspective on the legal issues raised, which implicate prosecutors' constitutional duties, peace officers' privacy interests, the relationship between prosecuting offices and investigating agencies, and the procedural rules governing criminal cases prosecuted throughout the State.

In addition, in 2016, the California Department of Justice, in consultation with the bargaining representatives of affected employees, adopted a formal policy providing for the Department to inform prosecuting offices when the personnel file of one of its peace officer employees contains information potentially subject to disclosure under *Brady*. That policy creates an effective, workable mechanism for *Brady* compliance and is consistent with this Court's decision in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, which approved a police department policy providing for similar notifications to the local district attorney. Also consistent with *Johnson*, in October 2015 the Attorney General published a formal Opinion concluding that, to facilitate compliance with *Brady*, a state law enforcement agency may lawfully release to a district attorney's office the names of officers with sustained findings of misconduct. The Attorney General therefore has a direct and substantial interest in the Court's consideration of the validity of these types of law enforcement notification practices. This brief is submitted pursuant to California Rules of Court, rule 8.520, subdivision (f)(8).

INTRODUCTION

Under *Brady v. Maryland* (1963) 373 U.S. 83, prosecutors have an affirmative duty under the United States Constitution to learn of and disclose to defense counsel material exculpatory information known by any member of the "prosecution team." This includes information that could be used to impeach a peace officer who participated in the investigation that led to the filing of criminal charges. Simultaneously, California's *Pitchess* statutes, enacted following this Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, provide that peace officer personnel records are confidential and can be disclosed only pursuant to a court order premised on showings of "good cause" and materiality. In *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, this Court held that these statutory provisions preclude prosecutors from directly reviewing officer personnel files, but approved a policy under which a local police department notified prosecutors that an officer's file contained information that might be subject to disclosure under *Brady*.

The Court of Appeal in this case erred in holding that this type of notification mechanism, which is critical for *Brady* compliance, violates the *Pitchess* statutes. Its reading of the statutory structure creates serious constitutional concerns that this Court can and should construe the statutes to avoid. Without a *Brady* notification, neither the prosecution nor the defense will be able to reliably use the *Pitchess* procedures to discover impeachment information located in peace officers' personnel records. That creates an unacceptable risk that material impeachment information will go undisclosed—a result that the federal Constitution forbids. At the same time, the Court of Appeal's conclusion that law enforcement agencies must remain silent when they are aware of potential impeachment material in their possession cannot be reconciled with their independent federal

constitutional obligation to share potential exculpatory or impeachment information with the prosecution.

This Court has long recognized that the *Pitchess* statutes can and must be harmonized with *Brady*. Where prosecutors may not access officer personnel files directly, as this Court has held, another review and notification mechanism is essential to permit *Brady* compliance. The Court should hold, consistent with *Johnson*, that the *Pitchess* statutes allow a law enforcement agency to disclose to prosecutors, for the purpose of complying with *Brady*, an officer's name and the fact that his personnel records include potential *Brady* information. Such a disclosure should permit the prosecution or defense to trigger the in camera review procedures provided under the *Pitchess* statutes and to obtain any identified *Brady* material.

The only apparent alternatives for permitting *Brady* compliance would be (1) to read the *Pitchess* scheme as providing no confidentiality protection at all for officers' names and the fact that potential impeachment material is located in their personnel records, thus permitting such information to be freely disclosed outside the employing agency, or (2) to sanction the filing of *Pitchess* motions with respect to every officer whose credibility, competence, possible bias, or the like might be at issue, and modifying the statutory "good cause" standard in criminal cases to permit (indeed, require) in camera review without any specific indication of the presence of relevant exculpatory information. The former approach would not be consistent with this Court's prior reading of the scope of the *Pitchess* statutes' confidentiality protections and would go beyond what is needed to align the *Pitchess* statutes with *Brady*'s requirements. The latter would impose significant burdens on litigants and trial courts. It would also expose many more officers' files to scrutiny than if prosecutors and defendants could target their requests to officers identified by their

employing agencies as having potential impeachment information in their records. The Court should decline to adopt these alternatives and instead read the *Pitchess* statutes to permit law enforcement agencies to communicate to prosecutors, for the purpose of complying with federal *Brady* requirements, the names of officers with potential impeachment information in their personnel records.

The contrary judgment of the Court of Appeal should be reversed.

ARGUMENT

1. In *Brady v. Maryland* (1963) 373 U.S. 83, the U.S. Supreme Court held that, under the due process clause of the federal Constitution, prosecutors must disclose potentially exculpatory evidence to criminal defendants. Defendants have no generalized right to criminal discovery (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559), but the Constitution's fair trial guarantee requires that the prosecution affirmatively disclose any evidence in its possession that is potentially favorable to the defense and material to either guilt or punishment. (*E.g.*, *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7-8.) Evidence is material under *Brady* when "'there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different.'" (*Ibid.*, quoting *United States v. Bagley* (1985) 473 U.S. 667, 682.)

Brady's disclosure rule extends to evidence that can be used to impeach a witness. (See *Giglio v. United States* (1972) 405 U.S. 150, 154.) Impeachment material is "'evidence favorable to an accused.'" (*Bagley*, *supra*, 473 U.S. at p. 676.) Thus, when a peace officer testifies for the prosecution or when his work has other evidentiary implications for the case, material information bearing unfavorably on his credibility, possible bias, or competence must be disclosed. (See *People v. Gaines* (2009) 46 Cal.4th 172, 184; *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998, 1006.)

In a series of cases, the U.S. Supreme Court and this Court have held that prosecutors' *Brady* obligations extend beyond the contents of the prosecuting office's own case files. Under *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; see also *In re Brown* (1998) 17 Cal.4th 873, 879 [prosecutors' duty is "to ascertain as well as divulge"].) In this regard, "[c]ourts have ... consistently declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team,' which includes both investigative and prosecutorial personnel." (*Brown, supra*, at p. 879, alterations and some internal quotation marks omitted.)

The prosecution and the public, moreover, bear the consequences of any failure by any member of the prosecution team to disclose *Brady* material. This Court has made clear that "[r]esponsibility for *Brady* compliance lies exclusively with the prosecution," and that responsibility is "nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance" by any component of the prosecution team. (*Brown, supra*, 17 Cal.4th at pp. 878, 881 [duty belongs "solely and exclusively to the prosecution; those assisting the government's case are no more than its agents"].) Where there is a reasonable probability that the result of the proceeding would have been different had the withheld information been disclosed, reversal of a criminal conviction is required. (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 870 (*per curiam*); *Brown, supra*, at p. 891.)

This is true even if other members of the prosecution team fail to alert an individual prosecutor to the existence of information favorable to the accused. (E.g., *Kyles, supra*, 514 U.S. at pp. 421-422.) Knowledge of exculpatory or impeachment evidence in the possession of any member of

the prosecution team is imputed, as a matter of law, to the prosecution. (*Brown*, *supra*, 17 Cal.4th at pp. 879-880.)

Thus, for example, in *Brown*, this Court held that *Brady* was violated when the prosecution failed to turn over exonerating evidence contained in files of the crime lab of the Sheriff-Coroner, even though the prosecutor was not made aware of its existence. (*Brown*, *supra*, 17 Cal.4th at pp. 878, 883.) Similarly, in *People v. Masters* (2016) 62 Cal.4th 1019, the Court concluded that information about an agreement between a parole agent and a witness was in the prosecutor's possession for *Brady* purposes, notwithstanding that no record evidence suggested that the prosecutor personally knew about the agreement. (*Id.* at p. 1067; see also *Wearry v. Cain* (2017) __ U.S. __, 136 S.Ct. 1002, 1007, fn. 8 (*per curiam*) [rejecting State's defense that no one "'involved with the actual trial'" had likely seen an exculpatory statement, explaining "*Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor," internal quotation marks omitted].)

That the prosecution is responsible for ensuring *Brady* compliance does not mean that *Brady* imposes no direct obligation on other members of the prosecution team. To the contrary, because a "prosecutor's duty under *Brady* necessarily requires the cooperation of other government agents who might possess *Brady* material," law enforcement officers and agencies that act as part of the prosecution team have an independent duty to inform prosecutors when they are aware of information that may be favorable to the defense. (*United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 388; see also *id.* at p. 394 [*Brady* impose obligations "on the government as a whole"].) Federal courts of appeals across the country have reached the same conclusion, holding that it has been established law for decades that *Brady* binds law enforcement officers directly. (See, e.g., *Owens v. Baltimore City State's Attorneys Office* (4th Cir. 2014) 767 F.3d 379, 396-

401 [clearly established by 1988 that suppression of material exculpatory evidence by police officers is unconstitutional]; *Yarris v. County of Delaware* (3d Cir. 2006) 465 F.3d 129, 141 [law enforcement officers violate Constitution by failing to disclose exculpatory information to the prosecutor]; *Walker v. City of New York* (2d Cir. 1992) 974 F.2d 293, 299 [same]; *Carrillo v. County of Los Angeles* (9th Cir. 2015) 798 F.3d 1210, 1219-1223, 1220, fn. 14 [collecting cases].)

This constitutional disclosure duty does not impose on law enforcement officers and agencies the obligation to make the sometimes complex (and often highly contextual) legal determination whether a potentially favorable piece of information meets *Brady*'s materiality standard. (*Walker*, *supra*, 974 F.2d at p. 299.) Rather, law enforcement officers and agencies must provide the information to the prosecutors working directly on the case, who may then evaluate it and decide whether disclosure to the defense is appropriate or required. (See *id.*; *Blanco*, *supra*, 392 F.3d at p. 388; *Carrillo*, *supra*, 798 F.3d at p. 1220, fn. 12.)[1]

---

[1] The Association for Los Angeles Deputy Sheriffs contends that the Sheriff's Department is not part of the "prosecution team" with respect to its maintenance of peace officer personnel records. (Answer Br. at pp. 31-32; cf. *Johnson*, *supra*, 61 Cal.4th at p. 715 [declining to decide whether a prosecutor's *Brady* "obligation extends only to what the police know *about the specific case* and does not go so far as to include confidential personnel records the police department maintains in its administrative capacity," italics in original].) To be sure, difficult questions may arise in some situations concerning whether particular governmental agencies or officials are members of the prosecution team or whether their knowledge of information is attributable to the prosecution. (See *In re Steele* (2004) 32 Cal.4th 682, 697 ["prosecution cannot reasonably be held responsible for evidence in the possession of *all* governmental agencies, including those not involved in the investigation or prosecution of the case," italics in original]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 904 [*Brady* "duty does not extend to all law enforcement agencies that might possess relevant material"]; *id.* at pp. 904-905 [discussing cases]; cf. *People v.*

(continued...)

2. Against this backdrop, California's *Pitchess* statutes, enacted following this Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, establish a conditional privilege for officer personnel records. Penal Code section 832.7, subdivision (a), provides that "[p]eace officer or custodial officer personnel records ..., or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Evidence Code section 1043, in turn, provides that a party seeking discovery of officer personnel records must file a motion supported by "good cause," which requires a showing that the records are material to the subject matter of the litigation and that the identified agency

---

(...continued)
Jacinto (2010) 49 Cal.4th 263, 270-271 [sheriff's department operating jail and acting as custodian of witness not part of prosecution team for compulsory process clause purposes].) Similarly, in certain circumstances some governmental entities may have a "hybrid status" in which some of their activities may properly be considered part of the prosecutorial effort and others not. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1318 [California Department of Corrections and Rehabilitation part of prosecution team with respect to investigation of prison murder but not with respect to operation of prisons]; Answer Br. at pp. 31-32 [discussing same].) But in the context relevant to this case, where a law enforcement agency like the Sheriff's Department acts primarily in an investigative or law enforcement capacity, its officers testify at criminal trials, and the records in question directly involve officers' performance of those duties, personnel records fall within the prosecution team's duty to disclose. (See 98 Ops.Cal.Atty.Gen. 54 (2015), 2015 WL 7621362, at *7; cf. *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1109-1110 [city, as employer of investigating officers and custodian of officers' personnel records, part of prosecution for purpose of post-conviction discovery statute].) In such circumstances, the law enforcement agency, in maintaining records potentially relevant to assessing the officers' honesty, character, possible bias, and competence in the performance of their duties, is "'acting on the government's behalf'" or is "'assisting in the government's case.'" (*Barrett, supra*, at p. 1315, quoting *Kyles, supra*, 514 U.S. at p. 437 and *Brown, supra*, 17 Cal.4th at p. 881.)

has the requested records. (Evid. Code, § 1043, subd. (b)(3).) If good cause is established, the trial court conducts an in camera review of the records and determines whether any information is subject to disclosure. (Evid. Code, § 1045, subd. (b); *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.)

The personnel information protected under these provisions extends to personal data (such as marital status, home address, and educational history), benefit elections, and information relating to performance appraisals, discipline, complaints, or investigations of complaints, among other things. (Pen. Code, § 832.8.) The statute does not shield from disclosure the mere identity of an officer, his employing agency, or the fact that he was involved in a specific interaction with the public. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 284 [name, employing agency, and dates of employment]; *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 64 [involvement in on-duty shooting].) This Court has explained that, in enacting the *Pitchess* scheme, the Legislature was not "concerned with making confidential the identities of peace officers or the basic fact of their employment." (*Commission on Peace Officer Standards*, *supra*, at p. 295.) And bare factual information about an officer's participation in a specific incident involving a member of the public does not associate the officer with confidential personnel matters, disclose any investigation into or discipline of the officer, or "'imply any judgment that the [officer's actions] were inappropriate or even suspect.'" (*Long Beach Police Officers Assn.*, *supra*, at pp. 72-73, quoting 91 Ops.Cal.Atty.Gen. 11, 16-17 (2008).)

In circumstances, however, where revelation of an officer's identity would have such an effect, the Court has read the *Pitchess* statutes to preclude disclosure of the officer's name. In *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, the Court held that section 832.7 barred the

disclosure of the name of an officer involved in a particular disciplinary appeal in response to a Public Records Act request. (*Id.* at p. 1297.) The Court reasoned that "section 832.7, subdivision (a), is designed to protect, among other things, 'the identity of officers' subject to complaints." (*Ibid.*)

This Court has also read the confidentiality protections of the *Pitchess* statutes to deny direct access by prosecutors to peace officer personnel records, even for the purpose of complying with *Brady*. In *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, the Court held that, "[c]onsistent with a recognition that one legislative purpose [behind the *Pitchess* statutes] was to protect ... officers' privacy interests 'to the fullest extent possible,'" the statutory scheme bars prosecutors from directly reviewing officer personnel records. (*Id.* at pp. 712-714, internal quotation marks omitted.) Prosecutors enjoy no superior access to protected personnel files; like the defense, they must file a *Pitchess* motion to seek access to information from them. (*Id.* at p. 714.)

The *Johnson* Court did not apply this conclusion to a law enforcement agency's disclosure of an officer's name and the fact that his personnel records contained information that might be subject to disclosure under *Brady*. In that case, the San Francisco Police Department had a policy of reviewing peace officer personnel records and notifying the district attorney's office of the names of officers with potential impeachment information in their personnel files. (*Johnson*, *supra*, 61 Cal.4th at pp. 706-707.) That notification, in turn, enabled the district attorney to file a *Pitchess* motion seeking in camera review of records concerning a peace officer who was expected to be a witness in a pending case. (*Id.* at p. 707.) The Court explained that the "police department ha[d] laudably established procedures to streamline the *Pitchess/Brady* process." (*Id.* at p. 721.)

3. In the present case, the Court should confirm its approval of notification practices like that in *Johnson* and hold that the *Pitchess* statutes

do not prevent law enforcement agencies from disclosing to a prosecutor that there is potential *Brady* material in the personnel file of a particular officer. Any contrary reading of the statute would create serious constitutional concerns.

To begin with, a requirement that a law enforcement agency remain silent when it is aware that it has potential officer impeachment information in its possession would run afoul of the agency's own constitutional obligations under *Brady*. As explained above, although prosecuting offices are most directly responsible for *Brady* compliance, law enforcement officers and police and sheriff's departments have an independent and affirmative duty to inform prosecutors when they possess evidence potentially favorable to the defense in a case in which they are participating. (*Supra* at pp. 12-13.)

A rule forbidding law enforcement agencies from giving prosecutors any indication that an officer's personnel records contain possible *Brady* information would also, in many cases, result in a criminal defendant never receiving relevant impeachment information. Under Penal Code section 832.7 and Evidence Code section 1043, a party may obtain officer personnel information only upon a motion describing the type of records or information sought, accompanied by an affidavit showing "good cause" for the requested discovery. "Good cause" requires a showing of both "materiality" to the litigation and a reasonable belief that the agency has the type of information requested. (Evid. Code, § 1043, subd. (b)(3); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016.) Averments in the affidavit may be stated on information and belief, but must present "specific" and "plausible" facts supporting the belief that relevant impeachment information exists in the files. (See *Warrick, supra*, at pp. 1025-1026; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1226 [information sought "must be requested with sufficient specificity to preclude the possibility of

a defendant's simply casting about for any helpful information"].) If defense counsel has no reason to believe that a given officer's personnel files might contain information bearing negatively on his credibility, possible bias, or competence, a defendant would have little chance of satisfying this standard as it has been applied up to now. (Compare *City of Santa Cruz*, *supra*, 49 Cal.3d at pp. 79-80, 85 [good cause established by declaration alleging, based on statements of defendant and information in police report, that officers used excessive force in arresting defendant]; *Warrick*, *supra*, 35 Cal.4th at p. 1027 [same by declaration alleging that officers mistook defendant for actual perpetrator and falsely accused defendant of drug crime].)

The *Johnson* decision solved this problem by stating that a *Brady* notification from a law enforcement agency, coupled with an explanation of why an officer's credibility might be relevant, is sufficient under the *Pitchess* statutes to trigger in camera review. (*Johnson*, *supra*, 61 Cal.4th at p. 721; see also *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759, 774 [same].) Yet under the Court of Appeal's ruling, an officer's employing agency would be barred from supplying prosecutors with even this basic fact—with the result that neither the defense nor the prosecution would be able to meet the statutory prerequisites for review and disclosure of impeachment information located in protected personnel records.

To be sure, there may be instances in which the prosecution or defense is aware of information from sources other than a confidential personnel file that could satisfy the good cause standard as currently understood. The Court observed in *Johnson* that "defendants are always permitted to file their own *Pitchess* motion even without any indication from the police department (through the prosecution) that the records might contain *Brady* material and, indeed, even if, hypothetically, the prosecution had informed them that the police department had said the records do *not*

contain *Brady* material." (*Johnson*, *supra*, 61 Cal.4th at p. 721, italics in original.) For example, the defendant himself may have observed conduct that he believes reflects negatively on an officer's credibility and that he suspects will be substantiated in personnel records. (See *Warrick*, *supra*, 35 Cal.4th at p. 1027; *City of Santa Cruz*, *supra*, 49 Cal.3d at pp. 79-80.) But in cases in which there is no independent information that could support a showing of good cause, a rule prohibiting law enforcement agencies from alerting prosecutors to the presence of possible impeachment material in protected personnel files would mean that neither the prosecution nor the defense could obtain in camera review of personnel files. And without such review, possible impeachment information located in those files would remain undisclosed. Where such information is material to the conduct of a criminal trial, that outcome is one the federal Constitution forbids.

A rule prohibiting law enforcement agencies from alerting prosecutors to potential *Brady* information in officer personnel records would also disable the mechanism for *Brady* compliance this Court identified in *Johnson*. In *Johnson*, the Court held that prosecutors were not constitutionally required to file *Pitchess* motions to obtain potentially relevant impeachment information from officer personnel records because defendants have equal ability to file such motions on their own. (*Johnson*, *supra*, 61 Cal.4th at pp. 705-706, 715-719.) The Court explained that when "information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence," there is no suppression within the meaning of *Brady*. (*Id.* at p. 715, internal quotation marks omitted.) Under the circumstances discussed there, where the police notified the prosecution, and the prosecution in turn informed the defense, of the existence of possible impeachment material in officers' personnel records, "permitting

defendants to seek *Pitchess* discovery fully protects their due process right under *Brady* to obtain discovery of potentially exculpatory information located in confidential personnel records." (*Id.* at p. 721, citation omitted.)

Without any notification from a law enforcement agency, however, the prosecution could not reliably put the defendant on notice that potential officer impeachment information exists. (Compare *People v. Zaragoza* (2016) 1 Cal.5th 21, 52 [no *Brady* suppression where prosecution alerted defendant to existence of videotape and made it available for viewing]; *United States v. Bracy* (9th Cir. 1995) 67 F.3d 1421, 1428-1429 [same where government provided defense with information about witness's criminal history].) It is unclear, moreover, whether a rule barring the disclosure of the existence of possible impeachment information, which would result in shifting to the defense the entire burden for uncovering the existence of *Brady* material, could pass constitutional muster. (See *Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d 1119, 1136-1137 ["a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations"].)

Such a rule would be in substantial tension with the U.S. Supreme Court's repeated urging that prosecutors take special care to discharge their constitutionally mandated disclosure duties. *Brady*'s rule is premised on the fact that the prosecutor's role "transcends that of an adversary." (*Bagley*, *supra*, 473 U.S. at p. 675, fn. 6.) Prosecutors do not represent an "ordinary party to a controversy." (*Ibid.*) They are representatives of the government, "whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Ibid.*, internal quotation marks and alterations omitted.) Thus, the high court has consistently directed that the "prudence of the careful prosecutor … not … be discouraged." (*Kyles*,

supra, 514 U.S. at pp. 439-440; see also *Turner v. United States* (2017) __ U.S. __, 137 S.Ct. 1885, 1893 [similar].) A rule entirely thwarting prosecutors' ability to provide basic disclosures concerning the potential existence of exculpatory or impeachment information held by part of the prosecution team would stand at odds with this admonition.

4. The Court of Appeal erred by failing to read the *Pitchess* statutes to avoid these serious constitutional concerns. This Court has consistently held that the *Pitchess* statutes "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." (*Mooc*, *supra*, 26 Cal.4th at p. 1225.) In *Johnson*, this Court reaffirmed that "the *Pitchess* process operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (*Johnson*, *supra*, 61 Cal.4th at p. 720, internal quotation marks omitted.)

For example, in *City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th 1, the Court held that the statutory prohibition on revealing citizen complaints concerning conduct occurring more than five years before the events at issue in the litigation was not an absolute bar to disclosure of older complaints. (*Id.* at p. 13.) The Court reasoned that the *Pitchess* process does not operate to block disclosure of *Brady* material, and thus information otherwise subject to the statutory limitation could be disclosed as required by the Constitution. (*Id.* at pp. 14-15.)

The Court should apply a similar analysis here. Where prosecutors may not directly review officer personnel records, as this Court held in *Johnson*, *Brady* requires a different mechanism that assures that any material impeachment evidence in an officer's personnel file is divulged to the defense. The Court should hold that the *Pitchess* statutes permit a law enforcement agency to inform prosecutors, for the purpose of complying

with *Brady*, of an officer's name and the fact that his personnel records include material that might be subject to disclosure under *Brady*. Such a disclosure would allow the prosecution or defense to trigger the in camera review procedures provided under the *Pitchess* statutes and to obtain disclosure of any identified *Brady* material, as the Constitution requires.

Such a disclosure is also consistent with the *Pitchess* statutes' goal of protecting officer privacy. (See *Johnson*, *supra*, 61 Cal.4th at p. 712.) A *Brady* notification reveals the existence of potential impeachment information, but not its specific content. The notification is shared only with the parties in a criminal proceeding—initially the prosecutor, who is part of the prosecution team, and ultimately the defendant, who has a constitutional entitlement to disclosure of any material personnel-related impeachment information. Thus, a *Brady* notification ensures that the prosecution and the defense have an adequate mechanism to discover *Brady* information without unduly infringing on officer privacy.[2]

5. Theoretically, the Court could seek to harmonize the *Pitchess* statutes with *Brady*'s requirements through two other interpretive approaches. First, the Court could read section 832.7, subdivision (a), as extending no confidentiality protection at all to an officer's name and the

---

[2] This Court framed the issue presented in this case to consider the legality of *Brady* notifications when a peace officer is "a potential witness in a pending criminal prosecution." (See Oct. 11, 2017 Order, No. S243855 [granting petition for review and limiting issues].) *Brady*'s disclosure mandate, however, extends beyond peace officer witnesses who may testify in the future. It may require the revelation of information calling into question the honesty, competence, or bias of peace officers who have testified in the past or who are not expected to testify at all—for example, officers who processed the crime scene. Accordingly, in addressing the specific issue presented, the Court should not suggest that the *Pitchess* statutes foreclose *Brady* notifications outside the situation in which a peace officer is a potential future witness in a criminal trial.

fact that his personnel file contains potential impeachment material. Under such a construction, *Brady* notifications would be non-confidential and could be freely disclosed outside the employing agency. Second, the Court could hold that *Brady* notifications are impermissible under the *Pitchess* scheme, but that the defense and prosecution may establish the "good cause" necessary to obtain in camera review of personnel records for officers involved in a particular case without any specific indication that a particular officer's records contain possible *Brady* material. Both of these alternatives raise significant privacy and practical concerns.

With respect to the first alternative, concerning the scope of section 832.7's confidentiality protections, this Court has previously held that the *Pitchess* statutes forbid the disclosure of an officer's name when the disclosure would link the officer to protected personnel information. (*Copley Press*, *supra*, 39 Cal.4th at p. 1297; see also *supra* at pp. 15-16.) Here, it is hard to quarrel with the conclusion that a *Brady* notification constitutes a disclosure that connects a named officer to confidential personnel information. (See Typed Opn. at p. 27.) Such notifications are developed based on a review of officers' personnel records, and, by design, communicate that the contents of those records contain information that may reflect negatively on an officer's competence, credibility, or possible bias. In that way, a *Brady* notification reveals an officer's name "in conjunction with ... the personal or sensitive information that the statute seeks to protect." (*Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 299.) In addition, if the *Pitchess* statutes were construed to not apply to the identification of an officer as having potential *Brady* material in his personnel records, presumably that identification could be disclosed to anyone—including the public at large. (See *Long Beach Police Assn.*, *supra*, 59 Cal.4th at pp. 71-73 [declining to enjoin release of names of officers involved in on-duty shootings to newspaper in response to Public

Records Act request where such names not covered by section 832.7]; *Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at pp. 289-299 [officers' identities and employing agencies subject to disclosure under Public Records Act where such information not made confidential by *Pitchess* statutes].) Such wider disclosures would raise different privacy and practical concerns than those present in this case, which involves only communications to the prosecution for the specific purpose of *Brady* compliance. The Court accordingly should not, in this case, harmonize the *Pitchess* statutes with *Brady* by reading section 832.7 as extending no confidentiality protection at all to officer names and the fact that their personnel records contain possible impeachment information.

With respect to the second option of relaxing the "good cause" standard, the Court theoretically could hold that in camera review can be obtained without any indication from the employing law enforcement agency (or the defendant himself) that a specific officer's personnel records include potential *Brady* material. Under this approach, the Court could conclude that, in criminal matters, "good cause" under Evidence Code section 1043 is satisfied by a representation that a specific peace officer's credibility, competence, or possible bias is at issue. Such a reading of the *Pitchess* laws would enable the in camera review necessary for *Brady* compliance, but would lead to greater privacy concerns and would impose considerable burdens on courts, the prosecution, and defendants.

If law enforcement agencies were unable to inform prosecutors which, if any, officers' records contain potential *Brady* material, prosecutors and defendants could not limit their *Pitchess* motions to cases in which they know there is potentially relevant information in a specific officer's personnel file. They would instead be required to file a *Pitchess* motion in every case in which officer credibility, competence, bias, or the like might be at issue. Trial courts would be burdened with a substantially greater

volume of *Pitchess* motions, and many more officers' records would be exposed to scrutiny. Such a result would needlessly tax limited judicial resources and would not "protect [] officers' privacy interests to the fullest extent possible," as the Legislature intended. (*Johnson*, *supra*, 61 Cal.4th at p. 712, internal quotation marks omitted.)

Reconciling the *Pitchess* laws and *Brady*'s mandate by lowering the good cause standard would also not be sound policy. Although it would enable parties in a criminal case to secure the in camera review necessary to obtain personnel-related *Brady* material, it would still create a situation in which defense counsel were not informed of essential exculpatory facts known by the prosecution team. As explained above, the prosecution is not an ordinary party in a lawsuit; its duty in any individual case is to achieve a just outcome, not a victory for its side of the controversy. (See *Bagley*, *supra*, 473 U.S. at p. 675, fn. 6.) Practices that encourage disclosure "serve to justify trust in the prosecutor" in the discharge of that responsibility. (*Kyles*, *supra*, 514 U.S. at p. 439.) Policies that look in the opposite direction risk the opposite effect.

In *Johnson*, this Court made clear that the "*Pitchess* procedures can, and must, be employed in a way that ensures compliance with defendants' due process rights to receive exculpatory information without unduly burdening trial courts." (*Johnson*, *supra*, 61 Cal.4th at p. 722.) To achieve those necessary and important objectives, this Court should hold that the *Pitchess* statutes permit law enforcement agencies to notify prosecutors, for the purpose of complying with *Brady*, when an officer's personnel file contains potential *Brady* information.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: May 4, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General

Aimee Feinberg /jak

AIMEE FEINBERG (SBN 223309)
Deputy Solicitor General
PETER D. HALLORAN
Supervising Deputy Attorney General
MICHAEL CHAMBERLAIN
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I certify that the attached **BRIEF FOR THE ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST** contains 5,977 words, as counted by the word-processing program used to prepare the brief and excluding the cover page and the other parts of the brief excluded under rule 8.520, subdivision (c)(3).

Dated: May 4, 2018

XAVIER BECERRA
Attorney General of California

Aimee Feinberg /jak

AIMEE FEINBERG
Deputy Solicitor General
Attorneys for the Attorney General of California

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Association for Los Angeles Deputy Sheriffs v. Superior Court**
Case No.: **S243855**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 4, 2018, I served the attached **BRIEF FOR THE ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF REAL PARTIES IN INTEREST** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Elizabeth J. Gibbons
The Gibbons Firm, PC
811 Wilshire Blvd., 17th Floor
Los Angeles, CA 90017
Counsel for Petitioner

Douglas G. Benedon
Judith E. Posner
Benedon & Serlin, LLP
22708 Mariano Street
Woodland Hills, CA 91367
Counsel for Petitioner

Superior Court of California
County of Los Angeles
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012-3014
Case No. BS166063

Alyssa Daniela Bell
Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012-4202
Counsel for Amicus Curiae

Geoffrey Scott Sheldon
James Edward Oldendorph, Jr.
Alexander Yao-En Wong
Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor
Los Angeles, CA 90045-5309
Counsel for Real Parties in Interest

Jeff Adachi
Matt Gonzalez
Dorothy Bischoff
Public Defender, City and
County of San Francisco
555 Seventh Street
San Francisco, CA 94103
Counsel for Amicus Curiae

Court of Appeal, Second Appellate District,
Division 8
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013
Case No. B280676

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 4, 2018, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

SF2017203951
41993549.docx