Case No.: S243855

In The Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al.,

Real Parties in Interest

On Review From The Court Of Appeal For the Second Appellate District, Division 8
Civil No.: B280676

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

ANSWERING BRIEF OF REAL PARTIES IN INTEREST TO *AMICI CURIAE* BRIEFS

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I. INTRODUCTION

Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles (hereinafter collectively referred to as "the Department") provide the following response to the *amici curiae* brief of Riverside Sheriff's Association, Los Angeles Police Protective League, Southern California Alliance of Law Enforcement, and Los Angeles School Police Association ("*Amici*") in support of the Association for Los Angeles Deputy Sheriffs' ("ALADS") position in this appeal (hereinafter "*Amici* Brief").

For two general reasons, the *Amici* Brief does not support ALADS' position on appeal. First, the *Amici* Brief dedicates most of its discussion to summarizing background points and developments in the law and providing no explanation of why these support ALADS' position. The *Amici* Brief describes, for example, the following miscellaneous background items. It describes that no U.S. Supreme Court case has yet decided on how the standards of *Brady v. Maryland* (1963) 373 U.S. 83, apply to police internal disciplinary and investigative files (*Amici* Brief at p. 10), and that states such as Delaware, New Jersey, and New York have their own standards for release of peace officer information to criminal defendants that have certain similarities to and differences from California's statutory system under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, which is contained in Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045 (collectively, the "*Pitchess*" statutes) (*id.* at pp. 14-17). It also describes that different federal authorities have addressed *Pitchess*-like scenarios (*id.* at pp. 17-19), and that states treat the confidentiality of peace

officer information differently. (*Id.* at pp. 23-25.)[1] However, there is no cogent discussion as to why these background points and developments advance any position of *Amici* or ALADS. In fact, some items the *Amici* Brief discusses actually tend to support the Department's position. For example, the Brief explains that there is a bill pending in the California Legislature to amend the *Pitchess* statute to allow greater disclosure of peace officer information. (*Amici* Brief at pp. 25-26 (referencing Sen. Bill 1421, 2017-2018 Reg. Sess. (Cal. 2018).) Although not directly pertinent to the question before this Court, it shows a public policy trend toward disclosure of information contained in peace officer personnel records and supports the Department's position here.

Second, with only a couple of exceptions, when the *Amici* Brief does make arguments, they appear to address the broad point of whether, in general, *Pitchess* statutes in California violate *Brady* by requiring a preliminary showing prior to personnel file disclosure to criminal defendants or anyone. But the issue in this appeal is narrower, i.e., it pertains specifically to whether *Brady* requires and/or *Pitchess* allows one part of the "prosecution team" (law enforcement) to share the name of an officer with potential *Brady* material in his/her personnel file with the other part of the team in order to facilitate the prosecution team's collective *Brady* obligations. (See, *Giglio v. United States* (1972) 405 U.S. 150, 153-

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[1] The *Amici* Brief relies on a Stanford Law Review article to explain that states generally have "Public records," "Access and Disclosure," or "No access" statutes. (*Id.*, citing Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan.L.Rev. 743, 770-75 (2015).)

54; *In re Brown* (1998) 17 Cal.4th 873, 879, citing *United States v. Auten* (5th Cir.1980) 632 F.2d 478, 481.) As described below, a failure by *Amici* to so narrow the focus of their arguments renders most of their Brief irrelevant.

II. THE ARGUMENTS ADVANCED IN THE *AMICI* BRIEF OF THE ASSOCIATIONS LACK MERIT

A. THE ARGUMENT REGARDING FAR-REACHING CONSEQUENCES OF A RULING ALLOWING *BRADY* WARNINGS IS UNFOUNDED

Amici contend in the Brief's Introduction that a ruling by this Court in favor of the Department will have far-reaching consequences for law enforcement and place what *Amici* suggest are onerous burdens on law enforcement agencies. *Amici* appear to reason, as a matter of federal constitutional law, that *Brady* cannot give discretion to law enforcement to supersede state law *Pitchess* requirements by making a *Brady* alert. (See, *Amici* Brief at pp. 8-9.) *Amici* reason that if *Brady* alerts are allowed as a matter of constitutional law, then they are required, and not just for the Department, but essentially all law enforcement agencies. In turn, *Amici* suggest that if *Brady* alerts are required from law enforcement to prosecutors in every qualifying case then law enforcement agencies in California that do not issue warnings (as the Department does here) have potentially been violating *Brady* for many years. (*Id.* at p. 9, fn.2.) They will, *Amici* argue, have to begin creating some type of *Brady* list even though the case law and standards on what this requires are supposedly not well developed. (*Id.* at pp. 8-9.)

The foregoing contention lacks merit for a number of reasons. First, there is not just a single way for an agency to comply with a constitutional

requirement like *Brady*, and issuing an alert is just one way for a law enforcement agency to comply. As Justice Grimes described in her concurring and dissenting opinion in this case concerning the injunction at issue:

> The injunction does not compel the Department to do anything. It simply allows the Department to implement its decision that its *Brady* obligations are best fulfilled by giving the names of peace officers with *Brady* material in their files to prosecutors when charges are pending. The injunction, and a decision by this court to affirm it, would not require any other law enforcement agency to institute similar practices. It would merely confirm that such a practice is consonant with *Brady* and does not violate *Pitchess*.

(*Ass'n for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 450-51 (Grimes, J., concurring and dissenting, end note omitted.) Indeed, this concept of the *Pitchess* and *Brady* standards working in concert led this Court in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, to reference a *Brady* alert from law enforcement to the prosecution as "laudab[le]." (*Id.* at 721, "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."); *see also*, California Attorney General's office, Opinion No. 12-401 (October 13, 2015) 98 Ops.Cal.Atty.Gen. 54 (addressing procedure for limited identification of *Brady* material in officer personnel files).

Second, the foregoing argument by *Amici* regarding far-reaching secondary effects of a decision applies only if this Court rules that the alerts in this case are required (as opposed to being allowed) by *Brady*, but not if this Court rules in the Department's favor on the alternative ground that the alerts here do not violate *Pitchess*. (Department's Opening Brief filed Nov. 14, 2017 ("Opening Brief") at pp. 20-24 (setting forth statutory argument based on *Pitchess* laws).)

Third, although an argument like *Amici*'s that a decision will have far-reaching consequences may give a Court pause, it obviously should not stop this Court from providing a holding that is required by constitutional law. (See, Opening Brief at pp, 28-35 (explaining the basis for *Brady* due process principles superseding state *Pitchess* laws in this context).)

B. THE ARGUMENT BASED ON THE SIMILARITY OF *BRADY* AND *PITCHESS* STANDARDS LACKS MERIT.

Amici next make, in the Introduction to their Brief, a procedural argument based on the similarity of *Pitchess* and *Brady* standards. They contend that the issue in this case is "whether the Fourteenth Amendment permits California to require a defendant to make his or her showing of materiality, for both *Pitchess* and *Brady* purposes, at the pre-trial stage." (*Amici* Brief at p, 11.) *Amici* contend that "pre-trial procedures under the *Pitchess* statutes . . . are as constitutionally permissible as the post-trial procedures that require a similar showing of materiality in order to demonstrate '*Brady*' error has actually occurred." (*Id.* at p. 12.) This contention appears to be that because a defendant can demonstrate *Brady* error during trial or post-trial by showing material exculpatory information was not disclosed, there should be no harm in simply requiring the showing to be made earlier in a *Pitchess* motion at a pre-trial hearing. (See also,

Amici Brief at p. 27, fn.17, "There is no conflict between *Pitchess* and *Brady* because evidence that meets the higher *Brady* materiality standard will necessarily meet the lower *Pitchess* discovery standard".)

The argument lacks merit because this contention has nothing to do with the actual issue in this case -- whether a court order after a *Pitchess* motion is a prerequisite for a *Brady* alert to issue from one member of the prosecution team to the other. Indeed, even if the contention about the equivalence of pre- and post-trial "*Brady*" standards had relevance to this case, it would lack merit. The argument assumes that *Brady* is satisfied because a defendant can make a showing of materiality post-trial. Hence, requiring the showing of materiality to be made at a pre-trial hearing also satisfies *Brady*. This argument lacks merit because the government has its own independent obligation to disclose *Brady* material. Additionally, the fact that a defendant can make a *Brady* motion after trial does not satisfy due process because, in the case of confidential personnel records, it is highly unlikely a defendant would ever be privy to the information or otherwise be aware that any exculpatory evidence existed in an officer's personnel records. Accordingly, moving the time period for the motion up, under *Pitchess*, to a pre-trial hearing also would not satisfy due process if the government has not satisfied its disclosure obligation. Indeed, the inability for members of the prosecution team to communicate with one another about whether a witness has potential *Brady* material in his/her personnel file could prevent a constitutionally-required disclosure from being adequately made.

C. THE CASE LAW CITED BY *AMICI* IS INAPPOSITE

Amici also contend that the *Pitchess* process "will necessarily **prevent** '*Brady*' error from occurring." (*Amici* Brief at p, 12, emphasis in

original.) This is simply not the case if law enforcement has qualifying exculpatory material in its possession and cannot make prosecutors aware of it so that it can be disclosed. This entirely depends on criminal defendants being able to craft and win *Pitchess* motions without having all the information that *Brady* requires those criminal defendants to have.

Amici also cite several cases for the proposition that Courts have already upheld the California *Pitchess* statutes as constitutional under *Brady*. (*Amici* Brief at pp. 21-22.) The cases cited by *Amici*, including *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475-76, and *Harrison v. Lockyer* (9th Cir. 2003) 316 F.3d 1063, 1066, are distinguishable because they involved a more traditional *Pitchess* scenario in which it is the criminal defendant who makes a *Pitchess* motion that is denied (resulting in a claim that *Brady* evidence has been wrongfully withheld). The instant case presents a different *Brady* issue, i.e. whether one member of the prosecution "team" can present limited information to the other member without a *Pitchess* motion being filed and won. The cases cited do not involve this issue.[2]

Similarly, later in their brief *Amici* contend that there "are a plethora of cases, both state and federal, that have concluded requiring [a particular showing before disclosure of records] is permissible under *Brady*." (*Amici* Brief at p. 23.) None of the cases cited, however, address the particular

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[2] *De La Cruz v. Jacquez*, 2013 WL 3337767 (C.D. Cal. June 28, 2013), also discussed by *Amici*, is distinguishable for the same reason. It involved the denial of a criminal defendant's motion and contention of a consequent *Brady* violation. It did not involve communication of a *Brady* alert from one member of the prosecution team to the other.

issue presented here on the extent to which compliance with state law *Pitchess* standards is necessary for one member of the prosecution team to communicate a *Brady* alert, which consists of a name and employee number and does not contain any substantive information from an officer's personnel file, to the other member.

As to the case law cited by the Department, *Amici* contend the Department "has not cited a single case that holds the *Pitchess* scheme in California, or any *Pitchess* like scheme in any other state that requires a particular showing before disclosure of personnel records, violates *Brady*." (*Amici* Brief at p. 23.) The contention has little consequence because applicable authority cited by the Department in its briefing on the merits shows that it violates *Brady* for the Department not to be able to issue to prosecutors a simple *Brady* alert (i.e., the name of a deputy). (Opening Brief at pp. 16-20.) Case law squarely holds that both prosecutors and investigating agencies have a constitutional obligation to disclose exculpatory evidence. (*Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078, 1087, quoting *United States v. Blanco* (9th Cir. 2004) 392 F.3d 382.) A *Brady* violation occurs when the government fails to turn over even evidence that is known only to police investigators and not the prosecutors. (*Id.*, citing *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-70, and *Kyles v. Whitley* (1995) 514 U.S. 419, 438; *United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 394 ("To repeat, *Brady* and *Giglio* impose obligations not only on the prosecutor, but on the government as a whole. As we said in *Zuno-Arce*, the DEA cannot undermine *Brady* by keeping exculpatory evidence 'out of the prosecutor's hands until the [DEA] decide[s] the prosecutor ought to have it.'") (quoting *United States v. Zuno-Arce* (9th Cir. 1995) 44 F.3d 1420, 1427.)

D. THE ARGUMENT BASED ON DEFENSE THEORIES RULING OUT ANY *BRADY* ERROR LACKS MERIT

At the end of their Brief, *Amici* make an argument that appears to be that if there is no defense theory that encompasses personnel file information, and the matter goes to trial, then there is no *Brady* error even if it turns out personnel information had *Brady* material. (*Amici* Brief at pp. 26-27.) The next step in the argument appears to be that if there in fact is a defense theory encompassing personnel file information, then a *Pitchess* motion by the defense would succeed in having the information revealed. The contention lacks merit because, again, a defense theory might not be apparent if relevant *Brady* information that needs to be disclosed is never disclosed. The defense would never know to assert the relevant theory. Indeed, the foregoing arguments improperly put the entire onus on the defense to effectuate *Brady*, when instead *Brady* without question places an obligation on the government to disclose exculpatory evidence. (*Brady*, *supra*, 373 U.S. at p. 87; *Giglio*, *supra*, 405 U.S. at pp. 153-55.) The Court of Appeal's holding here therefore improperly restricts the flow of *Brady* information within the prosecution team and impairs the government's ability to make these constitutionally required disclosures.

III. CONCLUSION

In light of all the foregoing, the arguments in the *Amici* Brief lack merit and must be rejected.[3]

Dated: July 23, 2018

LIEBERT CASSIDY WHITMORE

By: _____

Geoffrey S. Sheldon
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Attorneys for Real Parties in Interest LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF JIM MCDONNELL, and COUNTY OF LOS ANGELES

[3] The *Amici* Brief contains numerous statements based on analysis of case law and legal research. The Department, by this Answer, does not attempt to correct every point, but demonstrates why the Brief's contentions do not affect the outcome of this case.

IV. CERTIFICATE OF WORD COUNT

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

I, Alex Y. Wong, certify in accordance with California Rules of Court, Rule 8.520(c)(1) that this brief (excluding the items that are not counted toward the maximum length) contains 2,564 words as calculated by the Microsoft Word 2010 software with which it was written.

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

Executed on July 23, 2018, in Los Angeles, California.

By: _____

Alex Y. Wong
Attorney for Real Parties
in Interest

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On **July 23, 2018**, I served the foregoing document(s) described as **ANSWERING BRIEF OF REAL PARTIES IN INTEREST TO *AMICI CURIAE* BRIEFS** in the manner checked below on all interested parties in this action addressed as follows:

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Executed on **July 23, 2018**, at Los Angeles, California.

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

Cynthia Morris