Case No.: S243855

In The Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

vs.

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

Respondent.

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

Real Parties in Interest

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

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

REAL PARTIES IN INTEREST'S REPLY TO PETITIONER'S ANSWER TO PETITION FOR REVIEW

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

Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell and County of Los Angeles provide the following Reply in response to the Answer of Petitioner Association of Los Angeles Deputy Sheriffs to Real Parties' Petition for Review.

I. THE ANSWER DOES NOT REFUTE THAT REVIEW OF THIS CASE IS NECESSARY TO SETTLE IMPORTANT QUESTIONS OF LAW (CAL. R. CT. 8.500(b)(1)

A. ALADS CANNOT DEMONSTRATE THAT THE USE OF *BRADY* ALERTS "VIOLATES WELL ESTABLISHED LAW," BECAUSE THERE IS NO PRIOR CASE LAW PROHIBITING THE PRACTICE

ALADS asserts that the "*Brady* alert" (i.e., notifications that an officer's personnel records might contain exculpatory or impeachment information) process proposed to be used by Real Parties, analyzed by the Attorney General in 98 Ops.Cal.Atty.Gen 54 (2015), *and actually utilized by the SFPD in People v. Superior Court ("Johnson")* (2015) 61 Cal.4th 696, "violates well established law." (Answer, p. 16.) However, conspicuously absent from the Answer are citations to *any* cases (other than the Court of Appeal decision in *ALADS*) which hold that a law enforcement agency violates the "*Pitchess* statutes" (i.e., California Penal Code §§ 832.7 and 832.8 and Evidence Code §§ 1043 through 1045) when it alerts prosecutors that an officer's personnel file may contain *Brady* material. In fact, the vast majority of the cases to which ALADS cites do not address *Brady* at all. Rather, most are cases which address disclosure of peace

officer personnel records *to the press* pursuant to the California Public Records Act, *Government Code* section 6250, *et seq.* ("CPRA"), or *to the public* generally. (See, *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 73, 71, *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 298, *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902, *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1430, *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 599.)

Real Parties concede that, in the CPRA context, the statutorily created privacy rights of peace officers in their personnel records prevail over the press and general public's interest in having access to those records under the CPRA. However, the public's interest in accessing information concerning the people's business under the CPRA is completely distinct from a criminal defendant's constitutional due process rights to receive exculpatory and impeachment information under *Brady* because his or her freedom is at stake. The CPRA cases simply have no bearing whatsoever on whether an officer's privacy rights must yield to a criminal defendant's due process rights.

Other cases to which ALADS cites address potential disclosure of peace officer personnel records pursuant to a county commission's subpoena power (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1210, fn. 5) or through the use of civil discovery procedures (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401, *Hackett v. Superior Court* (1993) 13 Cal. App. 4th 96, *City of San Diego v. Superior Court* (1981) 136 Cal. App. 3d 236). These cases, like the CPRA cases, are also clearly irrelevant.

With respect to the remaining cases to which ALADS cites which actually do involve the *Pitchess* procedures in the context of criminal discovery, those cases still do not address the specific question at issue here of whether limited *Brady* alerts from one member of the prosecution team to another violate the *Pitchess* statutes. (See, e.g., *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4 430, 432, *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475, *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 56, *People v. Superior Court* (*Gremminger*) (1997) 58 Cal.App.4th 397, 404-407.)

While ALADS further contends that the release of a *Brady* list (i.e., list of names of peace officers identified as potentially having Brady material in their personnel files) "flies directly in the face of these decisions," again not a single one of the cited cases mentions, much less addresses the permissibility of maintaining or disclosing a *Brady* list. In fact, *Government Code* section 3305.5, which prohibits public agencies from taking punitive action solely because an officer's name has been placed on a *Brady* list, clearly demonstrates that the legislature is aware that *Brady* lists are a tool frequently used by members of the prosecution team.

Given ALADS' failure to cite to a single published case (other than the underlying *ALADS* decision) which provides that the *Brady* alert and *Brady* list procedures utilized by law enforcement and prosecutorial agencies throughout the state (see *Amici Curiae* letters) is, in fact, illegal, the state of the law (at least as ALADS interprets it) is anything but "well established." Accordingly, the Court should grant review to address this important question of law.

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B. THE HOLDING IN *JOHNSON* WAS BASED ON THE ASSUMPTION THAT *BRADY* ALERTS ARE PERMISSIBLE AND COMPATIBLE WITH THE *PITCHESS* PROCEDURES

ALADS argues that this Court's analysis in *Johnson* "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." (ALADS' Answer to Petition for Review ("Answer"), p. 15.) While Real Parties agree the Court did not *expressly* rule upon the legality of the *Brady* alerts that the SFPD provided to prosecutors, it is abundantly clear that key portions of the *Johnson* decision were *necessarily* premised upon such *Brady* alerts being permissible and compatible with the *Pitchess* motion procedure.

One likely reason that the lawfulness of the SFPD's practice was "neither in question nor determined by this Court" is that the Court simply took it as understood that the practice was permissible. This is evident in the way the Court framed the issues presented in the case for review. Specifically, in discussing the procedural history of the case, this Court explained the scope of its inquiry after it granted the SFPD's and district attorney's petitions for review:

> We granted the police department's and district attorney's petitions for review and stayed the underlying criminal matter. Later, **we requested the parties to brief the question of whether "the prosecution's obligation under *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (*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."

(*Id*. at 709.)

If the SFPD's practice of providing *Brady* alerts to the prosecution was prohibited by the *Pitchess* statutes, and the law on this was "well settled" as ALADS contends, then it is unlikely that this Court could have specifically requested briefing on whether the prosecution's *Brady* obligations would "be satisfied if it simply informs the defense of what the police department has informed it **[in violation of the *Pitchess* statutes]** (that the two officers' personnel files might contain *Brady* material)."

The fact of the matter is that if the SFPD's use of *Brady* alerts was clearly a violation of the *Pitchess* statutes, then significant portions of the *Johnson* opinion would be rendered meaningless and unreliable since the factual circumstances presented by the case could never be legally replicated. According to ALADS, portions of the *Johnson* decision should actually state as follows:

> Because criminal defendants and the prosecution have equal ability to seek information in confidential personnel records, and because such defendants, who can represent their own interests at least as well as the prosecution and probably better, have the right to make a *Pitchess* motion whether or not the prosecution does so, **we also conclude that the prosecution fulfills its *Brady* duty as regards the police department's [illegal] tip if it informs the defense of what the police department informed it [in violation of the *Pitchess* statutes]**, namely, that the specified records might contain exculpatory information. That way, defendants may decide for themselves whether to bring a *Pitchess* motion. **The information the police department has provided [in violation of the *Pitchess* statutes],** together with some explanation of how the officers' credibility might be relevant to the case, would satisfy the threshold showing a defendant must make in order to trigger judicial

> review of the records under the *Pitchess* procedures.

(*Johnson, supra*, 61 Cal.4th at 705-706.)

> When the police department informed the district attorney **[in violation of the *Pitchess* statutes]** that the officers' personnel records might contain *Brady* material, the prosecution had a duty under *Brady, supra*, 373 U.S. 83, 83 S.Ct. 1194, to provide this information to the defense. No one disputes that. The question before us is whether the obligation goes beyond that.

(*Id*. at 715.)

> Because a defendant may seek potential exculpatory information in those personnel records just as well as the prosecution, the prosecution fulfills its *Brady* obligation if it shares with the defendant any information it has regarding whether the personnel records contain *Brady* material, and then lets the defense decide for itself whether to file a *Pitchess* motion. In this case, this means the prosecution fulfilled its obligation when it informed defendant of what the police department had told it **[in violation of the *Pitchess* statutes]**, namely, that the personnel records of the officers in question might contain *Brady* material, and that the officers are important witnesses.

(*Id*. at 716.)

ALADS' proffered interpretation of *Johnson* is simply nonsensical. As much as ALADS would like to ignore the underlying facts in *Johnson*, and claim that the facts were unnecessary to the Court's conclusions, the Court's conclusions in the case were not reached in a vacuum and cannot be separated from those facts. In *Johnson*, the Court was clear that its conclusions were based upon the facts of the case, which included the fact the SFPD provided *Brady* alerts to the prosecution:

> **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, 83 S.Ct. 1194, 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**.

(*Id*. at 721-722.)

Based on the foregoing, it is abundantly clear that key portions of the *Johnson* decision were dependent upon *Brady* alerts being permissible and compatible with the *Pitchess* motion procedure. Accordingly, given the apparent conflict between the factual underpinnings of *Johnson*, and the Court of Appeal's decision in *ALADS*, the Court should grant review to, at a minimum, settle the conflict created by the *ALADS* decision.

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C. *BRADY* ALERTS, USED BY NUMEROUS AGENCIES THROUGHOUT THE STATE, ARE COMPATIBLE WITH THE *PITCHESS* MOTION PROCEDURES AND REDUCE THE NEED FOR GROUNDLESS *PITCHESS* MOTIONS

ALADS contends that Real Parties are incorrect in asserting that the Court of Appeal's *ALADS* decision represents the true "sea change" in criminal prosecutions. According to ALADS, the Court's approval of the *Brady* alert procedure would "ensure fishing expeditions and increase the frequency of filed *Pitchess* motions exponentially." (Answer, p. 25-26.) To make this argument, ALADS contends that the *ALADS* decision itself "effects no change whatsoever to existing *Pitchess* and *Brady* jurisprudence." ALADS' argument is wrong for a number of reasons.

First, the *ALADS* decision clearly affects "existing *Pitchess* and *Brady* jurisprudence" to the extent it undermines in the factual underpinnings of *Johnson,* as discussed above. Second, the *ALADS* decision is the first and only published decision to conclude that the use of *Brady* alerts by law enforcement and prosecution agencies violates the *Pitchess* statutes. Third, as evidence of the sweeping impact the *ALADS* decision will have on *Pitchess* motion practice, this Court needs look no further than the numerous *Amici Curiae* letters that have been filed in support of Real Parties' petition by various prosecutorial agencies and organizations throughout the state, including the California Department of Justice, the California District Attorneys Association, the City and County of San Francisco City Attorneys Office, the City and County of San Francisco District Attorney's Office and the Federal Public Defender. As indicated in *Amicus Curiae* San Francisco City Attorney's letter, at the time

Johnson was litigated, the SFPD's understanding was that at least thirteen counties in California employed a *Brady* alert procedure similar to the one used by SFPD. In the wake of this Court's decision, that number has reportedly expanded to twenty or more counties. Accordingly, the *Brady* alert procedures being utilized in more than one third of California's 58 counties are now in question.

ALADS also makes the nonsensical claim that Real Parties' position has the effect of "[l]owering 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." (Answer, p. 26.) To the contrary, *Brady* alerts do not in any way affect the minimum threshold showing needed to obtain *in camera* review. Rather, *Brady* alerts simply streamline the *Pitchess* motion process by providing a moving party with a basis for declaring a "reasonable belief the agency has the type of information sought." (See *Johnson, supra*, 61 Cal.4th at 721 ["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."].)

Contrary to ALADS' position, *Brady* alerts *reduce* the incidence of "fishing expeditions" and unmeritorious *Pitchess* motions. Logically, if a *Pitchess* motion is supported, at least in part, by the fact the agency issued a *Brady* alert on an officer, or an officer's name appears on a *Brady* list, there will actually be a factual basis behind the claimed "reasonable belief the agency has the type of information sought." Accordingly, a *Pitchess* motion that is supported by a *Brady* alert is the opposite of a "fishing

expedition." Furthermore, even though a criminal defendant is entitled to bring a *Pitchess* motion irrespective of whether a *Brady* alert has been made, the fact a law enforcement agency regularly engages in the *Brady* alert process may have the beneficial effect of minimizing the filing of unnecessary *Pitchess* motions where no such alert has been issued regarding a given officer.

On the other hand, if law enforcement agencies are precluded under the *Pitchess* statutes from providing *Brady* alerts to prosecutors, prosecutors will essentially be required to file *Pitchess* motions simply to ascertain whether an officer has *Brady* information in his or her personnel file that must be disclosed to the defendant (or risk the consequences of a possible *Brady* violation). Without *Brady* alerts, attempts to pursue *Brady* material through the *Pitchess* process will occur in a factual vacuum, devoid of any basis for believing an officer has *Brady* information in his or her file. Any *Pitchess* motions that are filed under such circumstances will, by definition, be "fishing expeditions." Thus, contrary to ALADS claims, both the number of *Pitchess* motions, and the number of pure fishing expeditions will increase dramatically if *Brady* alerts are barred by the *Pitchess* statutes.

In light of the potential impact upon criminal courts, as well as the uncertainty now cast upon the *Brady* alert procedures utilized by law enforcement agencies and prosecutorial agencies throughout the state, the Court should grant review to settle these important questions of law.

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D. THE USE OF *BRADY* ALERTS OR *BRADY* LISTS DOES NOT USURP THE TRIAL JUDGE'S GATEKEEPER FUNCTION NOR WILL IT ERASE ANY CONFIDENTIALITY PROTECTION FOR PEACE OFFICER DISCIPLINARY RECORDS

ALADS also argues that Real Parties' intended *Brady* alert process, the same process utilized by the SFPD and other agencies following the Attorney General's 2015 opinion, "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." (Answer, p. 22.) By making this argument, ALADS clearly misunderstands the *Brady* alert process, and how it fits into the *Pitchess* motion procedures as discussed at length in *Johnson*. The *Brady* alert does not result in the disclosure of anything beyond a name or list of names to a prosecutor and the fact the personnel records of the subject officer(s) might contain *Brady* material. It is merely the beginning of the process and the trial court always retains its role as the ultimate gate keeper of access to the officer's personnel records and information contained therein.

Even after the prosecution, in fulfilling its *Brady* obligations, shares with the criminal defendant the information it received from the law enforcement agency (i.e., that the personnel records of the officers in question might contain *Brady* material), both the prosecution and defense are still required to bring *Pitchess* motions if they wish to obtain any information actually contained in the personnel files. (See *Johnson, supra*, 61 Cal.4th at 716.) If there is no actual case in which a *Pitchess* motion can be filed, there is obviously no need or ability for any party to access

information in the personnel records. ALADS' "chicken little" assertion that the *Brady* alerts proposed by Real Parties would somehow "erase any confidentiality protection for peace officer disciplinary records" (Answer, p. 23) is illogical and has no basis in reality.

Given ALADS' immense confusion as to what is actually at stake, the Court should grant review to settle the important questions of law presented in the case and to provide the parties herein, as well as *Amici Curiae*, clarification as to whether the *Brady* alert procedures are permissible under existing law.

II. CONCLUSION

For all of the foregoing reasons, and as fully described in the Petition for Review, Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell and the County of Los Angeles respectfully request that this Court grant the instant Petition for Review.

Dated: October 10, 2017 LIEBERT CASSIDY WHITMORE

By: */s/ Geoffrey S. Sheldon*
Geoffrey S. Sheldon
Alex Y. Wong
Attorneys for Real Parties in Interest LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF JIM MCDONNELL and COUNTY OF LOS ANGELES

III. CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

I, Alex Y. Wong, certify in accordance with California Rules of Court, rule 8.504(d) that this brief (excluding the items that are not counted toward the maximum length) contains 3,169 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 October 10, 2017, in Los Angeles, California.

By: */s/ Alex Y. Wong*
Alex Y. Wong
Attorney for Petitioner

IV. 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 **October 10, 2017**, I served the foregoing document(s) described as **REAL PARTIES IN INTEREST'S REPLY TO PETITIONER'S ANSWER TO PETITION FOR REVIEW** in the manner checked below on all interested parties in this action addressed as follows:

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

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☐ **(BY PERSONAL DELIVERY)** I delivered the above document(s) by hand to the addressee listed above.

Executed on **October10, 2017**, at Los Angeles, California.

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

/s/ Beverly T. Prater
Beverly T. Prater