No. S243855

IN THE SUPREME COURT OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS
Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

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

After a Judgment of the Court of Appeal of the State of California,
Second Appellate District
Court of Appeal Case No. B280676

REQUEST FOR PERMISSION TO FILE AMICI CURIAE BRIEF OF LAW SCHOOL PROFESSORS IN SUPPORT OF REAL PARTIES IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, ET AL.
AND
AMICI CURIAE BRIEF OF LAW SCHOOL PROFESSORS IN SUPPORT OF REAL PARTIES IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, ET AL.

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

Proposed amici curiae Professor Jody D. Armour, Professor W. David Ball, Professor Lara Bazelon, Professor Samantha Buckingham, Dean Erwin Chemerinsky, Professor Gabriel "Jack" Chin, Professor Beth A. Colgan, Professor Sharon Dolovich, Professor Ingrid Eagly, Associate Dean Carrie Hempel, Professor Alex Kreit, Professor Máximo Langer, Professor Laurie Levenson, Associate Dean Justin Levitt, Professor Eric J. Miller, Professor Samuel Pillsbury, Dean L. Song Richardson, Professor Heidi Rummel, Professor Jonathan Simon, Professor Kelly Strader, Professor Katie Tinto, Professor Sherod Thaxton, Professor Ronald Tyler, Professor Rachel E. VanLandingham, Professor Robert Weisberg, and Professor Kate Weisburd make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.520, subd. (f). Amici are scholars engaged in the study and teaching of criminal law and criminal procedure at California law schools. The group includes professors who have considerable experience working on issues of California and federal criminal law and procedure. Amici have an interest in ensuring the Court properly considers the implications of this case on the administration of justice.[1]

Amici's affiliations are listed below to provide context for their interest and their ability to assist the court in deciding this matter:

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[1] Pursuant to California Rule of Court 8.520(f)(4), amici state that no party or counsel for any party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

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Because amici will be affected by this Court's decision and may assist the Court through their unique perspectives, they respectfully request the permission of the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of the State of California, to file this brief.

Dated: May 2, 2018

By: 

Jonathan Abel

Counsel for *Amici* Law Professors

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AMICI CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

I. SUMMARY OF THE ARGUMENT

California goes farther than practically any other jurisdiction to conceal evidence of police misconduct. Documented instances of dishonesty and other misconduct are kept in personnel files hidden from public view. And not just from the public. The misconduct evidence in the personnel files is kept hidden even from a prosecutor carrying out her duties under *Brady v. Maryland*, 373 U.S. 83 (1963), unless the prosecutor first gets a court order. The extraordinary privacy protections that California law provides for police misconduct—protections, collectively known as the *Pitchess* provisions—run headlong into the federal constitutional requirement that prosecutors "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). After all, how can a prosecutor be required to disclose material from a file that she is prohibited from reviewing?

For the second time in three years, the clash between *Pitchess* and *Brady* has come before this Court. Amici urge the Court to hold that *Brady* ascribes to prosecutors constructive knowledge of any favorable, material evidence in the police personnel files and, thus, requires that prosecutors disclose this information to the defense. If prosecutors are not allowed to review the personnel files themselves, this Court should declare that the police agencies must review and disclose the material themselves. In the case currently before the Court, the *Brady* alert system proposed by the Los Angeles County Sheriff's Department—but never implemented because of the decision of the Court of Appeal—should be not only permitted but, in fact, required in all jurisdiction in the state. Someone must be responsible for bringing out the critical evidence hidden in police personnel files. If the

prosecutor cannot search the files, then the police themselves must, at the very least, implement an alert system to facilitate the process.

II. CALIFORNIA'S SOLICITUDE FOR POLICE PRIVACY IS EXTREME COMPARED TO OTHER JURISDICTIONS.

Although this Court is well-acquainted with *Pitchess* and *Brady*, the Court may benefit from hearing how the conflict between the police desire to conceal their own misconduct and the defense's due process right to access that misconduct plays out in other states. In the brief national canvass that follows, California emerges as the state that seemingly goes farther than any other in hiding police misconduct from prosecutors and defendants.[2]

A. No access regimes

A small minority of jurisdictions in the country impose severe limitations on access to police misconduct records—limitations that prevent not only defendants and the public from accessing the records, but even prevent prosecutors pursuing their *Brady* obligations from looking at the files without a court order. California is one of these rare jurisdictions. In California, anyone seeking access to police personnel records must file a *Pitchess* motion in the trial court. *See* Cal. Penal Code §§ 832.7, 832.8; Cal. Evid. Code §§ 1043-1045. The moving party must show "good cause" for discovery of the misconduct, and, if "good cause" is shown, the trial court will conduct an in camera review of whatever records the law enforcement

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[2] The section of the brief regarding practices around the country draws heavily from a 2015 law review article written by counsel for amici. The article provides further details and citations describing the various practices around the nation. *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (hereinafter "Brady*'s Blind Spot*"), *available at* http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/04/67_Stan_L_Rev_743_Abel.pdf.

agency deems relevant. *People v. Superior Court* (*Johnson*), 61 Cal. 4th 696, 710-11 (2015). After the in camera review, the court decides what material to release and then releases that material under a protective order. As noted above, this procedure applies to everyone, including prosecutors carrying out their *Brady* duties. *Id.* at 705. Because the *Pitchess* process applies to prosecutors, prosecutors may be unable to obtain crucial exculpatory and impeachment material from the personnel files unless they already know enough about the officer to satisfy *Pitchess*'s "good cause" threshold. In cases in which the prosecutor knows nothing about the officer, but in which impeachment evidence nonetheless lurks in the personnel file, there is an obvious tension between *Pitchess* and *Brady*.

Outside California, only a dwindling handful of jurisdictions constrain prosecutors' *Brady* searches, and those jurisdictions have found ways to allow for more flexibility in complying with *Brady* than California has done. For example, a New Hampshire statute had limited prosecutorial access to police personnel files, but the state's courts nonetheless allowed prosecutors to directly review the files in some cases. *See* Brady*'s Blind Spot*, 67 STAN. L. REV. at 766-68 (quoting N.H. Rev. Stat. Ann. § 105:13-b (2014)). And, in 2012, New Hampshire amended the statute to make clear that "'[e]xculpatory evidence in a police personnel file . . . shall be disclosed to the defendant' and that in camera review was required only '[i]f a determination cannot be made as to whether evidence is exculpatory.'" *Id.* Likewise, Maine amended its personnel file statute to explicitly exempt prosecutors' *Brady* searches from the confidentiality generally shrouding personnel files. *Id.* at 769-70. In Colorado, a court order is required for prosecutors to access the personnel files, even for *Brady* purposes. *Id.* at 769. But, in 2014, the state associations representing prosecutors, police chiefs, and sheriffs announced a statewide policy of using alert systems to ensure compliance with *Brady*. *Id.* at 769.

B. Public access regimes

At the other end of the spectrum, some states make misconduct records accessible not only to prosecutors, but also to the public. *Id.* at 770-73. Anyone who files a public records request may review these records. A recent fifty-state survey found that twelve states generally made misconduct records public and thirteen more states made the misconduct public when it was particularly serious. Robert Lewis et al., *Is Police Misconduct a Secret in Your State?* WNYC.ORG (Oct. 15, 2015), *available at* https://www.wnyc.org/story/police-misconduct-records. These jurisdictions privilege transparency over privacy. Because officers occupy positions of great public trust, the public must be able to verify that the officers are living up to that trust.

C. Special access for prosecutors

A third model exists, one in which prosecutors have access to the personnel files, but defendants and the public do not. *See* Brady*'s Blind Spot*, 67 STAN. L. REV. at 773-75 (providing examples). Because the prosecutor has access and the defendant does not, the prosecutor has an obligation, under *Brady*, to learn of and disclose the material to the defense. The federal system provides one such example. By law and by policy, federal prosecutors routinely review federal agents' files for *Brady* material. *Id.* at 759 n.76.[3] State prosecutors around the country have implemented systems for carrying out this *Brady* obligation. In Washington and North Carolina, for example, prosecutors build lists of officers with *Brady* material in their

[3] The Department of Justice maintains a policy requiring federal prosecutors "to seek all exculpatory and impeachment information from all the members of the prosecution team," including "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." UNITED STATES ATTORNEYS' MANUAL § 9-5.001(B)(2) (2014).

files and use those lists to review and disclose that material when these officers are slated to testify. *Id.* at 773-75. These jurisdictions still prevent defendants and the public from piercing the confidentiality of the records, but they allow the prosecutor—after all, a member of the prosecution team—some limited access to the personnel files to fulfill his constitutional duties.[4]

* * *

In the end, California's great solicitude for police privacy makes it a national outlier, and it is this unusual solicitude, which risks violating basic principles of due process, that has placed the state's judiciary in the difficult position of mediating between state law and the federal constitution.

III. THE COURT SHOULD NOT AVOID THE CONSTITUTIONAL QUESTION ABOUT THE PROSECUTOR'S CONSTRUCTIVE KNOWLEDGE OF POLICE MISCONDUCT.

Brady violations have three elements. First, the evidence must be favorable to the defense. Second it must be material, meaning that it creates a reasonable probability of a different outcome. Third, it must be suppressed by the state. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In the context

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[4] Even in jurisdictions in which prosecutors have special access to the records, it is the practice of some prosecutors' offices not to do anything to learn of and disclose the *Brady* material. Brady*'s Blind Spot*, 67 STAN. L. REV. at 775-79. The reasons for failing to employ systems to seek out this material include ignorance of the law, disorganization, and institutional inertia. *Id.* The bruising politics of revealing police misconduct are a further cause of the prosecutorial inaction in these jurisdictions. Police associations and police unions are powerful political forces; they understand that if an officer's misconduct is revealed to the prosecution, that officer may be barred from testifying in future cases, and that could endanger her ability to work in law enforcement. *Id.* at 746, 781. As a result, officers and their representatives have used litigation, legislation, and political pressure to prevent prosecutors from disclosing police misconduct, even where no statute prevents prosecutors from making such disclosures. *Id.* at 783-89.

of police personnel files, no one disputes that the misconduct evidence they contain may be favorable and material. As a doctrinal matter, then, the only dispute is about suppression. If some favorable, material evidence in a personnel file is not disclosed, does that constitute suppression within the meaning of *Brady* and its progeny? The Court has tried to avoid this constitutional question, but answering the question is essential to resolving the issues in the personnel file dispute.

The United States Supreme Court in *Kyles v. Whitley* made clear that a prosecutor is responsible for disclosing material even if she does not actually know about it. In that case, the Supreme Court held that the 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*, 514 U.S. at 437. If the prosecutor fails to learn of and disclose some information known to the police, that is considered suppression. *Id.* A plain reading of *Kyles*'s language would mean that the prosecutor has a duty to learn about—and is, thus, constructively knowledgeable of—misconduct in the personnel file, because that information is "known to the others acting on the government's behalf in the case, including the police." *Id.* However, opponents of disclosure employ a carousel of rationales to insist that *Kyles*'s language does not include such material. The stakes of this question are high because, if the prosecutor is constructively knowledgeable of the misconduct, then she must turn it over (or else violate *Brady*) regardless of any process *Pitchess* lays out. On the other hand, if the prosecutor is not constructively knowledge of this information, there is no constitutional duty to disclose this material, and the framework created by *Pitchess* faces no constitutional pressure from *Brady*.

In *Johnson*, this Court identified the constructive knowledge issue and assiduously avoided it.[5] The Court avoided the issue by tailoring its analysis of the prosecutor's ability to review the personnel file to a situation in which there was a functioning *Brady* alert system. *Johnson*, 61 Cal. 4th at 705, 721. *Johnson*'s extended discussion of the prosecutor's and defendant's "equal access" to the misconduct records—an equal access that was supposed to assuage the tension between *Pitchess* and *Brady*—was entirely premised on the existence of an alert system that would tell the prosecutor that the officer had a potential *Brady* issue and allow the prosecutor to pass along this tip to the defense. *Johnson*, 61 Cal. 4th at 715-16. *Johnson* explained that, because the tip put the prosecutor and defendant in the same position to prevail on a *Pitchess* motion, the contents of the personnel file were not being suppressed within the meaning of *Brady*. *Id.*

While relying on such an alert system allowed the Court to resolve the controversy in *Johnson*, it immediately spawned questions about counties, cities, and individual law enforcement agencies that do not employ alert systems. Were prosecutors in those jurisdictions constructively knowledgeable of the misconduct in the personnel files and, thus, obligated to provide the material to the defense? Without an alert system, how could they satisfy their obligation to notify the defense when there was *Brady* material in an officer's personnel file? Even if the answer was that the

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[5] The *Johnson* opinion characterized the issue as a tension between the argument that *Brady*'s constructive knowledge encompasses all information "possessed by any member of the prosecution team, including the police" and the argument that it "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." *Johnson*, 61 Cal. 4th at 715 (emphasis omitted). The Court explained: "We need not resolve this dispute, because we conclude instead that the prosecution has no *Brady* obligation to do what the defense can do just as well for itself." *Id.*

prosecution would have to file a *Pitchess* motion in every case on every officer, how would prosecutors show the requisite "good cause" when they knew nothing specific about the contents of the officers' files? Did *Brady* have some other mechanism outside the *Pitchess* process to make sure the evidence was disclosed? *Johnson*'s method of constitutional avoidance was sustainable only if all jurisdictions immediately adopted a *Brady* alert system and diligently stuck to it. But, as is now all too clear, that would not be the case.

Sooner or later, this Court will have to reach the question of prosecutors' constructive knowledge of the material in police personnel files, either because the Court upholds the injunction in this case and bans *Brady* alert systems, or because the Court stops short of requiring alert systems in all jurisdictions and some jurisdictions elect not to employ such systems. If there is no *Brady* alert system in place for a particular agency, prosecutors will be forced to resolve the constitutional question for themselves: Does the federal constitution require them to learn of and disclose evidence from the very personnel files that state law prevents them from reviewing?

IV. PROSECUTORS HAVE CONSTRUCTIVE KNOWLEDGE OF THE MISCONDUCT IN POLICE PERSONNEL FILES AND, THUS, MUST DISCLOSE THE MISCONDUCT TO THE DEFENSE.

The answer to the question about the prosecutor's constructive knowledge must be that the prosecutor is presumed to have knowledge of the misconduct in the file, even if she has no direct access to the file, and even if there is no *Brady* alert system in place. This is the truest reading of *Kyles*'s language about the prosecutor's duty to learn what is known to others on the prosecution team, *Kyles*, 514 U.S. at 437, a duty invoked by the United States Supreme Court in a number of subsequent cases, *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam); *Banks v. Dretke*, 540 U.S. 668, 693 (2004); *Strickler*, 527 U.S. at 275 n.12.

The benefit of constructive knowledge is that it prevents prosecution team members from being able to dodge *Brady*'s disclosure requirements by keeping information secret from the prosecutor. Further, the constructive knowledge doctrine incentivizes the prosecutor to take his head out of the sand and search for information known to other members of the team. Although it may be difficult to define the far reaches of a prosecutor's constructive knowledge, the personnel files at issue in this case are nowhere close to that line.

Courts have employed a number of factors in determining what material lies within the prosecutor's constructive knowledge, and the personnel files fall easily within that knowledge. Courts have asked how "closely aligned" the agency with the records is with the prosecution, how logistically difficult it would be for the prosecutor to seek out the information in question, and whether the prosecutor was put on notice of the significance of the material in the defendant's case. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) ("As the burden of the proposed examination rises, clearly the likelihood of a pay-off must also rise before the government can be put to the effort."); *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993) ("[W]here a prosecutor has no actual knowledge or cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information."); s*ee also* Brady*'s Blind Spot*, 67 STAN. L. REV. at 755-57 (discussing other factors employed in defining constructive knowledge).

These criteria point to the conclusion that the misconduct in the personnel files fits squarely within the sweep of the prosecutor's constructive knowledge. First of all, the police officer and police agency—both of which have actual knowledge of the officer's misconduct—are indisputably "closely aligned" with the prosecution. The reason the officer's personnel

file matters, after all, is that he is involved in the case. Second, the logistics of the prosecutor's tracking down the personnel file are easy. The police agency knows exactly where the files are kept and could easily produce the material to the prosecutor, were it permitted to do so. The files are not hidden away in some unindexed storage room. Third, the prosecutor is clearly on notice about the importance of any misconduct that might be in the files and about the defense's need for this information to be disclosed. In light of these factors, it is not difficult to see why the prosecutor has constructive knowledge of the misconduct in the files.

Opponents of disclosure use dubious distinctions to argue that police misconduct evidence falls outside the sweep of *Brady*. For example, Petitioner Association for Los Angeles Deputy Sheriffs ("ALADS") urges the Court to distinguish between information that the police agency maintains in its investigative capacity, which would be imputed to the prosecutor under *Brady*, and "information housed by the [police agency] in its administrative capacity for internal purposes," which would not. Answering Br. 46 (citing *People v. Superior Court* (*Barrett*), 80 Cal. App. 4th 1305, 1317-18 (2000)); *see also id.* at 32. ALADS also asserts that *Kyles v. Whitley*'s language about the prosecutor's constructive knowledge applies only to information that the prosecution team members learned while investigating the defendant's particular case, thus excluding information known to the agency from other cases or from administrative proceedings. Answering Br. 28-29, 46, 46 n.5 (citing briefing in *Johnson*, 61 Cal. 4th at 715).

However, the United States Supreme Court has never endorsed an "administrative capacity" exception to *Brady*; nor has the high court suggested that *Brady* and *Kyles* apply only to information discovered in the defendant's specific case. And the Supreme Court has handled several cases in which the prosecutor was found constructively knowledgeable of

information that the police investigators had dredged up in other cases. Brady*'s Blind Spot*, 67 STAN. L. REV. at 753-54 (noting three Supreme Court cases involved *Brady* material from unrelated cases). Indeed, *Kyles v. Whitley* itself involved *Brady* material from an unrelated case: "evidence linking Beanie" —the key informant—"to other crimes at Schwegmann's [grocery store] and to the unrelated murder of one Patricia Leidenheimer." 514 U.S. at 428-29. Moreover, the claim that *Brady* is limited to information learned by the prosecution team members in the defendant's particular case does not make sense. Would it really be acceptable for a detective to conceal impeachment information he knew about an informant just because that information came from the detective's experiences with that informant in an earlier case? Certainly not. By the same logic, the police agency cannot conceal information it possesses about an officer's dishonesty just because that information was discovered in a prior case or in an administrative proceeding.[6]

Opponents of disclosure inaptly analogize to other types of confidential records in an attempt to show that a prosecutor's *Brady* duty does not always give license to review an agency's files. *E.g.*, *Johnson*, 61 Cal. 4th at 718 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and *J.E. v. Superior Court*, 223 Cal. App. 4th 1329 (2014)). But these analogies fall

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[6] *See People v. Garrett*, 23 N.Y.3d 878, 897 (2014) (Lippman, C.J., concurring) (attacking distinction between constructive knowledge of case-specific material and constructive knowledge of material from other cases: "This distinction is arbitrary and illogical in the context of *Brady*'s suppression prong. . . . There is no rational basis for charging the People with a police officer's knowledge of his own misconduct in the defendant's case but not with wrongdoings perpetrated by the same officer in another context."); *see also* Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1704 (1996) ("Perhaps the officer was not a state actor when he engaged in the underlying corrupt conduct, but he was a state actor when he testified against the defendant and concealed his misconduct from the defense.").

apart because the confidential records in those cases were not possessed by members of the prosecution team, nor was the information known to anyone on the team. The police personnel records and the misconduct they contain are known to, and within the control of, members of the prosecution team: namely, the officer and the agency. That is what distinguishes them from other types of third-party discovery material; the prosecution team knows about them and possesses them.

Notably, in a recent decision, the United States Court of Appeals for the Ninth Circuit held that *Brady* makes a state prosecutor constructively knowledgeable of the misconduct documented in a city detective's personnel files, thus deciding the constitutional question. *Milke v. Ryan*, 711 F.3d 998, 1016 (9th Cir. 2013) ("The state is charged with the knowledge that there was impeachment material in [Det.] Saldate's personnel file."). This Court, too, should hold that *Brady* makes prosecutors constructively knowledgeable of the misconduct in the personnel files, thus requiring them to disclose it to the defense.

V. *BRADY* ALERT SYSTEMS SHOULD BE REQUIRED IF PROSECUTORS ARE NOT ALLOWED DIRECT ACCESS TO THE PERSONNEL FILES.

Brady alert systems have their constitutional shortcomings, to be sure, but they are immeasurably better than the alternative: no system for finding and disclosing the *Brady* material in the files. This Court should hold that law enforcement agencies are permitted to create *Brady* alert systems and share the alerts with prosecutors, who will in turn share them with defendants. In fact, the Court should go a step further to hold that jurisdictions must have such alert systems in place, as long as prosecutors are not permitted to review the files for *Brady* material. The *Brady* alert system is the only thing preventing an outright and intractable conflict between *Pitchess* and *Brady*. If the alert system is not employed in a particular

jurisdiction, it would amount to an impermissible concession that *Brady* does not apply to police misconduct material.

Alert systems, in which police agencies review files for potential *Brady* material, are not the ideal manner of complying with *Brady*: direct review by the prosecutor should be the gold standard. But if prosecutors are not allowed direct access to the files, the next best alternative is to employ an alert system. From a *Brady* perspective, the shortcomings of these alert systems are well-known and have been discussed at length in this case and in *Johnson*. We will address them only briefly here.

One major concern is the alert system's attempt to make fact-specific decisions about what is favorable and material without knowing anything about the facts of the case. *See, e.g.*, Opening Brief at 18. *Brady* is a fact-based inquiry, and what might be favorable and material in one case may be neither in the next case. The concern is that a police agency reviewing the personnel files in a vacuum may discount impeachment evidence because it seems not material enough for *Brady*. But, in a case in which the evidence is in equipoise, even a minor piece of impeachment evidence could be *Brady* material. Likewise, if the agency is working off a fixed list of types of misconduct that qualify as *Brady* material—as the Los Angeles County Sheriff's Department was planning to do—the list might overlook evidence that is favorable in some way not contemplated by the fixed list. This potential for overlooking the favorable or material nature of the evidence is one reason that prosecutors, who know about the facts of the particular case, should be in charge of making the *Brady* determinations.

A second flaw with the *Brady* alerts is more conceptual, but no less important. There is something discombobulating about separating the duty for *Brady* compliance from the authority to ensure that compliance. *Brady* and its progeny place the duty squarely on the shoulders of the prosecutor. *E.g.*, *In re* Brown, 17 Cal. 4th 873, 878 (1998) ("Responsibility for *Brady*

compliance lies exclusively with the prosecution."); *see also Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty" to learn of and disclose *Brady* material.). Outside of the personnel-file context, the prosecutor is in a position to question her agents about what they know and what steps they are taking to ensure that they have diligently disclosed all *Brady* material. But, in the *Pitchess* regime, the prosecutor is wholly without authority to check the work of her agents. From the perspective of doctrinal design, it is problematic to have a prosecutor charged with a duty that she is powerless to carry out herself—and powerless even to monitor. Yet, that is the situation in California with *Brady*'s application to police misconduct evidence. The prosecutor is left hoping that whatever *Brady* alert system has been established is working properly. This is especially problematic given what appears to be the personal and professional self-interest of the police in not revealing misconduct evidence.

Despite these shortcomings, the *Brady* alert system has significant value compared to a situation in which no one reviews the file for *Brady* material. As long as the "tips" generated by these alert systems are sufficient to satisfy *Pitchess*'s "good cause" showing,[7] the alerts ensure that some amount of impeachment evidence finds its way out of the personnel files and into the defense's hands—even if the alerts do not capture as much material

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[7] To facilitate the *Brady* disclosure process, the "tip" provided by the police agency, "together with some explanation of how the officer's credibility might be relevant to the proceeding," must be sufficient to satisfy *Pitchess*'s "good cause" requirement for in camera review. *See Johnson*, 61 Cal. 4th at 721. If the defendant must dig up and cite additional evidence to prevail on a *Pitchess* motion, critical *Brady* material will remain undisclosed in many cases, thus allowing the *Pitchess* process to violate *Brady*. *See Serrano v. Superior Court*, 16 Cal. App. 5th 759, 774 (2017) ("Under *Johnson*, counsel's declaration was sufficient to trigger in camera review of [the deputy sheriff's] personnel file, and it was error for the superior court to deny [defendant]'s motion on the ground that he failed to allege specific officer misconduct.").

as they should. Moreover, the alerts allow this Court to avoid the direct constitutional conflict between *Pitchess* and *Brady* that has been in the offing since at least 2002, *see City of Los Angeles v. Superior Court* (*Brandon*), 29 Cal. 4th 1, 12 n.2 (2002), and that this Court sought to avoid in 2015, *Johnson*, 61 Cal. 4th at 715.

The stakes are high in the legal debate about *Brady* alert systems. If the Court of Appeal's injunction stands and the alert systems are banned, it is hard to conceive of any way in which police misconduct evidence will come to light, unless there are already enough publicly available facts about the officer's misconduct that a *Pitchess* motion will be granted. But those facts are rarely publicly available because California law makes it so hard to learn anything about discipline an officer has received. As a result, for an officer who has misconduct in her file but about whom nothing is publicly known, there is little chance that any *Pitchess* motion can succeed in opening up the file. If alert systems are not employed, misconduct evidence in the files will sit there undiscovered and undisclosed, even though it would have qualified as *Brady* material if only it had come to light. This is the vicious cycle that will ensue if the *Brady* alerts are banned.

Significantly, ALADS offers no explanation for how *Brady* material will be discovered in the personnel files if the alert systems are banned and if nothing is already publicly known about the officer's misconduct. The ALADS position appears to be two-pronged. First, the evidence is not *Brady* because it was not unearthed by the prosecution team in the course of investigating the particular defendant's case. Answering Br. 28-29, 46. ALADS makes this argument even though the United States Supreme Court has never drawn such a distinction and even though *Kyles v. Whitley* and other Supreme Court cases have referred to *Brady* material discovered by the prosecution team while investigating other cases. *See supra* pages 10-11. Second, and more troublingly, ALADS seems to argue that whatever *Brady*

responsibilities there may be with respect to this evidence, those responsibilities fall on the prosecutor and are, thus, not a concern of law enforcement. Answering Br. 12 ("The duty to disclose under *Brady* is solely on the prosecutor ..."); *id.* at 14 ("[T]he Department has no obligation under *Brady.*"); *id.* at 48 ("*Brady* . . . does not impose obligations on law enforcement. *Brady* relates only to the prosecutor."); *id.* at 49 ("the Department does not have constitutional obligations under *Brady*"); *see also id.* at 46-47, 53. This shoulder shrug does not acknowledge the constitutional significance of the *Brady* material, nor does it acknowledge the responsibilities that law enforcement officers and agencies bear as agents of the prosecution. *Kyles*, 514 U.S. at 437. This insouciance about *Brady* compliance should not become governing law.

The *Brady* alert system is a critical element of ensuring that *Pitchess* complies with *Brady*. The *Johnson* Court was right to "laud[]" such alert systems, *Johnson*, 61 Cal. 4th at 721, and the Court in this case should go farther if it wants to avoid deciding the direct conflict between *Brady* and *Pitchess*. It should hold that these alert systems are required in all jurisdictions.[8] In this sense, we agree with ALADS: the same logic that permits these alert systems ought to make them mandatory. *See* Answering Br. at 47. ("If *Brady* imposed a constitutional obligation on the Department to turn over names and employee numbers of deputies on a Department's so-called *Brady* list, then such obligation would be mandatory."). There are only two alternatives to requiring the alert systems: one is to give up on *Brady* altogether, which is not really an option; the second is for the Court to declare

[8] The Court should reemphasize that tips generated by these systems are sufficient to satisfy *Pitchess*'s "good cause" showing, when coupled with a statement of how the officer's credibility might be relevant to the case. *See Johnson*, 61 Cal. 4th at 721; *Serrano*, 16 Cal. App. 5th at 774.

that *Pitchess* permits prosecutors to access the personnel files for *Brady* purposes—a conclusion that would require revisiting *Johnson*.

VI. CONCLUSION

California has staked out an extreme position with respect to police privacy. However, that policy is necessarily bounded by federal constitutional law. The simplest escape from the conflict between *Brady* and *Pitchess* is to allow prosecutors to review police personnel files for *Brady* material, thus relocating California to the national mainstream. But this solution would require a reworking of the Court's recent decision in *Johnson*. If the Court is reluctant to revisit the holding of that case, it should instead declare that all jurisdictions must employ *Brady* alert systems in order to save *Pitchess* from directly violating *Brady*. At a minimum, it must hold that *Brady* alert systems like the one in this case are permissible.

Dated: May 2, 2018

By: 

Jonathan Abel

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CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that the foregoing proposed Amici Curiae Brief contains 5,356 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the cover information, the signature block, and this certification.

Dated: May 2, 2018

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PROOF OF SERVICE

***ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS v. SUPERIOR COURT OF LOS ANGELES COUNTY*, No. S243855**

I, Shira Levine, state:

I am a citizen of the United States. My residence is 1531 Everett Ave, Oakland, CA 94602. I reside in Alameda County, California, where this mailing took place. I am over the age of eighteen years and not a party to this action. On the date forth below, I served the foregoing documents described as:

REQUEST FOR PERMISSION TO FILE AMICI CURIAE BRIEF OF LAW SCHOOL PROFESSORS IN SUPPORT OF REAL PARTY IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT

AND

AMICI CURIAE BRIEF OF LAW SCHOOL PROFESSORS IN SUPPORT OF REAL PARTY IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT

on the following persons in this action addressed as follows:
SEE ATTACHED SERVICE LIST

[X] BY FIRST CLASS MAIL – I deposited with the United States Postal Service this same day in Oakland, California, the said correspondence in a sealed envelope, postage prepaid.

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

Shira Levine

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ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS v. SUPERIOR COURT OF LOS ANGELES COUNTY, No. S243855

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