S243855

IN THE SUPREME COURT 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, Division 8
Case No.: B280676

After a Writ Proceeding from the Superior Court of Los Angeles County
Hon. James C. Chalfant
Case No.: BS166063

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rules 8.208(e)(3) and 8.488, I certify that petitioner Association for Los Angeles Deputy Sheriffs knows of no person or entity with either (1) an ownership interest of 10 percent or more in the party (rule 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (rule 8.208(e)(2)).

Dated: February 12, 2018

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

For nearly 40 years, California's statutes governing discovery of peace officer personnel records, enacted in response to this Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), have coexisted with the principles articulated by the United States

Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny. This coexistence has the two schemes working in tandem to protect separate rights – a defendant's right to obtain exculpatory or impeaching information material on the question of his or her guilt, and peace officers' right to keep their personnel records private. The Court of Appeal in this case upheld the coexistence. This Court should do the same.

Brady and its progeny do not create a right to discovery in a criminal case, but rather ensure that a defendant received a fair trial based on knowledge of exculpatory or impeaching information material on the question of his or her guilt. The duty to disclose under *Brady* is solely on the prosecutor and extends to information gathered in connection with investigation of the case against the defendant.

Pitchess is different. This Court's opinion in *Pitchess*, and the Legislature's codification of its principles in now what commonly are referred to as the *Pitchess* statutes, opened the door to limited discovery of confidential peace officer personnel records. Through the *Pitchess* statutes, a defendant, in some circumstances, may compel discovery of information in a peace officer's personnel file that is relevant to his or her ability to defend against a criminal charge.

In this case, the Los Angeles County Sheriff's Department, together with the County of Los Angeles and Jim McDonnell, the Sheriff of Los Angeles County, (collectively, "Department") established a list of deputy sheriffs whose records they believed contain potential

exculpatory or impeachment information under *Brady*. This is so even though such a list – termed a "Brady list" – is contemplated by statute as a list maintained by a prosecutorial agency, not by law enforcement. In addition to maintaining its own so-called Brady list, the Department announced its intention to turn over the list to the Los Angeles District Attorney's Office.

The Association for Los Angeles Deputy Sheriffs ("ALADS") brought a petition in superior court seeking injunctive relief to stop distribution of the list because doing so violated the *Pitchess* statutes.[1] Indeed, disclosure of the list would allow discovery of deputies' names and employee numbers in connection with discipline, which explicitly is prohibited unless ordered by a trial court after examination pursuant to *Pitchess* procedures. The superior court granted a limited preliminary injunction, but knowingly did so in a way that violates the *Pitchess* statutes, in fact renders them unconstitutional, disrupting the tandem operation of the *Brady* and *Pitchess* schemes. The Court of Appeal, in a two-to-one opinion, put the pieces back in place by striking the portion of the preliminary injunction that allowed the

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[1] ALADS is a recognized employee organization (Gov. Code, § 3500 et seq.) "and is the certified majority representative for non-supervisory peace officers of Bargaining Unit 611 in the County of Los Angeles. ALADS represents and negotiates on behalf of its members in labor relations with the [Department], concerning wages, benefits, working conditions, and other terms of employment." (PWM Exhs. 1-2.) Statutory references are to the Government Code unless otherwise specified.

Department to disclose to the District Attorney, absent compliance with the *Pitchess* statutes, names and employee numbers of affected deputies who are potential witnesses in a pending criminal prosecution.

This Court should affirm the decision of the Court of Appeal. The Department premises its desire to disclose information from its own Brady list to the District Attorney on its obligation under *Brady*. But the Department has no obligation under *Brady*. And the disclosure it seeks to make squarely violates the *Pitchess* statutes. As a result, the proper outcome in this case, which impacts all peace officers in the state, is achieved, as matters have worked for nearly four decades, by upholding the tandem operation of *Brady* and *Pitchess*. If either the prosecution or the defense wants to obtain information in a peace officer's personnel record, it can do so through *Pitchess*. Nothing else is required – whether based on the case law, the statutes or public policy and practical considerations. This Court should continue to support both *Brady* and *Pitchess* and prevent, as did the Court of Appeal, the Department's attempted disclosure of confidential peace officer information absent compliance with the statutory *Pitchess* scheme.

FACTUAL AND PROCEDURAL STATEMENT

A. In 2016, the Department Announces a New Policy To Give Prosecutorial Agencies Its Own Version of a Brady List on a Routine Basis and Without Regard for Peace Officer Protections in the *Pitchess* Statutes.

As contemplated in the Public Safety Officers Procedural Bill of Rights Act ("POBRA"), a "'Brady list' means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is *maintained by a prosecutorial agency or office* in accordance with the holding in *Brady v. Maryland* (1963) 373 U.S. 83." (§ 3305.5, subd. (e), italics added.) Although not a prosecutorial agency or office, on October 14, 2016, the Department by letter to approximately 300 affected deputies announced the creation of its own version of a Brady list and its intent to give the list to the District Attorney and other prosecutorial agencies. (1 PWM Exhs. 3, 19-22.)

In this letter, the Department indicated that, "[i]n an effort to ensure that [it is] in compliance with [*Brady*], as well as with more recent directives from the California Supreme Court and our State's Attorney General," it had created its own version of a Brady list. (1 PWM Exhs. 20.) The list was made after it had "convened a

Commanders' Panel to evaluate individual employees' personnel records that may contain potential exculpatory or impeachment information." (*Ibid.*)

The Department claimed that, "in order to comply with our constitutional obligations, this letter . . . serves to advise you that we are *required* to provide the names of employees with potential exculpatory or impeachment material in their personnel file to the District Attorney and other prosecutorial agencies where the employee may be called as a witness." (1 PWM Exhs. 21, italics added.) The letter implied that the Department would turn over its list, with names and employee numbers, to the District Attorney absent compliance with *Pitchess* procedures. (*Ibid.*) *Pitchess* procedures would come into play only to the extent "that no portion of an investigation or contents of [a deputy's] file will be turned over to either the prosecution or the defense absent a court order." (*Ibid.*)

The Department also gave examples of performance deficiencies that it had used to include deputies on its list, including (1) immoral conduct; (2) bribes, rewards, loans, gifts, favors; (3) misappropriation of property; (4) tampering with evidence; (5) false statements; (6) failure to make statements and/or making false statements during departmental internal investigations; (7) obstructing an investigation/influencing a witness; (8) false information in records; (9) policy of equality – discriminatory harassment; (10) unreasonable force; and (11) family violence. (1 PWM Exhs. 19-20.) Although many

of these deficiencies involve serious misconduct, an act of much less seriousness, such as a deputy's providing false information on a time record on one occasion, also would qualify for inclusion on the Department's list.

ALADS sent letters to the Department on behalf of certain of its members, objecting to their inclusion on the list and the disclosure. (See 1 PWM Exhs. 4, 24.) The Department responded that it intended to "proceed with satisfying [its] Constitutional obligations under *Brady v. Maryland*" and would provide names and employee numbers of affected deputies to the Los Angeles District Attorney's Brady Compliance Unit after November 14, 2016. (1 PWM Exhs. 4-5, 25-26.)

B. ALADS Files a Petition for Writ of Mandate in Superior Court Seeking Injunctive Relief To Prevent Distribution of the Department's List.

ALADS, on behalf of its approximately 7,800 member deputies, filed in the superior court a petition for writ of mandate, seeking, among other things, injunctive relief to prevent the Department from releasing its list to the District Attorney. (1 PWM Exhs. 1-26, 33-76.) The foundation for the request for injunctive relief was that the Department had "unilaterally identified [affected] deputies as having a founded investigation in their personnel file, which led to disciplinary

action, and ha[d] been identified, solely by the [Department], as reflecting moral turpitude, untruthfulness, or bias." (1 PWM Exhs. 9-10.) ALADS sought to prevent this "[u]nilateral[] disclos[ure]." (1 PWM Exhs. 13, 15, 46.)

As ALADS demonstrated, in violation of the *Pitchess* statutes, "the Department is threatening to release the names of deputies specifically *in connection* with information that the personnel files of the named deputies include[] founded investigations for which they were previously disciplined. Even without releasing the content of the investigation, by releasing the names of deputies who may have 'potential exculpatory or impeachment material in their personnel file' as a result of 'a founded administrative investigation involving [certain deficiencies],' the Department is clearly releasing the names of deputies linked to confidential information in that deputy's personnel file, namely his or her prior discipline." (1 PWM Exhs. 54, original italics.)

The Department objected to a preliminary injunction (1 PWM Exhs. 82-101), but the parties agreed to temporarily halt distribution of the list (1 PWM Exhs. 106). In accordance, the trial court entered a temporary restraining order, preventing disclosure of the list, allowed the Department to file formal opposition to the requested injunctive relief, and set a hearing date. (1 PWM Exhs. 105-106.)

In its formal opposition, the Department claimed that it had "a legal duty to notify [the] prosecution" under *Brady* "of the names

of deputies who may have *Brady* material in their personnel files." (1 PWM Exhs. 130; see 1 PWM Exhs. 119-137.) The Department said that, regardless of the *Pitchess* statutory scheme, it could fulfill this "legal duty" either by "disclos[ing] the names on a case-by-case basis or . . . develop[ing] a mechanism whereby it provides prosecutors with a list of deputies who have sustained findings for policy violations involving moral turpitude, untruthfulness, or bias . . . ." (1 PWM Exhs. 130.) The Department relied on this Court's opinion in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, as well as a 2015 post-*Johnson* opinion by the Attorney General, 98 Ops. Cal. Atty. Gen. (2015) [2015 WL 7621362]. (E.g., 1 PWM Exhs. 131.) This is so, ALADS demonstrated, even though the propriety of a proposed practice to turn over peace officer names as part of a supposed *Brady* obligation was not at issue in *Johnson* and the Attorney General's opinion cited no authority for sanctioning the disclosure of names absent *Pitchess* compliance. (See 1 PWM Exhs. 169-183.)

C. The Trial Court Grants Limited Injunctive Relief, Which Improperly Fails To Account for Peace Officer Protections in the *Pitchess* Statutes.

The trial court granted a preliminary injunction. But it conditioned injunctive relief in a manner that failed to respect the protections afforded to peace officers under the *Pitchess* statues.

The trial court enjoined the Department from "[r]eleasing to the Los Angeles County District Attorney's Office, or any person, agency, or official outside the Sheriff's Department, the Sheriff's Department's 'Brady List' prepared, maintained, and described by the Sheriff's Department in its October 14, 2016 letter." (2 PWM Exhs. 302.) The trial court thus recognized that the Department's proposal to send its own version of a Brady List to the District Attorney, as some sort of free-floating obligation, was not required under *Brady* and its progeny and violated the *Pitchess* statutes. (See 1 PWM Exhs. 192-193; 2 PWM 210 ["there's no Brady obligation unless there's a criminal case and a criminal defendant. There's no Brady obligation floating in the air. It's got to be tethered to a case"].)

Despite precluding the Department from releasing its Brady list, the trial court allowed it to disclose individual names and employee numbers of deputies on the list. According to the preliminary injunction, the Department may not "[d]isclos[e] to the Los Angeles County District Attorney's Office, or any prosecutorial agency, the fact that any individual Deputy Sheriff's name or employee number appears on the aforementioned 'Brady List,' *unless* a criminal

prosecution is pending and the Deputy Sheriff at issue is involved in that prosecution as a potential witness, in which case the [Department] may disclose to the prosecutorial agency that the Deputy Sheriff is listed on the Sheriff's Department's 'Brady List' and/or may have 'Brady material' in his or her personnel file." (2 PWM Exhs. 302, italics added.) The trial court did *not* preclude the Department "from maintaining a 'Brady List' internally" or "from disclosing the fact that an individual Deputy Sheriff is listed on the . . . Department's 'Brady List' when a criminal prosecution is pending and the Deputy Sheriff at issue is involved in the pending prosecution as a potential witness." (2 PWM Exhs. 302-303.)

As a result, although the trial court granted preliminary injunctive relief, it did so in a manner that allows the Department to not only maintain its list, but also to release names and employee numbers to the District Attorney, without regard for the peace officer protections in the *Pitchess* statutory scheme. In other words, the trial court determined, the Department may release names and employee numbers absent compliance with the *Pitchess* statutes when a criminal prosecution is pending and a deputy sheriff is involved in that prosecution as a potential witness. (See 2 PWM Exhs. 302.)

D. ALADS Petitions for a Writ of Mandate in the Court of Appeal, Demonstrating the Trial Court's Preliminary Injunction Effectively Renders the Statutory *Pitchess* Scheme Unconstitutional.

Because the trial court's preliminary injunction permitted disclosure absent compliance with *Pitchess*, ALADS filed a petition for writ of mandate in the Court of Appeal.[2] ALADS argued the trial court's decision that the Department may release names of deputies when they are a potential witness in a pending criminal prosecution "is beyond any authority recognized by law and is, in fact, directly contrary to the Department['s] recognized statutory obligation to prevent from release to anyone, outside the context of a [*Pitchess*] motion pursuant to Evidence Code section[] 1043 et seq., the very information it has obtained the court's authorization to voluntarily release." (Mem. in Support of PWM 42.)

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[2] ALADS also appealed from the preliminary injunction order. (Code Civ. Proc., § 904.1, subd. (a)(6).) The Court of Appeal exercised its discretion to decide the matter by way of ALADS's petition for writ of mandate. According to the appellate court, quick resolution of the matter on a writ petition, rather than through appeal, was warranted because the *Pitchess* "procedure affects every state and local law enforcement agency in California, and potentially every state criminal prosecution wherein a state or local peace officer is a witness." (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 429-430 (*ALADS*).)

In opposition, the Department argued that it, "as a law enforcement agency and member of the 'prosecution team,' owes an affirmative duty under *Brady* to disclose to prosecutorial agencies the names of employees involved in criminal prosecutions who the Department reasonably believes have exculpatory or impeachment information in their personnel files." (Prelim. Opp. 7.) According to the Department, "the trial court correctly determined that the . . . Department's constitutional *Brady* obligations trump peace officers' statutory privacy rights in the limited circumstance where there is a pending criminal case that requires disclosure of exculpatory evidence to the criminal defendant." (*Id.* at p. 19.) Indeed, the Department viewed its *Brady* obligations so broadly that it suggested the trial court's limit on disclosure to a pending criminal prosecution might constitute error. (*Id.* at 19, fn. 3.)

E. The Court of Appeal Grants the Writ Petition in Part By Striking the Improper Limits in the Preliminary Injunction That Violate the *Pitchess* Statutes.

The Court of Appeal presented the primary issue, and that relevant on this Court's review, as follows: "[W]hether a statewide statutory discovery procedure that has been in effect for nearly 40 years violates the Constitution, as construed in *Brady*, when enforced in the context of a filed criminal prosecution that includes as witnesses, peace officers with

founded allegations of misconduct, relevant to veracity, in their personnel files." (*ALADS, supra,* 13 Cal.App.5th at p. 429.)

The Court of Appeal reviewed *Brady* and *Pitchess*, as well as this Court's "express[] observ[ation] that the statutory *Pitchess* procedures do not violate either *Brady* or constitutional due process, but rather, supplement both." (*ALADS, supra,* 13 Cal.App.5th at p. 437, citing *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14, 16 (*City of Los Angeles*) [*Pitchess* operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information]; *People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1226 (*Mooc*) [*Pitchess* "viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence . . . now an established part of criminal procedure in this state"].) The appellate court determined that *Johnson, supra,* 61 Cal.4th 696 did not authorize the trial court's permitted disclosure, but rather supported compliance with the *Pitchess* statutes, and the Attorney General's 2015 opinion lacked justification to approve disclosure. (*ALADS*, at pp. 440-445.) Based on this review, the Court of Appeal granted writ relief to prevent the Department from disclosing to the District Attorney names on its version of a Brady list.

The appellate court concluded the Department could create a Brady list "for internal use only." (*ALADS, supra*, 13 Cal.App.5th at p. 436.) But the appellate court determined disclosure of names from the list was not permissible and to allow such disclosure would render the *Pitchess* statutes unconstitutional. (*Id.* at pp. 421-422.) In addition, the trial court's injunction allowing disclosure outside of *Pitchess* when a deputy on the Department's own Brady list is a "'potential'" witness in a pending criminal case was overbroad because "it treats potential witnesses identically regardless of their materiality" in conflict with *Brady*'s standard of materiality as a prerequisite to disclosure. (*Id.* at p. 440.) Accordingly, the appellate court directed, "the language in the injunction that allows the [Department], or any real party, to disclose the identity of any individual deputy on the *Brady* list to any agency or individual outside the [Department], absent a properly filed and granted *Pitchess* motion and corresponding court order, even if the affected deputy is a potential witness in a filed criminal prosecution, must be stricken." (*Id.* at p. 439.)

In a dissent, Justice Grimes concluded that "[t]his case does not present the question whether *Brady* principles *mandate* disclosure of officer names to the prosecutor. The trial court's injunction merely allows the Department to implement a determination that it can best fulfill its *Brady* obligations by giving the names of peace officers with

Brady material in their files to prosecutors when charges are pending. The injunction mandates nothing of the Department or any other law enforcement agency. [¶] The question presented to us is whether the *Pitchess* statutes preclude the disclosure of *Brady*-list names by the Department to the prosecutor in a pending prosecution. The courts have always viewed *Pitchess* 'against the larger background' of the prosecution's constitutional *Brady* obligations. [Citation.] We would do no more here, by finding no *Pitchess* violation in a procedure that is consonant with *Brady* obligations and that does not involve a prosecutor's perusal of any information in an officer's personnel file." (*ALADS, supra*, 13 Cal.App.5th at p. 458.)

F. This Court Grants the Department's Petition for Review, Directing the Parties To Brief a Question That in Many Respects Reflects the Trial Court's Preliminary Injunction.

This Court granted the Department's petition for review. It asked the parties to brief the following issue: "When a law enforcement agency creates an internal *Brady* list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion? (See *Brady v. Maryland* (1963) 373 U.S.

83; *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, §§ 832.7-832.8; Evid. Code, §§ 1043-1045.)"

As set forth in the discussion below, and contrary to the Department's position, the answer to the Court's question is that, in a pending criminal prosecution, disclosure of a peace officer's name and identifying number, along with the fact that officer may have relevant exonerating or impeaching information in his or her confidential personnel file, may be made only by court order on a properly filed *Pitchess* motion.

LEGAL DISCUSSION

I.

BRADY COMPLIANCE REQUIRES THE PROSECUTION TO PROVIDE THE DEFENSE EXCULPATORY OR IMPEACHING MATERIAL INFORMATION KNOWN TO THE INVESTIGATIVE TEAM.

In 1963, the United States Supreme Court held that the prosecution has an obligation under federal due process to disclose to the defense all evidence that is favorable to the defendant and material on the question of his or her guilt. (*Brady*, *supra*, 373 U.S. at p. 87.) Almost nine years later, the high court extended the *Brady* obligation to material evidence that impeaches a prosecution's witness,

even if such evidence is not inherently exculpatory. (*Giglio v. United States* (1972) 405 U.S. 150, 154-155.) Materiality is determined by whether a reasonable probability exists that, had the prosecution disclosed the exculpatory or impeaching evidence, the result of the proceeding would have been different, i.e. whether the non-disclosure undermines confidence in the trial's outcome. (*United States v. Bagley* (1985) 473 U.S. 667, 682.) Based on these principles, a *Brady* violation has three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282 (*Strickler*).)

The prosecutor's *Brady* obligation is based on information gathered during the course of an investigation relating to a criminal charge against a defendant. "The scope of this [*Brady*] disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf . . . .' [Citation.] Courts have thus consistently 'decline[d] "to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*).) "[A]ny favorable evidence known to the others acting on the government's behalf is imputed to the

prosecution. 'The individual prosecutor is presumed to have knowledge of *all information gathered in connection with the government's investigation.*' [Citations.]" (*Ibid.*, italics added; see also *Strickler, supra*, 527 U.S. at pp. 280-281 [prosecutor, to comply with *Brady*, "'has a duty to learn of any favorable evidence known to the others acting on the government's behalf *in th[e] case*, including the police'" (italics added)].)

Brady disclosure, as a result, focuses on the prosecution and its investigation of the case against the defendant. The duty to disclose solely and exclusively is the responsibility of the prosecution, and those assisting the government's case are simply its agents. (*Brown, supra*, 17 Cal.4th at p. 881.) "By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance." (*Ibid.*) "[W]hile the Constitution does not impose a duty 'to allow [a defendant] complete discovery of [the prosecutor's] files as a matter of routine practice' [citation], the [United States] Supreme Court has on more than one occasion urged 'the careful prosecutor' to err on the side of disclosure and, by necessary extension, *thorough examination of investigative files.* [Citations.]" (*Id.* at pp. 882-883, italics added; see also *id.* at p. 883 [prosecutor "required to be responsible for those persons who are directly assisting him in bringing an accused to justice"].)

The scope of the prosecutor's *Brady* obligation can be synthesized as follows: "A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution or the investigating agency in its work. The important determinant is whether the person or agency has been 'acting on the government's behalf' [citation] or 'assisting the government's case.' [Citation.]" [¶] Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possess that evidence or information. Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or disclose such material." (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315; see *IAR Systems Software, Inc. v. Superior Court* (2017) 12 Cal.App.5th 503, 516 ["'members of the team perform investigative duties and make strategic decisions about the prosecution of the case,'" as well as "'submit to the direction of the prosecutor and aid in the Government's investigation'"].)

Barrett exemplifies the scope of a prosecutor's *Brady* obligation. There, the defendant sought numerous Department of Corrections records in part based on the prosecutor's *Brady* obligation. The appellate court approved the disclosure of information the Department

of Corrections had obtained when it acted as an agency conducting a criminal investigation of the defendant's commission of a homicide. (*Barrett, supra*, 80 Cal.App.4th at pp. 1317-1318.) On the other hand, disclosure was improper for information possessed by the Department of Corrections in its capacity as prison administrator. (*Id.* at p. 1318.) Most of that information predated the homicide and consisted of records maintained through running the prison, i.e., "materials . . . generated when [the Department of Corrections] was not acting as part of the prosecution team." (*Ibid.*) Thus, when the Department of Corrections acted as an investigative agency assisting the prosecution team, the information it collected was subject to *Brady*. But, "[i]n connection with its administrative and security responsibilities in housing California felons while they serve their sentences, [the Department of Corrections] is not part of the prosecution team," and its records are not part of *Brady* disclosure. (*Id.* at p. 1317.)

This distinction applies in the context of law enforcement personnel as well. "[T]he United States Supreme Court has no clearly established precedent that a police department or agency acts as a part of a prosecution team when the police compile and keep regular personnel files." (*Catzim v. Ollison* (C.D. Cal., Aug. 27, 2009, No. CV 05-7169) 2009 WL 282124, at *8.) Consequently, when a law enforcement agency is working with the prosecution to investigate a criminal matter, information it obtains during that investigation would be subject to disclosure by the prosecution under *Brady* if it is

exculpatory or impeaching and material on the question of the defendant's guilt. To the contrary, when a law enforcement agency maintains information about a peace officer in his or her personnel file, it is acting in an administrative, not an investigative, capacity, and such information is not within the purview of the prosecutor's duty under *Brady*. In other words, information in a personnel file is not information gathered in the government's investigation of a criminal case, but rather created by the Department as an administrator, not as part of a prosecution team.

In sum, *Brady* requires the prosecution to disclose exculpatory or impeaching evidence that is material on the question of the defendant's guilt. The prosecution's duty extends to information gathered by its investigative team, i.e., those assisting with investigation of the defendant's case, but does not encompass information maintained by agencies in their administrative, as opposed to investigative, capacities.

II.

CALFORNIA'S STATUTORY *PITCHESS* SCHEME PROTECTS CONFIDENTIAL PEACE OFFICER PERSONNEL RECORDS.

As discussed, *Brady* extends only to exculpatory or impeaching material information obtained in investigating a case against a defendant and "d[oes] not create a general constitutional right to

discovery in a criminal case. [Citation.]" (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472 (*Gutierrez*).) Ten-plus years after *Brady*, however, this Court in *Pitchess* "'recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge. "In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as *Pitchess* motions' . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045."' [Citation.]" (*Johnson, supra*, 61 Cal.4th at p. 710.) *Pitchess* procedures thus opened criminal discovery to peace officer personnel records in narrow circumstances while, at the same time, protected peace officer privacy rights.

Penal Code section 832.7, subdivision (a), provides that "[p]eace officer . . . personnel records . . ., or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to [s]ections 1043 and 104[5] of the Evidence Code." As used in this section, "'personnel records' means any file maintained under [the peace officer's] name by his or her employing agency and containing records relating to" "discipline." (Pen. Code, § 832.8, subd. (d).) "[T]he legislative concern [in adopting Penal Code sections 832.7 and 832.8] appears to have been with linking a named officer to the private or sensitive information listed in section 832.8." (*Commission on Peace Officer*

Standards and Training v. Superior Court (2007) 42 Cal.4th 278, 295 (*Commission*).) As a result, Penal Code statutes 832.7, subdivision (a), and 832.8, subdivision (d), not only protect from public disclosure records pertaining to an officer's appeal regarding discipline, but also his or her identity. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1297-1298 (*Copley*).)

"This conclusion [that an officer's identity in connection with discipline is confidential] derives largely from section 832.7, subdivision (c), which permits, '[n]otwithstanding subdivision (a)' of section 832.7, a department or agency that employs peace officers to disclose certain data regarding complaints against officers, but only if that information is in a form which does not identify the individuals involved.' The language limiting the information that may be disclosed under this exception demonstrates that section 832.7, subdivision (a), is designed to protect, among other things, 'the identity of officers' subject to complaints. [Citations.] The legislative history of this provision confirms the Legislature's intent to 'prohibit any information identifying the individuals involved from being released, in an effort to protect the personal rights of both citizens and officers.' [Citations.]" (*Copley, supra*, 39 Cal.4th at p. 1297; see also *Berkeley Police Ass'n v. City of Berkeley* (2008) 167 Cal.App.4th 385, 399-402 (*Berkeley Police*).) Because "[t]he records sought in *Copley* linked the officer's name, not just to an on-duty shooting, but to a confidential disciplinary action involving the officer, . . . they were exempt from

disclosure. [Citation.]" (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 73 (*Long Beach Police*).)

Given the confidential records as specified in Penal Code sections 832.7 and 832.8, "Evidence Code sections 1043 and 1045 establish the procedures [for disclosure]. The party seeking discovery must file a written motion with service on the governmental agency having custody of the records sought. (Evid. Code, § 1043, subd. (a).) The motion must describe the type of records or information sought and include an affidavit showing good cause for the discovery, which explains the materiality of the information to the subject of the pending litigation and states on reasonable belief that the governmental agency has the records or information. (Evid. Code, § 1043, subd. (b) . . . .)" (*Johnson, supra*, 61 Cal.4th at p. 710.)

"'If the trial court concludes the defendant [or prosecution] has fulfilled these prerequisites and made a showing of good cause, the custodian of records should bring to court all documents "potentially relevant" to the . . . motion. [Citation.] The trial court "shall examine the information in chambers" (Evid. Code, § 1045, subd. (b)), "out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present" (*id.*, § 915, subd. (b); see *id.*, § 1045, subd. (b) [incorporating *id.*, § 915]). Subject to statutory exceptions and limitations, . . . the trial court should then disclose to the defendant [or prosecution] "such information [that] is relevant to the

subject matter involved in the pending litigation." (*Id.*, § 1045, subd. (a).)' [Citation.]" (*Johnson, supra*, 61 Cal.4th at pp. 710-711.)

"These procedures 'are based on the premise that evidence contained in a law officer's personnel file may be relevant to an accused's criminal defense and that to withhold such relevant evidence from the defendant would violate the accused's due process right to a fair trial. *Pitchess* and Evidence Code sections 1043 through 1047 also recognize that the officer in question has a strong privacy interest in his or her personnel records and that such records should not be disclosed unnecessarily. Accordingly, both *Pitchess* and the statutory scheme codifying *Pitchess* require the intervention of a neutral trial judge, who examines the personnel records in camera, away from the eyes of either party, and orders disclosed . . . only those records that are found both relevant and otherwise in compliance with statutory limitations. In this manner, the Legislature has attempted to protect the defendant's right to a fair trial and the officer's interest in privacy to the fullest extent possible.' [Citation.]" (*Johnson, supra*, 61 Cal.4th at p. 711; see also *id.* at p. 712.) This Court has endorsed the *Pitchess* practice "for many years, a practice [it] ha[s] concluded adequately balances the defendant's right to a fair trial with the officer's right of privacy. [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1284-1285.)

The *Pitchess* procedures apply whether it is the prosecution or the defense seeking the information from confidential peace officer personnel records. (*Johnson, supra,* 61 Cal.4th at pp. 712-714; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046 [prosecution does not receive information turned over to the defense on a successful *Pitchess* motion but rather must comply with the *Pitchess* procedures if it wishes to obtain information from confidential personnel records].) *Pitchess* procedures protect confidential information in a peace officer's personnel file, even if such information is obtainable elsewhere. (*Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 99, 101.)

III.

FOR NEARLY 40 YEARS, *BRADY* AND *PITCHESS* HAVE WORKED IN TANDEM. COMPLIANCE WITH *PITCHESS* CAN SATISFY A PROSECUTOR'S *BRADY* OBLIGATION.

Brady and *Pitchess*, though they protect separate rights, do not operate in isolation, but in tandem, and have done so successfully for nearly 40 years, since the 1978 enactment of the statutory *Pitchess* scheme. (*Johnson, supra,* 61 Cal.4th at pp. 719-720 ["*Brady* requirements and *Pitchess* procedures have long coexisted"]; see also *Gutierrez, supra,* 112 Cal.App.4th at p. 1473 ["two schemes operate in tandem"].) "'Th[e] procedural mechanism for criminal defense discovery [in the *Pitchess* statutes], which must be viewed against the larger background of the prosecution's constitutional obligation to

disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial [citations], is now an established part of criminal procedure in this state.' [Citation.]" (*Johnson*, at p. 712, quoting *Mooc*, *supra*, 26 Cal.4th at pp. 1225-1226.)

This Court has examined closely the interplay between *Brady* and *Pitchess*. For example, although both use the term "material," they use the word differently. "Under *Brady*, evidence is 'material' only if it is reasonably probable a prosecution's outcome would have been different had the evidence been disclosed. [Citation.] By contrast, '[u]nder *Pitchess*, a defendant need only show that the information sought is material "to the subject matter involved in the pending litigation." [Citation.] Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any [information] that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*. [Citation.]' [Citation.]" (*Johnson*, *supra*, 61 Cal.4th at pp. 711-712.) "[T]he statutory *Pitchess* procedures [thus] implement *Brady* rather than undercut it, because a defendant who cannot meet the less stringent *Pitchess* standard cannot establish *Brady* materiality." (*Gutierrez*, *supra*, 112 Cal.App.4th at p. 1474.)

In another sense, "'[o]ur state statutory [*Pitchess*] scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady* . . . . Unlike *Brady*, California's *Pitchess*

discovery scheme entitles a defendant to information that will "facilitate the ascertainment of the facts" at trial [citation], that is, "all information pertinent to the defense" [citation].' [Citation.]" (*Johnson supra*, 61 Cal.4th at p. 720.) "It is true . . . that in some ways the *Pitchess* statutory scheme is potentially narrower than *Brady*'s requirements. . . . However, because the ""*Pitchess* process' operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information,"' all information that the trial court finds to be exculpatory and material under *Brady* must be disclosed, notwithstanding Evidence Code section 1045's limitations. [Citation.]" (*Ibid.*, quoting *City of Los Angeles, supra*, 29 Cal.4th at p. 14 [Evid. Code, § 1045, subd. (b)(1)'s five-year limit on discovery of civilian complaint against peace officer would not prevent disclosure if it were exculpatory or impeaching and material under *Brady*].)

Moreover, because *Pitchess* opened criminal discovery to certain information in peace officer personnel files, compliance with its procedures can satisfy a prosecutor's *Brady* obligations. A prosecutor must follow *Pitchess* procedures to obtain information in peace officer personnel files. This is because "Penal Code section 832.7, subdivision (a), states that police officer personnel records are 'confidential.' It permits disclosure by use of the *Pitchess* procedures but otherwise provides only one exception to the confidentiality requirement – the exception for investigations. This exception indicates that the Legislature considered the range of situations in which prosecutorial

need justifies direct access to peace officer personnel records, and it decided that those situations should be limited to 'investigations or proceedings concerning the conduct of peace officers' . . . ." (*Johnson, supra*, 61 Cal.4th at pp. 713-714.) A prosecutor thus does not have direct access to information in peace officer personnel files. (*Ibid.*)

Based on the express language of Penal Code section 832.7, subdivision (a), a prosecutor's "[c]hecking for *Brady* material is not an investigation [excepted from compliance with *Pitchess* procedures]. A police officer does not become the target of an investigation merely by being a witness in a criminal case." (*Johnson, supra*, 61 Cal.4th at p. 714.) "Treating [peace] officers as the subject of an investigation whenever they become a witness in a criminal case, thus giving the prosecutor routine access to their confidential personnel records, would not protect their privacy interests 'to the fullest extent possible.' [Citation.]" (*Ibid.*; *Gutierrez, supra*, 112 Cal.App.4th at p. 1475 ["argument for routine review of the complete files of all police officer witnesses in a criminal proceeding necessarily fails"].) Consequently, "prosecutors, as well as defendants, must comply with the *Pitchess* procedures if they seek information from confidential personnel records." (*Johnson*, at p. 714; see also *People v. Davis* (2014) 226 Cal.App.4th 1353, 1374 [prosecution can use "the *Pitchess* procedure to perform its obligations under *Brady*"].)[3]

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[3] In similar fashion, the information requested in *Barrett* that the Department of Corrections had obtained in its administrative capacity

IV.

BRADY LISTS ARE CONTEMPLATED BY POBRA AS A TOOL FOR PROSECUTORIAL AGENCIES, NOT LAW ENFORCEMENT. THEY DO NOT EXIST AS A MEANS TO AVOID *PITCHESS*.

As noted, under POBRA, a "'Brady list' means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, *which is maintained by a prosecutorial agency or office* in accordance with the holding in *Brady v. Maryland* (1963) 373 U.S. 83." (§ 3305.5, subd. (e), italics added.) POBRA thus contemplates a Brady list as a device used by prosecutors to facilitate their *Brady* compliance. POBRA precludes a law enforcement agency from punishing its peace officers because prosecutors have included them on a Brady list. (*Id.* at subds. (a)-(d).)

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was subject to discovery after in camera review by the trial court based on relevance after issuance of a subpoena duces tecum by the defense. (*Barrett, supra*, 80 Cal.App.4th at pp. 1317-1320.) Just as a subpoena duces tecum is the proper procedure to follow for discovery from third parties (*id.* at p. 1318), *Pitchess* is the proper procedure to follow for discovery of information in peace officer personnel records. Moreover, although the Department relies on criminal discovery statutes outside of *Pitchess* (OBOM 17-20), it cites no authority suggesting that they provide for discovery absent compliance with *Pitchess* or otherwise override *Pitchess*. In fact, discovery is limited by privilege pursuant to an express statutory provision. (Pen. Code, § 1054.6.)

The legislative history of section 3305.5 is in accord and demonstrates that a Brady list is a tool for prosecutors. It states, "In recent years, [before the 2013 enactment of section 3305.5], several District Attorneys and Public Defenders . . . established 'Brady Lists' containing the names of public safety officers who[] they believe have committed some act that, when presented to a jury, might be used for impeachment purposes or as exculpatory evidence in criminal trial. [¶] The standard for placing public safety officers on Brady lists varies from county to county. Some counties implement and maintain a Brady policy with no discernible standings for inclusions or mechanisms for appeal, which results in the arbitrary and perpetual placement of public safety officers on Brady lists. Because prosecutors enjoy absolute prosecutorial immunity and immunity under the Eleventh Amendment, it is impossible to challenge one's placement on a Brady list, even if that placement was malicious or made in error." (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 313, Sen. Weekly History of Feb. 6, 2014 (2013-2014 Reg. Sess.) p. 6.) Concerns with prosecutorial immunity for placement on a Brady list would not be an issue if the list were not created by the prosecution.

Moreover, the legislative history speaks of the duty of prosecutors in relation to *Brady*. It recognizes "[t]he term 'Brady list' refers to a list kept by a prosecutor's office, of police officers for whom the prosecutor's office has determined evidence of misconduct exists that would have to be turned over to the defense pursuant to *Brady v.*

Maryland." (Sen. Com. on Public Safety, Rep. on Sen. Bill No. 313, Sen. Weekly History of Feb. 6, 2014, *supra*, at pp. 7-8; see also *id.* at pp. 8-9 ["the DA's office might put that officer's name on a 'Brady list' to flag for its deputy DA's the need to disclose this evidence if they ever need to call that officer as a witness"; "discretion given to district attorneys to place an officer on a Brady list allows for unwarranted personnel action to be taken against peace officers at the whim of a DA"].) The legislative history thus is reflective of a prosecutor's *Brady* obligations.

The policy of the Los Angeles County District Attorney's office is in accord with section 3305.5 and its legislative history. There, according to the deputy in charge of the discovery compliance unit of the post-conviction litigation and discovery division of Los Angeles County's District Attorney's office, "the computer-based Officer and Recurrent Witness Information Tracking System (ORWITS) . . . stores known current and historical potential impeachment information regarding police officers, governmentally employed expert witnesses, and other recurrent witnesses. The information maintained in the system is obtained from various sources, including investigations which have been presented for filing or have resulted in a criminal charge being filed against a police officer or witness, as well as news media accounts of relevant incidents, reports of misconduct by individual DA's, or civil judg[]ments. *All sources are outside of police*

personnel files." (2 PWM 371, italics added.)[4] Thus, although the Department claims it not only is authorized but required to give the District Attorney names of deputies on its list, and that to forbid disclosure of names of deputies on its list will be the sea change in the law, the practice of the District Attorney's office shows otherwise. (See OBOM 17-20.)

In sum, consistent with *Brady* imposing an obligation *on the prosecution*, a so-called Brady list, as reflected in section 3305.5, is created *by the prosecution* for use in criminal cases outside of information in officers' personnel files. A Brady list created by the prosecution is consistent with both section 3305.5 and *Pitchess*.

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[4] The Los Angeles County District Attorney's policy was described by Sacramento's sheriff as the "'gold standard'" of Brady systems because it has a compliance unit, a 26-page manual explaining the process of reviewing an officer for placement on a list, a requirement that law enforcement's internal investigation be completed before placement on the list and, in some cases, an appeal process for officers placed on the list. (Gutierrez, *California police unions fight discipline of officers under prosecutors' lists*, Sac. Bee (Sept. 12, 2013) [Brady lists "created and used by prosecutors"].)

V.

THE DEPARTMENT'S PLAN TO RELEASE INFORMATION FROM CONFIDENTIAL PEACE OFFICER PERSONNEL FILES IS NOT REQUIRED BY *BRADY* AND UNNECESSARILY VIOLATES *PITCHESS*.

A. The Department's Justification Based on *Brady* for Creating Its Own Brady List and Releasing the Information to the District Attorney Fails.

In its letter to deputies advising of the creation of its own Brady list and its intent to release that list to the District Attorney, the Department justified the list and distribution by saying it had a constitutional obligation under *Brady* to disclose the information. (1 PWM Exhs. 19-21.) Before this Court, the Department continues to use *Brady* as its justification. It states that, "because law enforcement agencies are part of the prosecution team, they have a constitutional obligation to facilitate the disclosure of *Brady* information by prosecutors to criminal defendants. Accordingly, *Pitchess* and *Brady* can only be harmonized if law enforcement agencies are permitted to provide *Brady* alerts (i.e., disclosures to the prosecution of the names and identifying numbers of officers with potential *Brady* material in their personnel files) *without* the need for a court order on a properly filed *Pitchess* motion." (OBOM 7, original italics; see also OBOM 16-17.)

The Department's justification fails. The Department cites no authority for its premise that it, as a law enforcement agency, has any constitutional obligation under *Brady*. Indeed, the Department has no explanation as to why this supposed constitutional obligation has arisen now more than 50 years after this Court decided *Brady* and nearly 40 years after enactment of the *Pitchess* statutes.

In fact, *Brady* neither contemplates nor imposes an obligation on the Department. *Brady* imposes an obligation solely on the prosecution. (*Brown, supra*, 17 Cal.4th at pp. 878-879.) True, under *Brady*, the prosecution has a duty to disclose exculpatory or impeaching material information to the defense that is uncovered by law enforcement when it is investigating a criminal case against a defendant on behalf of the prosecution. (*Id.* at pp. 879-882.) But that duty is on the prosecutor. And it extends to information obtained during an investigation about a criminal matter against a defendant. It does not extend to information housed by the Department in its administrative capacity for internal purposes. (*Barrett, supra*, 80 Cal.App.4th at pp. 1317-1318.)[5] In short, this purported constitutional

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[5] In *Johnson*, the district attorney and the police department argued 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." (*Johnson, supra*, 61 Cal.4th at p. 715, original italics.) The Department here takes a contrary position.

obligation the Department has created for itself decades after *Brady* and *Pitchess* does not exist.

Indeed, the absence of a constitutional obligation is evident from the nature of the issue at hand. 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. The Department is claiming there is such a mandatory obligation. But, at the same time, we know that the Department has no duty to create its own internal Brady list. POBRA does not even contemplate such a list by the Department, but only by the prosecution. (§ 3305.5, subd. (d).) And, if creation of a Department list is not required, then neither can disclosure of information on it be required. As this Court asks in the issue presented for review, "may" the Department release information on an internal Brady list absent compliance with *Pitchess*? A permissive act cannot be justified by a constitutional obligation. Contrary to the Department's claim, therefore, *Brady* does not justify, let alone mandate, the Department's creation of a list or its distribution, whether on a routine or case-by-case basis, to the District Attorney.

The dissent in *ALADS, supra,* 13 Cal.App.5th 413, made the same mistake. Analyzing the trial court's preliminary injunction, the dissent says that it "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 the prosecutors when charges are pending." (*Id.* at p. 450, fn. omitted.) The dissent continues that the prosecution's responsibility under *Brady* "has nothing to do with the **law enforcement agency's own obligation to reveal *Brady* information to the prosecutor.**" (*Id.* at p. 451, original emphasis.) As noted, *Brady*, however, does not impose obligations on law enforcement. *Brady* relates only to the prosecutor. (*Brown, supra*, 17 Cal.4th at pp. 879-882.) The dissent, therefore, assumes an obligation that does not exist to reach a result, one which is contrary to *Brady* and its progeny.

In sum, more than 50 years after *Brady*, the Department has created for itself a duty that *Brady* neither establishes nor supports. *Brady*, therefore, cannot justify the Department's list or its disclosure to the District Attorney.

B. The Department's Release of Information on Its Own Brady List to the District Attorney – Outright or in Connection with a Criminal Prosecution – Impermissibly Would Violate *Pitchess*.

1. The contemplated disclosure would violate the clear terms of the *Pitchess* statutes.

As established, POBRA does not contemplate the Department's creation of its own version of a Brady list. And

Brady does not sanction the Department's release of the list, whether as a whole or on a case-by-case basis, to the District Attorney. Thus, when the Department nonetheless decides to create its own version of a Brady list, what can it do with that list? Can it use the list internally? Yes, subject to POBRA. Can it turn over the list to the District Attorney or, when a criminal prosecution is pending, disclose the names and employee numbers of deputies who are potential witnesses in that case? No. And the reason the Department cannot do so is that such disclosure violates the *Pitchess* statutes, which have existed for nearly four decades.

The Department contends, "Given the Department's constitutional *Brady* obligations, the Court must conclude that the limited disclosure of the names of *Brady* officers from one member of the prosecution team to the other does not violate the *Pitchess* statutes." (OBOM 22.) Yet, as already established, the Department does not have constitutional obligations under *Brady*. Moreover, the Department's releasing names and employee numbers of deputies to the District Attorney would constitute a violation of *Pitchess* – one that would render the *Pitchess* statutes, in existence for nearly 40 years, unconstitutional.

As noted, under the *Pitchess* statutes, names of officers in connection with discipline imposed on them are confidential. (Pen. Code, §§ 832.7, subds. (a) & (c), 832.8, subd. (d).) The Legislature

enacted those statutes to ensure that an officer's name linked to private or sensitive information listed by statute, including discipline, remains confidential. (*Commission, supra*, 42 Cal.4th at p. 295.) It provided only one exception – for investigations or proceedings concerning the conduct of police officers – that is not applicable here. (*Johnson, supra*, 61 Cal.4th at p. 710.) That is why an officer's identity in connection with discipline is not discoverable absent compliance with *Pitchess* procedures. (*Copley, supra*, 39 Cal.4th at pp. 1297-1298; see also *Long Beach Police, supra*, 59 Cal.4th at p. 73; *Berkeley Police, supra*, 167 Cal.App.4th at p. 399.) Here, by disclosing to the District Attorney that a particular officer is on an internal Brady list and may have exculpatory or impeaching information in his or her personnel file, the Department would be linking that deputy's name to discipline in direct violation of the *Pitchess* statutes.

The Department contends, and the dissent concluded, that *Copley* and such line of cases are inapplicable because they did not involve *Brady* and thus a synthesis of *Brady* and *Pitchess* principles. (OBOM 22-23; *ALADS, supra*, 13 Cal.App.5th at pp. 451-454.) *Pitchess*, however, applies regardless of the context, criminal or civil, in which discovery of information from peace officer personnel records is sought. (*Berkeley Police, supra*, 167 Cal.App.4th at p. 394 [*Pitchess* is "not just a limitation on discovery in criminal and civil proceedings but . . . a general condition of confidentiality for the records covered by it that applie[s] regardless of the context in which those records are

sought"].) And compliance with the *Pitchess* procedures is the exclusive means by which such information is discoverable. (*Riverside County Sheriffs Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 645 ["'*Pitchess* procedure is the sole and exclusive means' to obtain *Pitchess* discovery, and cases 'have rejected attempts to use other discovery procedures to obtain *Pitchess* records'"]; *Garden Grove Police Dept. v. Superior Court* (2001) 89 Cal.App.4th 430, 435 [defendant cannot "make an end run on the *Pitchess* process by requesting the officers' personnel records under the guise of a Penal Code section 1054.1 and *Brady* discovery motion (fn. omitted)].)

Moreover, *Copley* was not dependent on the context in which the records were sought, but rather on a direct interpretation of the *Pitchess* statutes and the legislative intent. (*Copley*, *supra*, 39 Cal.4th at pp. 1297-1298.) The statutes and the legislative intent have the same meaning whether a newspaper is seeking confidential information, as in *Copley*, or the Department wants to release it, as is the case here. Thus, given the across-the-board applicability of the *Pitchess* procedures as the exclusive means for discovery of information in peace officer personnel records and the plain language of the statutes, along with legislative intent, *Copley* is applicable in the context of this case as well.

Indeed, rather than releasing the names of deputies in connection with discipline, the Department has an obligation to protect confidentiality. (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200,

1210, fn. 5 [Pen. Code, § 832.7 "imposes on the sheriff the duty to maintain the confidentiality of peace officer personnel records or information obtained from those records"]; *Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 902 [voluntary public disclosure of *Pitchess* information prohibited]; see Cal. Const., art. I, § 1 [privacy an inalienable right].) Yet, the Department is disavowing that obligation based on a purported constitutional duty that does not exist. To allow the Department to release the names and employee numbers of officers directly will violate the Department's obligation under *Pitchess*.

This is so whether the Department releases the list as a whole or by names and employee numbers of deputies when a criminal prosecution is pending and a deputy on the list is a potential witness in that case. The limits on releasing the Department's so-called Brady list to individual names and employee numbers of deputies when a criminal prosecution is pending and a deputy on the list is a potential witness in that case, as decided by the trial court and articulated by this Court in its issue for review, do not account for *Pitchess*. Indeed, under *Pitchess*, the names of peace officers in connection with discipline specifically are rendered confidential. (Pen. Code, §§ 832.7, subd. (a), 832.8, subd. (d); see *Long Beach Police, supra*, 59 Cal.4th at p. 73; *Commission, supra*, 42 Cal.4th at p. 295; *Copley, supra*, 39 Cal.4th at pp. 1297-1298; *Berkeley Police, supra*, 167 Cal.App.4th at p. 399.) Consequently, release of the precise information the

Department seeks to give the District Attorney requires compliance with *Pitchess* procedures. Allowing law enforcement to provide this information to the District Attorney absent compliance with *Pitchess* procedures would not "protect [peace officer] privacy interests 'to the fullest extent possible,'" as mandated by the Legislature. (*Johnson, supra*, 61 Cal.4th at p. 714.)

2. The contemplated disclosure would render the *Pitchess* statutes unconstitutional.

No harmonizing of *Brady* and *Pitchess* to avoid application of *Pitchess* in this context, as the dissent concluded (*ALADS, supra*, 13 Cal.5th at pp. 449-450), is required because the Department has no *Brady* obligation. But, to say that the Department has an obligation under *Brady*, regardless of *Pitchess*, to release names of deputies and employee numbers to the District Attorney, whether on a list or on a case-by-case basis, is to require such release. If mandated by *Brady*, the release cannot be permissive or voluntary. And, if the Department is mandated to violate *Pitchess*, then the *Pitchess* statutes, in existence for nearly 40 years, cannot be constitutionally sound.

A conclusion that the *Pitchess* statutes are unconstitutional, however, is not a necessary result in this case. (*In re Skinker's Estate* (1956) 47 Cal.2d 290, 297 ["when two alternative interpretations are presented, one of which would be unconstitutional and the other constitutional, the court will choose that construction which will

uphold the validity of the statute and will be constitutional"].) The information regarding a deputy's name and employee number and the potential for *Brady* information in his or her personnel file can be provided, to either the prosecution or the defense, by following the *Pitchess* procedures. In other words, to the extent the issue whether a deputy has information in his or her confidential personnel file that might be impeaching evidence at trial is relevant in a particular case, either the prosecution or the defense can file a *Pitchess* motion for the trial court to conduct an in camera review. (*Johnson*, *supra*, 61 Cal.4th at pp. 715-722.)

In short, allowing the Department to release the names and employee numbers of deputies on its Brady list, whether on a routine or case-by-case basis, violates *Pitchess* because such an act by the Department directly conflicts with Penal Code sections 832.7 and 832.8. And a permissive, or voluntary, release makes no sense because the Department claims it has a constitutional obligation to do so under *Brady*, which would render the *Pitchess* statutes unconstitutional. As a result, the only harmonizing necessary here is a recognition that either the prosecution or the defense, in an appropriate case, must use the *Pitchess* procedure to discover potential *Brady* information in a deputy's confidential personnel file. (*Johnson*, *supra*, 61 Cal.4th at p. 718.)

C. This Court's Opinion in *Johnson* Does Not Permit the Release of Information on the Department's Own Brady List to the District Attorney.

In *Johnson*, the police department in San Francisco, "acting pursuant to procedures it ha[d] established, informed the district attorney that confidential personnel records of two peace officers who are potential witnesses might contain exculpatory information." (*Johnson, supra*, 61 Cal.4th at p. 705.) This Court asked: "(1) May the prosecution examine the records itself to determine whether they contain exculpatory information, or must it, like criminal defendants, follow the procedures the Legislature established for *Pitchess* motions? (2) What must the prosecution do with this information to fulfill its *Brady* duty?" (*Ibid.*)

As to the first question, this Court "conclude[d] that the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records." (*Johnson, supra*, 61 Cal.4th at p. 705.) As to the second question, this Court held that, "[b]ecause 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, . . . the prosecution fulfills its *Brady* duty as regards the police department's tip if it informs the defense of what the police department informed it, 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, 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." (*Id.* at pp. 705-706.)

From this, the Department, and the dissent in *ALADS*, contend that this Court in *Johnson* recognized a duty by the Department to disclose to the District Attorney information on its own Brady list absent compliance with *Pitchess*.[6] Not so.

In *Johnson*, the propriety of the law enforcement agency's policy to tell the prosecution that a police officer who is a potential witness

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[6] In this case, the Department argues against the position the law enforcement agency took in *Johnson*. In *Johnson*, the law enforcement agency asserted the prosecutor's *Brady* obligation did not extend to information in confidential peace officer personnel records kept in the agency's administrative capacity. (*Johnson*, *supra*, 61 Cal.4th at p. 715.) Here, in contrast, the Department contends the prosecution must become aware of information in confidential peace officer personnel records maintained in the Department's administrative capacity. The Department goes so far as to argue it has a constitutional obligation to give the prosecution that information, absent *Pitchess* compliance.

might contain exculpatory information was not at issue. This Court addressed only the obligations of a prosecutor once it has that information. (*Johnson, supra*, 61 Cal.4th at pp. 705-706, 712-722.) In doing so, this Court emphasized the validity of the *Pitchess* procedures, as well as the importance of complying with them, and recognized that *Brady* is satisfied by the ability of the prosecution or the defense to seek information through *Pitchess* procedures. As this Court stated, "We are confident that trial courts employing *Pitchess* procedures will continue to ensure that defendants receive the information to which they are entitled [under *Brady*]." (*Id.* at p. 720; see also *id.* at p. 711 ["'relatively relaxed standards for a showing of good cause under [Evid. Code, §] 1043, subd[.] (b) – "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought – insure the production for inspection of all potentially relevant documents'"].)

True, the Court, in acknowledging the "tip" provided by the law enforcement agency to the prosecution said that, "[i]n this case, the police department has *laudably* established procedures to streamline the *Pitchess/Brady* process." (*Johnson, supra*, 61 Cal.4th at p. 721, italics added.) But, the fact that this Court determined it was laudable to streamline the *Pitchess/Brady* process does not mean that it was giving law enforcement agencies permission to disclose confidential information without complying with *Pitchess* procedures.

Indeed, this Court did not in any respect address the duties, if any, of law enforcement. Rather, the issue in *Johnson* focused solely on the responsibilities of the prosecution.[7]

In addressing the responsibilities of the prosecution, this Court emphasized the confidentiality of peace officer personnel records under Penal Code section 832.7, subdivision (a), and the statute's limited exception for "'investigations or proceedings concerning the conduct of peace officers . . . .'" (*Johnson*, *supra*, 61 Cal.4th at pp. 713-714.) Concluding that the exception does not apply in the context of a criminal prosecution against a defendant, this Court determined that "[a] police officer does not become the target of an investigation merely by being a witness in a criminal case." (*Id.* at p. 714.) As a result, either the prosecution or the defense could seek the discovery of information from that officer's personnel file, but only through *Pitchess* procedures. (*Id.* at pp. 714-722.)

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[7] The policy in *Johnson* not only required the law enforcement agency to release names to the District Attorney, it also mandated that the District Attorney file a motion to obtain in camera review of the officer's personnel file. (*Johnson*, *supra*, 61 Cal.4th at p. 723 [when District Attorney determines that peace officer identified by police department "is a material witness in a pending criminal case or intends to call that officer as a witness," District Attorney "*shall*" make a motion under the *Pitchess* statutes (italics added)].) This Court rejected that aspect of the policy, concluding the prosecution was not required to file a motion for in camera review of the records because the defendant could do so. (*Id.* at pp. 705-706, 721-722.) As a result, the policy in *Johnson* as a whole was not "laudabl[e]." (See *id.* at p. 721.)

This line of thinking applies in the instant case. A deputy's name and employee number in connection with discipline, as the Department seeks to disclose to the District Attorney, are confidential under Penal Code section 832.7, subdivision (a). The filing of a criminal prosecution against a defendant in which such deputy is a potential witness does not strip his or her records of confidentiality. Thus, if either the prosecution or the defense wants information from that deputy's confidential record, *Pitchess* procedures must be followed. In other words, because the *Pitchess* statutes provide for discovery of confidential information in peace officer personnel records in specified circumstances, those statutes are the means by which any *Brady* material is revealed. Should the prosecutor discover *Brady* information in the *Pitchess* process, he or she would be required by *Brady* to provide that information to the defense. "[T]he *Pitchess* procedures the Legislature established long ago can protect defendants' interests without unduly infringing on police officers' privacy interests." (*Johnson, supra*, 61 Cal.4th at p. 714.)

As *Johnson* does not sanction the Department's release of confidential information to the District Attorney absent compliance with *Pitchess* procedures, nor does the Attorney General's opinion that relied on *Johnson* to reach such a result. The Attorney General found this Court's "approval of the policy [of law enforcement providing a tip to the District Attorney] was logically necessary to its decision" and thus "Penal Code section 832.7[, subdivision] (a) does not preclude [law

enforcement] from providing *Brady* list information to a district attorney for purposes of facilitating *Brady* compliance." (2015 WL 7621362, at *2.) The Attorney General went so far as to approve, based on *Johnson*, a policy that gave prosecutors access to a purported Brady list created by law enforcement and allowed them to "search it for the names of officers who have been subpoenaed to testify in upcoming criminal trials." (*Id.* at *6, fn. omitted.) But *Johnson* itself said that prosecutors could not search peace officer personnel records, and the Attorney General opinion does not cite any authority permitting a prosecutor routine access to a version of a Brady list created by law enforcement. The Attorney General's opinion thus reaches way beyond what this Court decided in *Johnson*.

The Attorney General's opinion also rejects the distinction in *Barrett*, *supra*, 80 Cal.App.4th at pages 1317-1318, between a law enforcement agency acting in an administrative versus an investigative capacity. (2015 WL 7621362, at *6-7.) According to the Attorney General, "[t]he [California Highway Patrol] is, first and foremost, a law enforcement agency, and its officers routinely act in an investigative or law enforcement capacity in connection with criminal prosecutions. At issue here are not CHP's records regarding its general operations, but its records regarding those peace officers whose routine activities result in criminal prosecutions." (*Id.* at *7, fn. omitted.)

In making these statements, the Attorney General forgets about *Pitchess* and the confidentiality of peace officer personnel records. Sure, when law enforcement acts in an investigative capacity in connection with a criminal prosecution, the information it obtains is within the realm of information attributed to the prosecutor. (*Brown, supra*, 17 Cal.4th at pp. 879-882; *Barrett, supra*, 80 Cal.App.4th at pp. 1317-1318.) But, for information from confidential peace officer personnel records, the Attorney General fails to recognize that *Brady* information can be obtained through the *Pitchess* procedures. Indeed, as this Court stated in *Johnson*, "[a] police officer does not become the target of an investigation merely by being a witness in a criminal case." (*Johnson, supra*, 61 Cal.4th at p. 714.) Thus, the Attorney General's rejection of *Barrett*, without any support, fails to justify allowing prosecutors confidential information absent compliance with the *Pitchess* statutes.

D. Public Policy and Practical Considerations Do Not Support the Department's Release of Information on Its Own Brady List to the District Attorney.

Much of the Department's justification for its decision to release deputy names and employee numbers in connection with discipline rests on policy and practical considerations. The dissent in *ALADS* relied on these considerations as well. When examined, however, they

do not hold up, and, indeed, the policy and practical considerations support adherence to the statutory *Pitchess* scheme.

For example, the Department claims that not allowing it to release names and employee numbers of deputies on its own Brady list to the District Attorney "would essentially require that *Pitchess* motions be filed by prosecutors in every single criminal case, as to every single law enforcement witness who might testify in the case." (OBOM 8; see also OBOM 30-35.) It continues that such motions would not be based on the "requisite showing of 'good cause,'" which would require trial court's "to entertain 'fishing expeditions' . . . ." (OBOM 8.) The dissent in *ALADS* adopted this same line of thinking. (*ALADS*, *supra*, 13 Cal.App.5th at pp. 454-455 ["practical import" of majority's holding "tells us that a prosecutor must file a *Pitchess* motion to obtain the identity of a deputy on the *Brady* list, that is, to find out whether or not a deputy in a pending criminal prosecution has potential *Brady* material in his or her file"].)

This is a flawed rationale. For nearly 40 years *Brady* and *Pitchess* have coexisted without the need for the prosecutor to file a *Pitchess* motion in every single case. Why now? If a deputy appears on the prosecution's Brady list, or the prosecution otherwise needs information on the deputy's complaint or discipline history, the prosecution can file a *Pitchess* motion to obtain information from the

deputy's confidential personnel file.[8] If impeachment of the deputy's potential testimony at trial will be necessary to the defense, the defense can file a *Pitchess* motion to discover complaint or discipline history. *Brady* and *Pitchess* have coexisted in this regard for decades. Maintaining this coexistence does not require prosecution *Pitchess* motions in every single case. (*Johnson, supra*, 61 Cal.4th at p. 718 ["*Pitchess* procedures should be reserved for cases in which officer credibility is, or might be, actually at issue rather than essentially mandated in all cases"].)

The *ALADS* dissent accepts the "suggest[ion] that law enforcement agencies across the state have been [providing tips on deputies to the prosecution] for years – not under a formalized procedure as attempted in this case (although that, too, has been happening since at least 2010), but in response to informal requests from prosecutors." (*ALADS*, 13 Cal.App.5th at p. 455.) The dissent

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[8] If the deputy is on the prosecution's Brady list, the prosecutor gives the defense that information. For example, in *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759, 765, the prosecutor told the defense that an arresting officer was on its Brady list. The defense filed a *Pitchess* motion, and, the Department opposed the discovery motion, contrary to its position here that it has a *Brady* obligation to give the district attorney information from confidential personnel record absent *Pitchess* compliance. (*Id.* at pp. 765-766, 773-774.) The Court of Appeal rejected the Department's opposition, concluding the defense made a showing for discovery based on the fact the arresting officer was on the District Attorney's Brady list and was the crucial witness in the case. (*Ibid.*)

thus assumes these tips do not violate *Pitchess* simply because they have been occurring.

Such an assumption, however, is not warranted, especially when the prosecution or the defense can discern information contained in these tips by filing a *Pitchess* motion. That process does justice to both *Brady* and *Pitchess*. Indeed, that apparently is the procedure of the District Attorney's Office in Los Angeles – the very agency to which the Department wants to release information. (2 PWM Exhs. 372 [*no* law enforcement agency provides notification of potential *Brady* material in a peace officer's file; rather, "present and consistent past procedure followed by the Los Angeles County District Attorney's Office for determining if any Brady material exists in the personnel files of any peace officer witness in a pending prosecution, who is not included in the [District Attorney's Brady list system] . . . is by the filing of a *Pitchess* Motion . . . by either the defense or the Trial Deputy in a particular case"].) Further, "[p]ursuant to and in compliance with Penal Code section 832.7, the Discovery Compliance Unit actively declines to accept information from a peace officer personnel file if the information is offered by a law enforcement agency without the express permission of the involved officer." (*Ibid.*)

Indeed, the trial court's limited preliminary injunction, allowing the Department to disclose information to the District Attorney once a criminal prosecution is pending and a deputy is a potential witness in that case, is what will cause "overfiling" of *Pitchess* motions.

Permitting the disclosure, as the trial court did, because it is required under *Brady* is nonsensical. (See 1 PWM Exhs. 193.) If the disclosure is required by *Brady*, it is mandatory, not permissive.

In that case, if disclosure is required upon the filing of a criminal prosecution for every potential law enforcement witness, a *Pitchess* motion will be filed for all of those potential witnesses. But not all will be material or require disclosure of exculpatory or impeaching information, i.e., some of those potential witnesses simply may have been present at the scene or been involved in an aspect of the law enforcement's work that has nothing to do with the prosecutor's or the defense's theory of the case.[9] Furthermore, disclosure based on a pending criminal prosecution does not relate to the time when prosecutors typically "determine if any potential Brady material exists with regard to any identified witness . . . ."[10] (2 PWM Exhs. 371.)

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[9] In fact, the trial court's "limitation" conflicts with the Department's own letter to affected deputies in which it stated that "[s]ubsequent case law [to *Brady*] has decreed that an *arresting or witnessing officer's* past record for certain work performance deficiencies involving moral turpitude is a factor which might impair the officer's credibility on the witness stand . . . ." (1 PWM 19, italics added.) The trial court's "limitation" to potential witnesses does not take into consideration the importance of an officer to a case, such as whether he or she arrested the defendant or witnessed the alleged criminal conduct.

[10] In the Los Angeles County District Attorney's Office, this identification of potential *Brady* material does not occur "in felony cases until before a preliminary hearing, and for misdemeanor cases

Thus, limiting the disclosure to a pending criminal prosecution for potential witnesses really is no limit at all. Rather, it is an invitation for unnecessary *Pitchess* motions. (See *Johnson*, *supra*, 61 Cal.4th at p. 718.)

In addition, allowing disclosure of deputy names and employee numbers in connection with discipline, whether on a routine or case-by-case basis, not only strips the information of its confidentiality, but also eliminates other protections in the *Pitchess* statutes. For example, under *Pitchess*, the trial court is the gatekeeper, screening for good cause and then allowing disclosure based on relevancy. (Evid. Code, §§ 1043, 1045.) Permitting disclosure by the Department eliminates the gatekeeper function such that the Department may turn over information based on its own determinations.[11] Moreover, disclosure of information under *Pitchess* requires issuance of a protective order such "that the records disclosed or discovered may not

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before any substantive hearing or 30 days before trial. It is only at this time that the [Trial] Deputy appearing in court is required by Office policy to notify the defense of any potentially exculpatory or impeachment evidence." (2 PWM Exhs. 371-372.)

[11] *City of Los Angeles*, *supra*, 29 Cal.4th 1, satisfies this gatekeeper function because, although this Court said a citizen complaint older than the five-year limit in Evidence Code section 1045, subdivision (b)(1), could be discoverable based on *Brady*, the disclosure would come only after the trial court had reviewed the information in camera and determined it was material per *Brady*. (*City of Los Angeles*, at p. 14.) Here, in contrast, the Department is proposing to release information based on its own determinations absent any *Pitchess* protections.

be used for any purpose other than a court proceeding pursuant to applicable law." (*Id.* at § 1045, subd. (e).) Disclosure by the Department will release the information without any protective order. Surely these results are not what the Legislature intended when it enacted the *Pitchess* statutes to enable discovery of peace officer personnel records in limited circumstances while also protecting privacy interests of peace officers "'to the fullest extent possible.' [Citation.]" (*Johnson, supra*, 61 Cal.4th at p. 714.)

Although the Court of Appeal concluded the Department could create its own Brady list for internal purposes (*ALADS, supra*, 13 Cal.App.5th at pp. 435-436), and that issue is not before this Court, the Department's act in providing the names and employee numbers of deputies on its list could violate POBRA. POBRA, of course, does not contemplate creation of a Brady list by law enforcement, but rather by a prosecutorial agency. (§ 3305.5, subd. (e).) POBRA then prevents punishment of a peace officer because that officer has been placed on a prosecutorial Brady list. (§ 3305.5, subds. (a)-(d).) If law enforcement agencies are allowed to create their own internal Brady lists, as *ALADS* concludes, then granting them permission to release information to prosecutors based on that list could consist of punishment of an officer for being placed on the list.

This is so because the officer likely will be considered subject to inclusion on the prosecution's Brady list, which could constitute "punitive action" under POBRA. (See § 3305.5, subd. (a).) As

recognized by the Legislature, "[p]lacement on a 'Brady List' is a 'scarlet letter' for peace officers." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill. No. 313 (2013-2014 Reg. Sess.) as amended April 24, 2013, p. 6.) Thus, allowing the disclosure requested by the Department in this case opens up the door to statewide POBRA violations.

Finally, in *Johnson*, the reason for adoption of the procedure to notify the prosecution of potential *Brady* material demonstrates it is not sound policy. There, "because '[r]epetitive requests by the District Attorney that the [Police] Department check employee personnel files of Department employees who may be witnesses create unnecessary paperwork and personnel costs . . . the Department is adopting a procedure under which the Department advises the District Attorney's Office of the names of employees who have information in their personnel files that may require disclosure under *Brady*." (*Johnson*, *supra*, 61 Cal.4th at p. 707.) Adopting a policy to address unnecessary paperwork and personnel costs is not grounds for violating the decades-old statutory framework of *Pitchess*. Although saving on paperwork and personnel costs may be a goal, it does not justify undoing the *Pitchess* statutory scheme that has worked in conjunction with *Brady* for nearly 40 years.

The courts have considered the *Pitchess* statutes a model of clarity and balance that permit discovery of peace officer personnel records while protecting officer privacy to the fullest extent possible.

(*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83 ["As statutory schemes go the [*Pitchess* statutory scheme] is a veritable model of clarity and balance"]; *Mooc, supra*, 26 Cal.4th at p. 1227 [through *Pitchess*, Legislature attempted to protect defendant's right to a fair trial and peace officer's interest in privacy to fullest extent possible].) The Legislature made public policy determinations when it enacted the *Pitchess* statutes, and the Department cannot override those determinations. If the Legislature sees issues with its *Pitchess* scheme, it can make changes. But it is not up to the courts to undo *Pitchess*, whether for administrative or expediency reasons or otherwise. (*Estate of Horman* (1971) 5 Cal.3d 62, 77 ["Courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature"]; *Joshua D. v. Superior Court* (2007) 157 Cal.App.4th 549, 565 ["Where the Legislature has made a policy choice, using as here particularly clear and unambiguous language, [court] may not second-guess its determination"].)

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the Court of Appeal.

Dated: February 12, 2018

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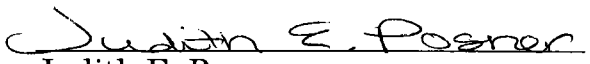

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the total word count of this Answer Brief on the Merits, excluding covers, table of contents, table of authorities, and certificate of compliance is 13,597.

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(C.C.P. § 1011)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of eighteen (18) years and not a party to the within action. I am a resident of or employed in the county where the mailing took place. My business address is 22708 Mariano Street, Woodland Hills, California 91367-6128.

On February 12, 2018, I served the **ANSWER BRIEF ON THE MERITS,** by enclosing a true and correct copy thereof in a sealed envelope as follows:

[X] **BY FIRST-CLASS U.S. MAIL:** I enclosed the document in a sealed envelope/package addressed to each of the addressees designated below and placed it for mailing, following our ordinary business practices. I am readily familiar with the mailing practice of my place of employment in respect to the collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business with postage fully prepaid.

The envelopes were addressed and mailed to all interested parties as follows:

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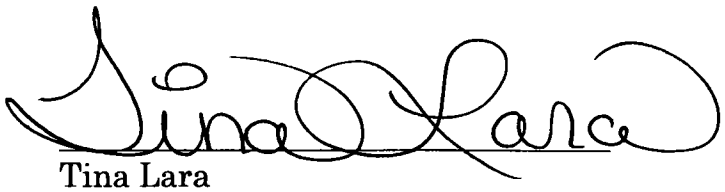
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 12, 2018, at Woodland Hills, California.



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