Supreme Court Case No. S243855

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS

Petitioner,

v.

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, Div. 8
2d Civ. No. B280676

After an Appeal from the Superior Court of Los Angeles County
Judge James C. Chalfant
LA County Sup. Ct. Case No. BS166063

PETITIONER ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS' ANSWER TO PETITION FOR REVIEW

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

The Association for Los Angeles Deputy Sheriffs ("ALADS"), Petitioners in the trial court and Court of Appeal, files the instant brief in opposition to the Petition for Review filed by the County of Los Angeles, the Los Angeles County Sheriff's Department, and Sheriff Jim McDonnell (collectively referred to hereinafter as Sheriff's Department), and in support to the Opinion of the Court of Appeal of California, Second Appellate District, Division 8.

The Court of Appeal correctly ruled that in order to uphold the injunction issued by the trial court, which authorized the Sheriff's Department to release employee discipline information to prosecutors, *"would require us to find the Pitchess statutes unconstitutional insofar as they prohibit, absent compliance with their specific procedures, disclosure to prosecutors of deputies from the Brady list who are also potential witnesses in a pending criminal prosecution. . . . Both our Supreme Court and at least one Court of Appeal have examined the constitutionality of Pitchess and the Pitchess statutes in light of Brady and found no constitutional infirmity." Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 422 (*ALADS*).

Contrary to the arguments submitted by the Sheriff's Department in support of its Petition for Review, this case presents no important issue of law which has not already been decided by this Court or over which there is any dispute in the Appellate Courts. The language of Penal Code section 832.7, which was central to the Court of Appeal's decision, is clear on its face:

> *"Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5,* ***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****."*

The proposed release by the Sheriff's Department of information directly obtained from the personnel files of its peace officer employees, i.e., the fact that specifically named Deputy Sheriffs have been disciplined for conduct which the Sheriff has determined negatively impacts the Deputy's credibility as a prosecution witness, is exactly the type of information which section 832.7 prohibits from release without compliance with the motion procedure established by Evidence Code sections 1043, *et seq.* The Sheriff's Department's overly broad claim of a constitutional obligation to release the statutorily protected discipline information is contrary to the language of section 832.7, the actual holding by this Court in *People v. Superior Court [Johnson]* (2015) 61 Cal.4th 696, 714 (*Johnson*), and the consistent judicial interpretations of the interplay between *Brady v. Maryland* (1963) 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (*Brady*) and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531(*Pitchess)* over the past 40 years. The Department's misinterpretation of the law, highlighted by its over-emphasis of one word in this Court's 27 page unanimous decision in *Johnson*, does not create a legal issue necessitating this Court's intervention.

FACTUAL BACKGROUND

The Court of Appeal in this case accurately and extensively set forth the factual and procedural history of this case. In light of that extensive statement of the case, the following is a short summary of the proceedings.

More than a year after this Court's decision in *Johnson* was published, the Sheriff's Department decided to create a list of Deputy Sheriffs who the Department determined, with no input from the affected Deputies or ALADS, had been previously disciplined for conduct which the Department determined involved moral turpitude or otherwise rendered the Deputy unable to credibly testify in a criminal prosecution. In October, 2016, the Department notified the approximately 300 Deputies the Department placed on its list that their names, and the Department's conclusion that their prior discipline history rendered them unable to testify

credibly in a criminal prosecution, would be turned over to the District Attorney.

ALADS responded by filing an application for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. The parties stipulated to the issuance of a TRO preventing the Department's release of the list and, after further briefing, the trial court issued a preliminary injunction.

The Sheriff's Department's stated intent in its letter to the affected Deputies was to immediately turn its internal *Brady* list over to the District Attorney and other prosecutors. The trial court correctly determined this release of discipline information was in direct violation of the *Pitchess* statutes since the Department had no "Brady obligation" outside the context of a specific, pending criminal prosecution. The trial court nonetheless issued an injunction authorizing the Department to release the discipline history information compiled by the Department, including the Department's credibility determination made on the basis of the previously imposed discipline, any time a Deputy on the list was a "potential" witness in a specific criminal prosecution, even though the Department never previously intended to release the information under these circumstances.

ALADS sought immediate Writ review in the Court of Appeal. The Court of Appeal granted the relief ALADS sought with regard to the Department's release of discipline information to prosecutors, finding that the trial court's order allowing the release of the statutorily confidential information constituted an incorrect determination that Penal Code section 832.7 is unconstitutional.[1]

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[1] Although ALADS' Petition for Writ of Mandate and Complaint for Injunctive Relief filed in the trial court sought relief under the Peace Officer's Bill of Rights Act preventing the Department from taking punitive action against Deputy Sheriffs by placing deputies on the internal *Brady* list or by transferring or otherwise altering their working conditions, the focus of the emergency injunctive relief sought by ALADS was the prevention of the Department's threatened release of its list to prosecutors.

The Sheriff's Department now seeks this Court's review and agreement with the trial court that the provisions of Penal Code section 832.7 and the corresponding sections of the Evidence Code are unconstitutional, despite decades of legal precedence to the contrary.

ARGUMENTS

A. THIS COURT'S DECISION IN *JOHNSON* DOES NOT REQUIRE REVIEW OF THE COURT OF APPEAL'S DECISION IN THIS CASE.

The Sheriff's Department begins its plea for review by overstating the significance of the San Francisco Police Department's (SFPD) practice under its Bureau Order 2010-01 to the determination of the legal issues before this Court in *People v. Superior Court [Johnson]* (2015) 61 Cal.4th 696, 714 (*Johnson*). The case presented to this Court in *Johnson* arose from the Court of Appeal's decision that criminal prosecutors must be allowed unfettered access to the personnel files of any peace officer who is expected to testify as a witness in any criminal prosecution, in order for the district attorney to conduct a preliminary review for potentially exculpatory evidence, without any party filing a motion for disclosure pursuant to Evidence Code § 1043, *et seq.* The determination of the legal error in this ruling was not based upon, or related to, the SFPD's practice of providing the district attorney with a list of officers with presumed *Brady* material in their personnel files, since the Court of Appeal actually ignored that practice when it ordered the SFPD to instead produce the entire personnel file for every officer involved in every prosecution.

Both the trial court and the Court of Appeal in *Johnson* held that Penal Code section 832.7 is unconstitutional because it blocks criminal prosecutors from having unrestricted access to the personnel files of its witnesses so that the prosecutor can comb the file of the prosecution team member for possible *Brady* material. This Court specifically rejected that conclusion, holding instead, based largely on the language of Penal Code section 832.7, that the prosecution has no greater access to police personnel

files than does the criminal defendant. *Johnson, supra*, 61 Cal 4th at 712-714.

The Sheriff's Department's distortion of the decision in *Johnson*, in order to claim a constitutional obligation to promulgate and publish a *Brady* list, takes a discussion of what information is necessary to make the preliminary showing required to obtain trial court review of personnel files under the *Pitchess* statutes and turns it, incorrectly, into the gravamen of this Court's decision.

One of the two issues identified by this Court in *Johnson* was *"whether the prosecution's obligation under Brady v. Maryland (1963) 373 U.S. 83 (Brady) and its progeny [would] be satisfied if it simply informs the defense of what the police department has informed it (that the two officers' personnel files might contain Brady material), which would allow the defense to decide for itself whether to seek discovery of that material pursuant to statutory procedures."* *Johnson, supra*, 61 Cal. 4th at 709. Contrary to the assumptions underlying the Sheriff's Department's arguments in this case, the *Johnson* case neither raised nor decided the lawfulness of the procedures agreed to by the San Francisco Police Department and the San Francisco District Attorney's Office regarding the police department's release of a list of its officers with disciplinary histories which the department determined negatively impacts the officer's ability to testify credibly in a criminal prosecution. The procedure established by SFPD's Bureau Order No. 2010-01 was never contested by any party in *Johnson* as unlawful. As such, the issue of the lawfulness of that Bureau Order was never considered or decided by this Court.

This Court resolved the issue related to Bureau Order 2010-01 as follows:

> *"When the police department informed the district attorney that the officers' personnel records might contain Brady material, the prosecution had a duty under Brady, supra, 373 U.S. 83, to provide this information to the defense. No one disputes that.* ***The question before us is whether the obligation goes beyond that****.*

> *Defendant argues that the district attorney has an obligation under Brady to provide material exculpatory information possessed by any member of the prosecution team, including the police department. The district attorney and police department respond that although in general the prosecutor's obligation to provide Brady material extends to what the police know, the 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. 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****." [Emphasis added.] 61 Cal.4th at 715.*

This Court's actual determination that the prosecution has no *Brady* obligation to obtain personnel file information which the defense can obtain itself did not turn on the existence or lawfulness of Bureau Order 2010-01, contrary to the Sheriff's Department's assertions in its current Petition for Review. Rather, that determination turned on the lawfulness of the provisions of Penal Code section 832.7 and Evidence Code sections 1043, *et seq.*, specifically as they relate to a prosecutor's obligations under *Brady*. This Court's discussion of that issue was extensive and involved an in depth analysis of the established law from both Federal and California Courts. (61 Cal.4th at pp.715-722.)

The *Johnson* Court began its analysis with a review of the established law concerning the purpose and scope of the *Brady* rule, recognizing that *"the prosecutor had no constitutional duty to conduct defendant's investigation for him. Because Brady and its progeny serve to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery, the Brady rule does not displace the adversary system as the primary means by which truth is uncovered."* 61 Cal.4th at p. 715, quoting *United States v. Martinez-Mercado* (5th Cir. 1989) 888 F.2d 1484, 1488; see further, 61 Cal.4th at pp. 715-717.

The Court next analyzed and followed the line of cases which have found the proper procedure for determining if any *Brady* information is contained in confidential files, including Child Protective Services records,

Pennsylvania v. Ritchie (1987) 480 U.S. 39, 59-61 and *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1333-1334, is by motion establishing materiality of information from the confidential files to the pending prosecution and the trial court's *in camera* review of the confidential files. 61 Cal.4th at 717-718. The Court likewise analyzed and applied the logical advantages of having the defendant rather than the prosecution pursue a *Pitchess* motion for discovery of discipline information from the peace officer witness's personnel files. *Id* at pp. 718-719.

Finally, and not primarily as the Sheriff's Department now claims, the Court rejected the defense's argument that the *Pitchess* statutes required a showing of too much information which the defense could never produce, therefore requiring the prosecutor, in order to comply with *Brady*, to review the personnel files of any peace officer witness and provide any impeachment information located in the file to the defense. The *Johnson* Court reasoned as follows [2]:

> *"[Defendant] argues that the Pitchess procedures are inadequate to protect his rights. We disagree. The Brady requirements and Pitchess procedures have long coexisted.* ***The Pitchess scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in*** *Brady. Instead, the two schemes operate in tandem. (People v. Gutierrez, supra, 112 Cal.App.4th at p. 1473.) We are confident that trial courts employing Pitchess procedures will continue to ensure that defendants receive the information to which they are entitled.*
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> *"Defendant is concerned that the required threshold showing is too high to expect him to be able to obtain exculpatory material from personnel records. On the contrary, a defendant must show good cause, but the burden is not high. Good cause for discovery exists when the defendant shows both materiality to the subject matter of the pending litigation and a reasonable belief that the agency has the type of*

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[2] While clearly this Court is intimately familiar with its own words from the Johnson decision, the following excessively long quote is necessary to properly place the word "laudable" back into the context it was actually used, in order to distinguish it from the manner it is presented by the Sheriff's Deprtment in its Petition.

information sought. (City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 84.) A showing of good cause is measured by relatively relaxed standards that serve to insure the production for trial court review of all potentially relevant documents. (Ibid.) (People v. Gaines (2009) 46 Cal.4th 172, 179.) ***The defense only needs to demonstrate a logical link between the defense proposed and the pending charge and describe with some specificity how the discovery being sought would support such a defense or how it would impeach the officer's version of events****. (Id. at p. 182, quoting Warrick v. Superior Court (2005) 35 Cal.4th 1011, 1021; see Warrick, at pp. 1024–1025 [the defense proposed may, depending on the circumstances of the case, . . . consist of a denial of the facts asserted in the police report].) This specificity requirement excludes requests for officer information that are irrelevant to the pending charges. (Warrick, at p.1021.) But if the defendant shows that the request is relevant to the pending charges, and explains how, the materiality requirement will be met.*

"Contrary to defendant's concern, to satisfy the "reasonable belief" requirement, he need not know what information is located in personnel records before he obtains the discovery. Such a requirement would be impossible. The required threshold showing does not place a defendant in the Catch-22 position of having to allege with particularity the very information he is seeking. (People v. Memro (1985) 38 Cal.3d 658, 684.) A reasonable belief that the agency has the type of information sought does not necessarily mean personal knowledge but may be based on a rational inference. (City of Santa Cruz v. Municipal Court, supra, 49 Cal.3d at p. 90 [finding adequate to trigger in camera review defense counsel's declaration stating the "belie[f]" that members of the public "may have" filed complaints of use of excessive force by the officers in question].) It is equally apparent that the statute, in calling for a description of the type of records sought to be disclosed, does not require the affiant to prove the existence of particular records. . . . Clearly, an affidavit which describes the information sought as consisting of prior complaints of excessive force by specific officers . . . has specified a . . . type of information within the plain meaning of the statute. (Id. at pp. 90-91.)

"In this case, the police department has laudably ***established procedures to streamline the Pitchess/Brady process****. It notified the prosecution, who 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. Moreover, as we have noted, 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****. The defense is not required simply to trust the prosecution or police department but may always investigate for itself. For these reasons, we conclude that, under these circumstances, permitting defendants to seek Pitchess discovery fully protects their due process right under Brady, supra, 373 U.S. 83, to obtain discovery of potentially exculpatory information located in confidential personnel records.* ***The prosecution need not do anything in these circumstances beyond providing to the defense any information it has regarding what the records might contain — in this case informing the defense of what the police department had informed it****."* 61 Cal 4th at 719-721.

This analysis by the *Johnson* Court makes clear that the lawfulness of the procedure created by the SFPD under Bureau Order 2010-01 was neither in question nor determined by this Court. When considered in the context it was actually used in the decision, the word "laudable," on which the Sheriff's Department relies so heavily to justify its planned release of its *Brady* list, does not and cannot be read to mean "lawful."

B. <u>THE SHERIFF'S DEPARTMENT'S INTERPRETATION OF THIS COURT'S USE OF THE WORD LAUDABLE IS CONTRARY TO ESTABLISHED LAW</u>.

The *Johnson* Court's description of the SFPD practice under Bureau Order 2010-01 as laudable is not, as asserted by the Sheriff's Department here, essential to the determination of the legal issue presented in the *Johnson* case. This is clearly established by the Court's analysis just three sentences following the use of the word laudable: *"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." 61 Cal. 4th at p. 721.

Both the Sheriff's Department and Justice Grimes, in her dissenting opinion, simply ignore this observation by the Court. Had the Court, as assumed by Justice Grimes, silently determined that the SFPD process was constitutionally required in order for the prosecution to comply with Brady, this stated conclusion would directly contradict the unstated ruling assumed by Justice Grimes.

This Court's conclusion that a defendant is capable of making the required showing necessary to obtain in camera review under the Pitchess statutes without the information that a specific officer's supervisors think that the officer's personnel file may contain Brady material, is completely consistent with this Court's ultimate conclusion in *Johnson* that the Pitchess statutes are not unconstitutional because the information in the personnel files is equally available to prosecution and the defense. The Court's passing description of SFPD's procedure as laudable, however, adds nothing to the legal analysis of the point.

C. THE BRADY LIST PROCESS PROPOSED BY THE SHERIFF'S DEPARTMENT VIOLATES WELL ESTABLISHED LAW.

The discipline history information released pursuant to SFPD's Bureau Order 2010-01 and proposed to be released by LASD's Brady list, is, as a matter of well established law, precluded from release absent a litigated and decided *Pitchess* motion. Penal Code § 832.7; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1297-1299 (*Copley Press*); *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 71-73 (*Long Beach*); *Commission on Peace Officers Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 295, 298-299 (*POST*). The unsolicited release of peace officer disciplinary history information by police agencies across the State which have followed SFPD's practice after

the issuance of the Attorney General's Opinion perfunctorily validating that practice (98 Ops.Cal.Atty.Gen. 54 (2015)) is similarly illegal.[3]

The *Brady* list practices which have been implemented following *Johnson* and the Attorney General's opinion all allow the release of specific discipline information about specific peace officers under circumstances where no criminal case is pending and no *Pitchess* motion has been filed or decided. Since the concept of the "prosecution team," which is the asserted Constitutional justification for the release of the confidential information in violation of the statute's clear provisions, does not exist when no prosecution is pending, no *Brady* obligation can justify the voluntary release of the information under those policies. *ALADS, supra*, 13 Cal.App.5th 413, 422.

The Sheriff's Department, as well as *Amici* who have requested permission to submit their opinions urging this Court to grant review and reverse the Court of Appeal's decision, rely upon the same administrative convenience which originally fostered Bureau Order 2010-01. These arguments, however, simply ignore the long established rule that public safety agencies have an obligation to protect the confidentiality of their peace offer employees' personnel files and are not free to voluntarily release the information, even when the agency believes the release is for a good reason.

In *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902 the Court of Appeal held that *"even though the Board's narrative report on the Miller shooting was not requested in discovery in a civil or criminal proceeding, the report constituted a confidential personnel record of the individual plaintiff officers. As such, San Diego could not properly make a voluntary public disclosure of that report."* The same conclusion was

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[3] The argument of the Sheriff's Department and those of the *Amici* who have thus far requested permission to file briefs in support of the Department's position seem to steadfastly ignore the sage advice of every mother: *"Just because everyone else is jumping off the bridge . . ."* Just because many police agencies have cleared the bridge by creating and releasing *Brady* lists simply does not make the practice lawful.

reached in *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1210, fn. 5: *"section 832.7 . . . imposes on the sheriff the duty to maintain the confidentiality of peace officer personnel records or information obtained from those records."*

The statutory confidentiality created by the Penal Code has been uniformly recognized by California Courts to be protectable by both the officer and the agency. As noted by the Third District Court of Appeal in *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401:

> *"Plaintiffs overlook the fact that the privilege against disclosure of official police records is held both by the individual officer involved and by the police department. (San Francisco Police Officers' Assn. v. Superior Court (1988) 202 Cal.App.3d 183, 189 [248 Cal.Rptr. 297].) ... [Fn.] As the court explained in San Francisco Police Officers' Assn. v. Superior Court, supra, 202 Cal.App.3d at page 189: 'The report by the Senate Committee on the Judiciary indicates that the main purpose of the [initial legislation establishing the official records privilege] was to curtail the practice of record shredding and discovery abuses which allegedly occurred in the wake of the California Supreme Court's decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305].' By affording the employing entity a privilege of nondisclosure, the incentive for destruction of records is eliminated."*

Likewise, in *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1430 the Court held:

> *"By allowing the agency to leave the individual officer publicly twisting in the wind, [the Bradshaw court] makes a choice between confidentiality and public access which, in our view, is inconsistent with the statutory scheme. If section 832.7 is to have any real meaning for the officer, it must extend a right enforceable by him as well."*

Similarly ignored by the Attorney General and agencies following the SFDP practice is the equally well established rule that personnel file information may not be released through means other than the motion described in Evidence Code sections 1043, et seq. See, *Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 100 (litigant could not circumvent *Pitchess* motion procedures, by using civil discovery procedures to obtain

information from a police officer's personnel file); *City of San Diego v. Superior Court* (1981) 136 Cal.App.3d 236, 237 ("*the statutes which protect personnel records and information from such records also protect the identical information about personnel history which is within the officers' personal recollections*."); *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 599, (rejecting attempt to obtain personnel file information through a CPRA request); *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, 432 (defendant could not circumvent the *Pitchess* process for discovery of a police officer's personnel files by requesting officer's criminal history records from district attorney and not from police department).

In *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019-1020, the Court of Appeal specifically required that a *Pitchess* motion be filed by a defendant seeking information from a peace officer witness's personnel file for impeachment purposes. In reaching this conclusion, the Court discussed the requirement that the defendant establish good cause for that discovery. As the Court held:

> "*To grant discovery of peace officer personnel records on the basis that [People v.] Wheeler [(1992) 4 Cal.4th 284] permits discovery of all personnel records reflecting officer misconduct involving moral turpitude, without requiring defendant to comply with the good cause requirement of Evidence Code section 1043,* ***would have the effect of destroying the statutory scheme****. Defendants could assert merely that police officers are known to lie, and thereby obtain discovery of all information contained in an officer's personnel records which potentially reflects on the officer's credibility.* ***This procedure would effectively abrogate the good cause requirement set forth in the Evidence Code and approved and applied by our Supreme Court, by permitting fishing expeditions into the arresting officers' personnel records in virtually every criminal case***. [Emphasis added.]

Also overturned without analysis by the Attorney General's opinions is the line of cases consistently holding that the prosecution does not have access to confidential personnel records absent compliance with the Pitchess procedures. *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633,

642; *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 415 [31 Cal. Rptr. 3d 735]; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475 [6 Cal. Rptr. 3d 138]; *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 56 [4 Cal. Rptr. 3d 767]; *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 404–407 [67 Cal. Rptr. 2d 910]. The release of a list of names of peace officers who are identified solely because of disciplinary information from their personnel files flies directly in the face of these decisions.

Contrary to the Sheriff's Department's assertions in its current Petition, the Court of Appeal's decision in this case did not impose a "sea change" in criminal procedure. As the case law discussed *supra* establishes, any "sea change" would result from this Court's adoption of the Sheriff's Department's position in this case.

Likewise, this Court did not intend to overturn the foregoing extensive jurisprudence regarding the Constitutional validity of the statutory scheme enacted to protect both the confidentiality rights of California peace officers and the due process rights of criminal defendants by its description of the SFPD procedures under Bureau Order 2010-01 as "laudable." Rather, the complete dismantling of a statutory scheme which has worked for decades, and which has been uniformly held to be Constitutional in face of attacks nearly identical to those offered by the Sheriff's Department here, would be the result of the adoption of the Sheriff's Department's position in this case.

D. THE SHERIFF'S DEPARTMENT'S SUGGESTED "LIMITED EXCEPTION" TO THE STATUTORY PROCEDURE IS UNTENABLE.

San Francisco's Bureau Order 2010-01, as illustrated by the Sheriff's Department's arguments urging this Court to judicially create a "limited" exception to the requirements of the *Pitchess* statutes, goes too far in its efforts to cut down on manpower and overhead costs at the expense of peace officer confidentiality rights. Contrary to the Sheriff's Department's arguments, the confidentiality rights of peace officers state-wide which are at issue in this case are not solely the product of the *Pitchess* statutory

scheme. Rather, those confidentiality rights are recognized and protected by Article I, Section 1 of the California Constitution. See, *Copley Press, supra,* 39 Cal. 4th 1272, 1300-1301. The balancing of Federal Constitutional rights and State Constitutional rights is a more complex question than the over-simplification evidenced in the Department's arguments that the Constitution trumps statutory rights. (Petition, pp. 27-28.)

The Department's argument that a "limited" exception to the *Pitchess* procedure can be carved out to protect the due process rights of criminal defendants itself illustrates the fallacy of the argument. The Sheriff's Department relies heavily for support of its limited exception position on the decision in *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10, which held that the 5 year limitation on discovery set forth in Evidence Code section 1045(b)(1) is inapplicable to Brady material sought in a *Pitchess* motion.

The 5 year discovery limitation at issue in *City of Los Angeles* is in fact a legislatively created, State law. The overall privacy rights of peace officers, which are directly and negatively impacted by the Sheriff's Department's proposed limited exception carve-out, are defined as inalienable rights by Article 1 Section 1 of the State Constitution. (*"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."*)

The Sheriff's Department's proposed carve-out thus creates an exception which swallows the rule. The exception proposed is that any time any peace officer is disciplined and his or her supervisors decide that the discipline those supervisors have imposed implicates the truthfulness or veracity of the officer, the supervisors are then allowed to report the officer, by name, as someone lacking in truth and veracity due to the disciplinary event, to someone not entitled to know that information. The SFPD process, and similar procedures authorized by the Attorney General's

opinion, allow this release of information at any time and without request by the District Attorney.

The limitation imposed by the trial court in this case, and now urged by the Department to be adopted by this Court as binding on all public safety employers in the State, would require that the unsolicited release of disciplinary history information will only occur when a peace officer is a "potential" witness in a criminal prosecution. This proffered exception to the statutory process improperly substitutes the Sheriff's Department's or other public safety employer's determination of relevance and materiality for that of the trial court, which is statutorily charged with the responsibility for making that determination. See, Evidence Code §§ 1043, *et seq.; Johnson, supra*, 61 Cal. 4th 696, 722 (*"The superior court was concerned that requiring it to review personnel records routinely for exculpatory material, including Brady material, would be too onerous. Personnel records can be quite voluminous. One answer to this concern is that the burden has long existed. First this court in Pitchess, supra, 11 Cal.3d 531, and then the Legislature in codifying Pitchess, placed the burden on the courts. It cannot be avoided."*)

In addition, the exception which the Sheriff's Department seeks to have this Court judicially impose on the statute is improperly over-broad. Every deputy on the scene of an arrest is a "potential" witness in the subsequent prosecution of that arrestee. Not every deputy on scene, however, is a witness whose credibility would be relevant or material to the issues or defenses in the case. As accurately explained by the Court of Appeal in this case,

> *"Not all "potential" LASD witnesses in a criminal case, however, will be significant enough that impeachment information in their personnel files will be material, which Brady requires as a prerequisite to disclosure. For example, while the credibility of a homicide detective who obtains an unrecorded confession from a murder defendant would likely be a material issue at trial, that of a patrol deputy who simply arrests the defendant but otherwise generates no incriminating evidence likely would not be. In the latter situation, impeachment information in the deputy's personnel file likely would not be material under Brady and thus there*

> *would be no disclosure obligation, even if we assume the validity of the trial courts constitutional rationale, that justifies ignoring the requirements of the Pitchess statutes. The injunction, though, permits violation of the Pitchess statutes in both situations described above, since it treats potential witnesses identically regardless of their materiality. The injunction is therefore overbroad even if we assume the validity of its own rationale." ALADS, supra,* 13 Cal. App. 5th 413, 440.

The rule proposed by the Sheriff's Department in this case would, in reality, erase any confidentiality protection for peace officer disciplinary records. Under the Department's view of the rule, any time any peace officer makes an arrest, information from his or her disciplinary records, specifically the information that the disciplinary record renders the officer incapable of testifying credibly in the prosecution, would be immediately turned over to the prosecutor. This would occur once charges were filed, apparently before any preliminary hearing or arraignment was held, and well prior to any plea discussions by the parties to the criminal case.

Since the statutory motion procedures would not be applicable, so to would the statutory requirement that a protective order be entered, preventing the use of the information for any reason other than the prosecution in which the information is released, not apply. This allows everyone in the prosecutor's office unfettered access to the information at any time. Nothing, in fact, precludes the prosecutor from sharing the information with not just defense counsel but the press or the public at large. In fact, nothing in the Department's proposed rule would prevent the Department from unilaterally providing the information to the defense, the press, or the public. This, however, is exactly what the *Pitchess* statutes intended to prevent and nothing in *Brady* requires this result.

The Sheriff's Department, in urging what it defines as a simple carve-out exception to the statutory *Pitchess* process, in fact requires, as correctly identified by the Court of Appeal in this case, a declaration that the statute is unconstitutional, despite 40 years of jurisprudence to the contrary:

> *"The trial court's finding that, because of its "Brady obligation," the LASD "may" violate the Pitchess statutes' disclosure prohibition, is, in our opinion, identical to finding that the Pitchess statutes' disclosure prohibition is unconstitutional in the particular context of a filed prosecution wherein a Brady list deputy is a witness. There is simply no lawful way judicially to approve a violation of state law unless compelled to do so by a higher authority: in this case, the United States Constitution as construed in Brady.*" 13 Cal. App. 5th at p. 421.

As this Court noted in *Copley Press*, supra:

> *"In enacting and amending sections 832.5, 832.7, and 832.8, the Legislature, though presented with arguments similar to Copley's, made the policy decision "that the desirability of confidentiality in police personnel matters does outweigh the public interest in openness." (Hemet, supra, 37 Cal.App.4th at p. 1428, fn. 18.) Copley fails to explain why the considerations underlying the Legislature's policy decision apply differently, depending on whether a part of a disciplinary matter that the officer's employer must, by statute, provide is handled inside or outside the law enforcement department itself. In any event, it is for the Legislature to weigh the competing policy considerations. As one Court of Appeal has explained in rejecting a similar policy argument: "[O]ur decision … cannot be based on such generalized public policy notions. As a judicial body, … our role [is] to interpret the laws as they are written."* (*SDPOA, supra*, 104 Cal.App.4th at p. 287.) [Footnotes omitted.] 39 Cal. 4th at 1298-1299.

Here, the Sheriff's Department fails to explain why the Legislature's policy determination that the privacy of police disciplinary records should be protected and subject to release only pursuant to a motion addressed to the sound discretion of the trial court, should now, after 40 years, be declared unconstitutional and eliminated. The administrative expedience and cost savings underlying SFPD's Bureau Order 2010-01 and the appeal to transparency articulated by the Sheriff's Department are insufficient to justify the judicial repeal of this statutory scheme which the Sheriff's Department herein seeks.

The Court of Appeal in this case issued a thoughtfully considered and well reasoned decision, which took into consideration, and followed,

the four decades of jurisprudence related to the *Pitchess* statutory scheme, the *Brady* rule, and the inter-play between the two. Contrary to the Sheriff's Department's suggestion in its instant Petition, the Court of Appeal did not "invite" this Court's re-review of its decision in *Johnson*. Rather, the Appellate Court correctly applied the existing judicial interpretations finding the statutory scheme at issue to be constitutional, specifically in light of the rule established in Brady.

E. THE "SEA-CHANGE" IN CRIMINAL PROSECUTIONS WILL RESULT FROM ADOPTION OF THE SHERIFF'S DEPARTMENT'S PROPOSED RULE, NOT THE COURT OF APPEAL'S DECISION.

The Sheriff's Department also asserts that if this Court allows the Court of Appeal's decision to stand, the sea change in criminal jurisprudence which will result will overwhelm the entire system. The most fundamental error in this argument is that the Court of Appeal's decision in this case effects no change whatsoever to existing *Pitchess* and *Brady* jurisprudence. The Court of Appeal's decision faithfully considered, followed, and applied existing judicial determinations that the provisions of the *Pitchess* statutes and the *Brady* rule are both lawful and can peacefully co-exist. The Sheriff's Department's position is the one which will up-end that long recognized and efficient co-existence.

Contrary to the Department's assertions, as previously noted, the *Johnson* Court directly recognized that a criminal defendant is not assisted at all in making the showing necessary to obtain in camera review of police personnel and discipline records by being advised by the prosecutor that a supervisor of a peace officer witness thinks the officer lacks veracity. With or without this information, the defense must establish

> *". . . materiality to the subject matter of the pending litigation and a reasonable belief that the agency has the type of information sought. A showing of good cause is measured by relatively relaxed standards that serve to insure the production for trial court review of all potentially relevant documents. The defense only needs to demonstrate a logical link between the defense proposed and the pending charge and describe with some specificity how the discovery being*

> *sought would support such a defense or how it would impeach the officer's version of events. This specificity requirement excludes requests for officer information that are irrelevant to the pending charges. But if the defendant shows that the request is relevant to the pending charges, and explains how, the materiality requirement will be met."* [Internal quotation makes and citations omitted.] 61 Cal.4th at 720-721.

The showing necessary to have a *Pitchess* motion granted, and in camera review held by the trial court is not now and never has been onerous. The addition of the fact that a supervisor thinks the witness officer is not credible does not establish any of the facts needed to present a logical link between the proposed defense and the pending charges. *Id*.

While undoubtedly it is easier for criminal defendants to submit *Pitchess* motions which simply state that a witness officer is on a *Brady* list, this information simply does not meet the standard of establishing the necessary logical link between a defense and the pending charges. Lowering the minimum threshold showing needed to obtain in camera review of discipline records from materiality and reasonable belief the agency has the type of information sought, to his supervisor thinks he's a liar, as is the essence of the Department's position, will ensure fishing expeditions and increase the frequency of filed *Pitchess* motions exponentially. This sea change in jurisprudence and practice is not supported by the long standing decisions of this Court and California Appellate Courts that *Brady* due process considerations do not render the *Pitchess* procedures unconstitutional. *Johnson, supra*; *City of Los Angeles, supra*; *People v. Gutierrez, supra*, 112 Cal.App.4th at p.1473.

CONCLUSION

Nothing presented by the Sheriff's Department in this case identifies an important question of law which has not previously been decided by this Court. See, e.g., *Johnson, supra*; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10, 12; *People v. Mooc* (2001) 26 Cal.4th 1216, 1219–1220; *People v. Gutierrez* (2003) 112 Cal. App. 4th 1463, 1472;

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People v. Memro (1985) 38 Cal.3d 658, 684. As such, the instant Petition for Review should be denied, in its entirety.

DATED: September 21, 2017

Respectfully submitted,

GREEN AND SHINEE, A P.C.

By: //SS//

ELIZABETH J. GIBBONS
Attorneys for Petitioner Association for Los Angeles Deputy Sheriffs

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), I certify that the total word count of Petitioner's Answer to Real Parties in Interest's Petition for Review, excluding covers, table of contents, table of authorities, and certificate of compliance is 6,884.

DATED: September 21, 2017

Respectfully submitted,

GREEN AND SHINEE, A P.C.

By: //SS//

ELIZABETH J. GIBBONS
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is 16055 Ventura Boulevard, Suite 1000, Encino, California, 91436.

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PETITIONER ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS' ANSWER TO PETITION FOR REVIEW
Supreme Court Case No. S243855

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Executed on September 21, 2017, at Encino, California.

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS v. S.C. (LOS ANGELES COUNTY SHERIFF'S DEPARTMENT)**
Case Number: **S243855**
Lower Court Case Number: **B280676**

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

09-21-2017

Date

/s/Elizabeth Gibbons

Signature

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Last Name, First Name (PNum)

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