Case No.: S243855

In the Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

vs.

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

Respondent.

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

Real Parties in Interest

On Review from the Court of Appeal for the Second Appellate District, Division 8
Civil No.: B280676

After a Writ Proceeding from the Superior Court of Los Angeles County
Judge James C. Chalfant
Case Number BS166063

REAL PARTIES IN INTEREST'S REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

In its Answer Brief on the Merits ("Answer Brief"), Petitioner Association for Los Angeles Deputy Sheriffs ("ALADS") asserts a number of arguments in support of the Court of Appeal's holding that "*Brady* alerts" are now illegal.[1] (See, *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 423, review granted Oct. 11, 2017, S243855.) The Court of Appeal's decision was, simply put, wrongly decided, and this Court must overturn it to preserve important constitutional due process rights.

Contrary to ALADS' assertions, law enforcement agencies like Real Party in Interest Los Angeles County Sheriff's Department ("LASD" or "Department") have their own *Brady* disclosure obligations under applicable law. Given this, and given the importance of *Brady* disclosures to a criminal defendant's due process right to a fair trial, law enforcement agencies must be permitted to share the names and employees numbers (only) of employees who may be material witnesses in a criminal prosecution with the other half of the "prosecution team," i.e., a prosecutor's office, so the prosecutor can fulfill its obligations under *Brady*

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[1] The term "*Brady*" as used throughout this brief refers to the disclosure obligations discussed in the United States Supreme Court's seminal decision in *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, and subsequent decision in *Giglio v. United States* (1972) 405 U.S. 150, 92 S.Ct. 763. As used throughout this brief, the "*Brady* alert" refers to the practice of a law enforcement agency advising a prosecutor (either on its own or upon request) that an employee who is a material witness in the prosecutor's case may have exculpatory or impeachment information in his or her background. (See, e.g., *People v. Superior Court* (2015) 61 Cal.4th 696 ("*Johnson*"); see also, *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759.)

and its progeny. To interpret the *Pitchess* statutes[2] as absolutely prohibiting even a limited disclosure like this, as the Court of Appeal did, is inconsistent with *Brady* and creates a serious risk that the whole *Pitchess* statutory scheme will be deemed unconstitutional.

ALADS tries a number of creative arguments in its Answer Brief to justify the Court of Appeal's decision, but none of them have any merit. For example, ALADS argues that because information in a peace officer's personnel file is "not information gathered in the government's investigation of a criminal case, but rather created by the Department as an administrator," the prosecution is under no obligation to disclose that information – even if it constitutes impeachment evidence. (Answer Brief, p. 32.) The cases that ALADS cites in support of this argument are readily distinguishable, however, and the argument itself is contrary to decades of applicable law.

Similarly, ALADS argues that Government Code section 3305.5, a provision of the Public Safety Officers Procedural Bill of Rights Act ("POBRA"), somehow prohibits a law enforcement agency from maintaining a *Brady* list because the recently enacted statute refers to *Brady* lists that are maintained by prosecutors. Simply put, ALADS incorrectly assumes that there can be only one kind of "*Brady* list," and its erroneous assumption is contradicted by both judicially noticeable facts and the law.

ALADS' argument that the Court of Appeal's holding will result in fewer *Pitchess* motions rather than more likewise lacks merit. ALADS'

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[2] The *Pitchess* statutes, as referred to herein, refer to California Penal Code sections 832.5, 832.7 and Evidence Code sections 1043, *et seq.*

argument defies common sense, and more importantly it ignores the impediment to a fair trial that the Court of Appeal's holding invites. Prohibiting one member of the "prosecution team" from disclosing to the other that a particular employee of the law enforcement agency who is or will be a material witness for the prosecution may have "*Brady* material" in his or her background unduly restricts a criminal defendant's and/or a prosecutor's ability to ***prevail*** (i.e., to simply have the trial court review the employee's personnel records *in camera*) on a *Pitchess* motion. Without a *Brady* alert, there is a serious risk that neither the prosecutor nor the defense attorney will be able to put together sufficient facts to have a *Pitchess* motion granted. This is particularly true in situations where only the law enforcement agency is privy to a particular employee witness's misconduct due to the confidential nature of internal administrative investigations. The risk of having a *Pitchess* motion denied when a law enforcement agency knows one of its employees, for instance, was discharged for submitting a false police report or planting evidence, but the Civil Service Commission deemed the punishment too severe, is too great for this Court to sanction, particularly given the fact that a *Brady* alert implicates minimal privacy rights, if any at all.

For all of these reasons, and for the reasons set forth in Real Parties in Interests' Opening Brief on the Merits, Real Parties respectfully request that the Court overturn the Court of Appeal and hold that a *Brady* alert practice wherein prosecutors are provided the names and employee numbers of individuals who have founded investigations for policy violations involving moral turpitude is permissible under the *Pitchess* statutes and/or because constitutional due process considerations warrant an extremely narrow exception to the *Pitchess* motion process.

II. THE LAW IS WELL-SETTLED THAT INVESTIGATIVE AGENCIES, NOT JUST PROSECUTORS, HAVE A DUTY TO DISCLOSE UNDER *BRADY*

In its Answer Brief, ALADS acknowledges case law that holds law enforcement agencies are part of the "prosecution team." (Answer Brief, pp. 27-29.) Nevertheless, ALADS argues the Department has no independent obligation to disclose exculpatory or impeachment evidence under *Brady, supra,* 373 U.S. 83. In order to make this argument, however, ALADS completely ignores the numerous published decisions which hold both prosecutors ***and*** investigating agencies have a constitutional obligation to disclose exculpatory and impeachment evidence. (*See, e.g., Tennison v. City and County of San Francisco* (9th Cir. 2009) 570 F.3d 1078, 1087, quoting *United States v. Blanco* (9th Cir. 2004) 392 F.3d 382; *Carrillo v. County of Los Angeles* (9th Cir. 2015) 798 F.3d 1210.)

In *Tennison*, former prisoners brought a civil rights action under 42 U.S.C. section 1983 against the City and County of San Francisco and homicide inspectors, alleging that the inspectors had withheld exculpatory evidence. There, the Ninth Circuit Court of Appeals plainly held that both prosecutors and police officers owed a duty under *Brady* to disclose exculpatory evidence:

> ***The Inspectors argue, first, that Brady imposes a duty on prosecutors, but not on police officers, to disclose exculpatory evidence. We reject the Inspectors' argument.*** We have held that exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the

> investigators not to give him certain materials unless he asked for them.
>
> *United States v. Blanco*, 392 F.3d 382, 388 (9th Cir.2004).
>
> ***The Inspectors' position also is untenable in light of the Supreme Court's admonition that "Brady suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'"*** *Youngblood v. West Virginia*, 547 U.S. 867, 869-70, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (per curiam) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)); *see also, e.g., Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir.2001) (stating that it was clearly established in 1979 and 1980 that police could not withhold exculpatory information about fingerprints and the conduct of a lineup from prosecutors). ***We accordingly reject this argument.***

(*Tennison, supra,* 570 F.3d at p. 1087 [Emphasis added].)

More recently, in *Carrillo v. County of Los Angeles*, the Ninth Circuit Court of Appeals reaffirmed the decades-old proposition that investigating agencies, and not just prosecutors, owe a duty of disclosure under *Brady*. Relying upon a number of cases, including a Fourth Circuit Court of Appeals case decided only one year after *Brady*, the court held as follows:

> Requiring police officers as well as prosecutors to disclose material and exculpatory evidence follows logically from *Brady's* rationale. "As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same." *Moldowan v. City of Warren*, 578 F.3d 351, 379 (6th Cir.2009). ***Because police officers play an essential role in forming the prosecution's case, limiting disclosure obligations to the prosecutor would "undermine Brady by allowing the***

> ***investigating agency to prevent production by keeping a report out of the prosecutor's hands."*** *United States v. Blanco*, 392 F.3d 382, 388 (9th Cir.2004) (quoting *United States v. Zuno–Arce*, 44 F.3d 1420, 1427 (9th Cir.1995)).

(*Carrillo, supra*, 798 F.3d at pp. 1219-1220 [Emphasis added]; see also *United States v. Zuno-Arce* (9th Cir. 1995) 44 F.3d 1420, 1427 ["It is the ***government's***, not just the prosecutor's, conduct which may give rise to a *Brady* violation." [Emphasis added].)

As the *Carrillo* court went on to explain, under Ninth Circuit authority, it is "unmistakably clear that police officers and prosecutors alike share an obligation to disclose 'pertinent material evidence favorable to the defense.'" (*Carrillo, supra*, 798 F.3d at p. 1220, quoting *United States v. Butler*, 567 F.2d 885, 888 (9th Cir.1978).)

While ALADS cites to *In re Brown* (1998) 17 Cal.4th 873, in which this Court observed that "the Supreme Court has unambiguously assigned the duty to disclose solely and exclusively to the prosecution; those assisting the government's case are no more than its agents," the case does not stand for the proposition that other members of the prosecution team owe no duty of disclosure whatsoever, as ALADS suggests. Rather, *In re Brown* merely holds that the prosecution will ultimately be held responsible for any failure to make a required disclosure to the defense, even where a member of the prosecution team, such as the investigating agency, fails to make a disclosure to the prosecutor, because the primary concern is for the fairness of trials and not prosecutorial misconduct:

> Despite any seeming unfairness to the prosecution, no other result would satisfy due process in this context. "The principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

(*Id.* at 881-882, quoting *Brady, supra*, 373 U.S. at p. 87; citing *Kyles, supra*, 514 U.S. at pp. 437-438 [115 S.Ct. at pp. 1567-1568], *Smith v. Phillips* (1982) 455 U.S. 209, 219, 102 S.Ct. 940, 947.)

Thus, contrary to ALADS' assertion, it is well settled that law enforcement agencies have their own disclosure obligations under *Brady*. An investigating agency's required disclosures may need to be made to the prosecutor, rather than to the defense, but they are disclosure obligations nonetheless. ALADS' arguments are built upon this weak and unsupported foundation, and for this reason, and the reasons set forth below, ALADS arguments must be rejected.

III. THE DUTY OF DISCLOSURE UNDER *BRADY* INCLUDES IMPEACHMENT INFORMATION CONTAINED IN PEACE OFFICERS' PERSONNEL FILES

In addition to refusing to recognize a law enforcement agency's well-established disclosure obligations under *Brady*, ALADS also takes too narrow a view of what constitutes *Brady* material that must be disclosed to the defense in a criminal case. Specifically, ALADS suggests that because information in a peace officer's personnel file is "not information gathered in the government's investigation of a criminal case, but rather created by the Department as an administrator," the prosecution is under no obligation to disclose that information – even if it constitutes impeachment evidence. (Answer Brief, p. 32) ALADS' position is simply wrong and, again, contrary to ***decades*** of United States Supreme Court and Ninth Circuit Court of Appeals precedent. As the Ninth Circuit recently explained in *Carrillo v. County of Los Angeles*:

> For decades prior, the Supreme Court had explained the presentation of false testimony violated due process. In its 1972 opinion in

Giglio, the Court reasoned ***Brady encompassed evidence implicating the credibility of a government witness:***

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 [55 S.Ct. 340, 79 L.Ed. 791] (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice."... In *Napue v. Illinois*, 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269 [79 S.Ct. 1173]. Thereafter *Brady v. Maryland*, 373 U.S. at 87 [83 S.Ct. 1194], held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.*
>
> 405 U.S. at 153-54, 92 S.Ct. 763 (emphasis added) (some citations omitted). In *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court reaffirmed this principle, citing *Giglio* for the proposition that "[i]mpeachment evidence ... as well as exculpatory evidence, falls within the *Brady* rule." *Id.* at 676, 105 S.Ct. 3375.

(*Carrillo, supra*, 798 F.3d at p. 1225-26.)

In addition, the *Pitchess* procedures themselves, i.e., Penal Code sections 832.5, 832.7 and Evidence Code sections 1043, *et seq.*, specifically allow a criminal defendant to compel the discovery of evidence in a law enforcement officer's personnel file, such as information about past complaints by third parties of excessive force, violence, dishonesty or the filing of false police reports. The *Pitchess* procedures "are based on the premise that evidence contained in a law enforcement 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." (*Johnson, supra,* 61 Cal.4th 696, quoting *People v. Mooc* (2001) 26 Cal.4th 1216, 1219-1220, 1227 and *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 640.)

Contrary to ALADS' assertion, it is irrelevant that the information contained in a peace officer's personnel records is "maintained by agencies in their administrative, as opposed to investigative, capacities." (Answer Brief, p. 32.) The case that ALADS relies upon for their erroneous assertion, *People v. Superior Court ("Barrett")* (2000) 80 Cal.App.4th 1305, did ***not*** involve impeachment information contained in the personnel files of peace officers who would be testifying as material witnesses at a criminal trial. Rather, the information sought by the criminal defendant, who stood accused of murdering his cellmate, consisted of 17 categories of records maintained by the Department of Corrections, including statistical information, policy manuals, incident logs and the like. (*Id.* at 1309-1310.)

The *Barrett* court ultimately held that the defendant was entitled to discovery under Penal Code section 1054.5 of the department's records relating to its murder investigation, but that a subpoena duces tecum was required in order to compel production of other records the department maintained in its capacity as administrator of the state prison system. (*Id.* at 1318.) Thus, the *Barrett* court's distinction between the department's administrative and investigative functions, vis-à-vis the right to discovery under Penal Code section 1054.5, is inapplicable here.

Moreover, in discussing the *Brady* obligations of members of the prosecution team, the *Barrett* court itself noted that "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." (*Id.* at 1315.) Unlike the Department of Corrections'

statistical information, manuals, etc., sought in *Barrett*, impeachment evidence regarding a peace officer witness who will be testifying at trial is ***directly connected*** with the "prosecution of the criminal charge against the defendant." Most importantly, law enforcement agencies do not merely keep personnel files and records of internal investigations for "administrative" purposes. Rather, they also keep personnel files because they are legally mandated to do so under Evidence Code section 1043 and Penal Code section 832.5.

Accordingly, where a peace officer's personnel file contains impeachment information, the prosecution is constitutionally obligated to disclose that information to the defense. Moreover, a *Brady* violation occurs even when the government fails to turn over evidence that is known only to police investigators and not the prosecutors. (*Tennison, supra*, citing *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-70, 126 S.Ct. 2188, and *Kyles v. Whitley* (1995) 514 U.S. 419, 438, 115 S.Ct. 1555). Hence, when an investigating agency is aware of potential impeachment evidence contained in an officer's personnel records, the agency is obligated to disclose it, or when the impeaching information is part of a confidential personnel record, facilitate such disclosure.

IV. PERMITTING *BRADY* ALERTS DOES NOT VIOLATE THE *PITCHESS* STATUTES, BUT EVEN IF THIS COURT CONCLUDES THAT IT DOES, THE CONSTITUTION NEVERTHELESS REQUIRES DISCLOSURE

Brady alerts do not violate the *Pitchess* statutes because the disclosure of an officer's name to a prosecutor does ***not*** necessarily mean that the officer is on his/her department's *Brady* list because of information contained in his/her personnel records. Officer names can be added to an

agency's *Brady* list from sources independent from an officer's personnel records, e.g., officer names can be added to a law enforcement agency's internal *Brady* list because of felony charges and/or convictions involving moral turpitude (Evid. Code § 788; Penal Code § 1054.1 (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177) or because of facts showing criminal conduct involving moral turpitude, whether or not the conduct resulted in the filing of criminal charges or a conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297). As such, ALADS reliance on *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 ("*Copley Press*") and *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 298 ("*Commission*") is misplaced.

ALADS reliance on *Copley Press* and *Commission* is also misguided because those cases are readily distinguishable. The *Copley Press* line of cases dealt with disclosures pursuant to the California Public Records Act, where information was sought by the press precisely so that it may be disseminated to the public. In that scenario, where the balancing of interests does not involve a criminal defendant's fundamental right to a fair trial, it makes sense that the Court would conclude a peace officer's statutorily created privacy interests in his or her employment records outweigh the public's need to know. But in a criminal case, where the contemplated disclosure is from one member of the prosecution team to another and a defendant's liberty (and in death penalty cases the

defendant's life) is at stake, the balance must tip in favor of disclosure.[3]

Nevertheless, ALADS argues in hyperbolic fashion that permitting *Brady* alerts between two members of the prosecution team would "render the *Pitchess* statutes, in existence for nearly 40 years, unconstitutional." (Answer Brief, p. 49.) Such a drastic outcome is completely unwarranted. Even if this Court were to conclude that a *Brady* alert from one member of the prosecution team to another would technically violate the *Pitchess* statutes, there is no need to throw out the *Pitchess* statutes and decades of jurisprudence with them. Rather, the Court can (and should) simply hold that while the *Pitchess* statutes generally remain constitutional, they must yield in this narrow circumstance to allow for *Brady* alerts between one member of the prosecution team to another. Such an outcome would be no different than the way this Court previously held that the five year statutory limitation on *Pitchess* discovery under Evidence Code section 1045, subdivision (b)(1), cannot be used to prevent disclosure of information concerning conduct more than five years old when the information is deemed material under *Brady*. (See *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1.) Such a holding would also be consistent with this Court's prior pronouncement that "no statutory discovery scheme can limit

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[3] *Copley Press*, *Commission* and similar cases cited by ALADS were decided prior to several relatively recent changes in the law and rules of professional conduct which authorized significant professional and criminal penalties against prosecutors who intentionally and in bad faith withhold exculpatory evidence. (See, e.g., Penal Code § 141, enacted by Stats. 2016, c. 879 (Assem. Bill No. 1909), Penal Code § 1424.5 and Bus. & Prof. Code § 6086.7, subd. (a)(5), enacted by Stats. 2015, c. 467 (Assem. Bill No. 1328), amended by Stats. 2016, c. 59 (Sen. Bill No. 1474), and Rule of Professional Conduct 5-110, effective November 2, 2017.) Clearly, there is a recognition that preserving a criminal defendant's due process right to a fair trial is of paramount importance.

a defendant's due process right of discovery; such rights operate outside of any statutory scheme." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.)

Allowing *Brady* alerts properly balances a criminal defendant's constitutional due process rights to a fair trial with the state-created privacy interests a peace officer has in his or her personnel records. Given that a criminal defendant's freedom/personal liberty is at stake, the potential risk of harm due to non-disclosure of names of officers with potential *Brady* material in their personnel files far outweighs any theoretical "harm" [4] that results to a peace officer from the disclosure of his or her name and employee number ***to a prosecuting agency***. This is particularly true since, contrary to ALADS' assertion, nothing about the *Brady* alert practice usurps the trial court's function as the gatekeeper. (See, Answer Brief, p. 66.) In making their argument, ALADS misconstrues what a *Brady* alert entails. With a *Brady* alert the only "information" disclosed to the prosecution is a name and employee identification number. Personnel records themselves are not disclosed to the prosecution. At most, a *Brady* alert may prompt the filing of a *Pitchess* motion in a criminal case if the prosecutor determines the employee is a material witness. But the judge hearing such a motion remains the gatekeeper under the statutorily

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[4] An October 2015 study/survey conducted by New York Public Radio found that police officer disciplinary records are confidential in 23 states, including California. In 15 states, police officer disciplinary records are available to the public in some situations. Finally, in 12 states, police officer disciplinary records are generally available to the public. (See https://www.wnyc.org/story/police-misconduct-records.) Real Parties are unaware of any evidence or studies indicating officers have suffered any harm in the 12 states that make police officer disciplinary records publicly available.

prescribed *Pitchess* process. The judge, upon granting a *Pitchess* motion, is responsible for performing the *in camera* review of the actual personnel files. This procedure minimizes the potential for abuse or "harm" to a peace officer that could result from a *Brady* alert.

For all these reasons, the Court must hold that either the *Pitchess* statutes are not violated in the context of a *Brady* alert and/or that *Brady* and its progeny trump the *Pitchess* statutes in this very narrow situation. To hold that statutory privacy rights for peace officers are more important than a criminal defendant's right to a fair trial, particularly when the disclosure is limited to the providing of names and employee numbers from one member of the "prosecution team" to another, would be a miscarriage of justice.

V. *BRADY* ALERTS AND *BRADY* LISTS ARE USED BY BOTH PROSECUTORS AND LAW ENFORCEMENT AGENCIES ALIKE

ALADS asserts that *Brady* lists are "contemplated by POBRA as a tool for prosecutorial agencies, not law enforcement." (Answer Brief, p. 41.) While the Department does not dispute that *Brady* lists, as specifically discussed in Government Code section 3305.5, refers to lists maintained by prosecutorial agencies, there is not one single definition for a "*Brady* list." Like many terms, however, the term "*Brady* list" varies depending on context.

ALADS cannot dispute that numerous law enforcement agencies throughout the state maintain their own *Brady* lists and proactively provide *Brady* alerts to the prosecution in order to fulfill their *Brady* obligations. This is not a new phenomenon. *Brady* lists have existed independently of POBRA for years. Indeed, Government Code section 3305.5 was only first

enacted in 2013, with an effective date of January 1, 2014, whereas *Brady* lists can pinpoint their genesis to the 1963 *Brady* and 1972 *Giglio* cases. Furthermore, *Brady* alerts by law enforcement agencies have also co-existed with *Pitchess* for many years,[5] and such alerts have never been seen as a problem before, as evident from the lack of published case law.

ALADS cites to a single (and now-superseded) policy of the Los Angeles District Attorney's office ("LADA") regarding the handling and maintenance of impeachment information on police officers in an effort to show that the LADA previously did not utilize information from police personnel files in preparing its *Brady* list (known as the Officer and Recurrent Witness Information Tracking System ("ORWITS")), and because of this a prohibition on *Brady* alerts will not result in a "sea change" in the law. (Answer Brief, p. 44.) First, the LADA is but one prosecutorial agency within the County of Los Angeles and state, whereas other prosecutorial agencies regularly receive *Brady* alerts from the law enforcement agencies with whom those agencies work. Second, the policy to which ALADS refers has since been superseded.[6] The current policy, which was updated on January 19, 2018, clearly reflects the District Attorney's recognition that it will receive *Brady* alerts from law enforcement agencies.

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[5] For example, in *Johnson,* 61 Cal.4th at p. 696, this Court decided a case involving *Brady* alert procedures that the San Francisco Police Department "laudably established" to streamline the *Pitchess/Brady* process were enacted in 2010. (*Johnson*, 61 Cal.4th at p. 723.) Other departments relied on an Attorney General's opinion in developing similar *Brady* alert policies as well. (See, e.g., 98 Ops.Cal.Atty.Gen. 54, at *7.)

[6] Regardless of what the policy says, it is clear that *Brady* alerts have been provided to the LADA for some time now. (See, *Serrano, supra,* 16 Cal.App.5th at p. 774.)

For example, the policy expressly recognizes "[a] finding of misconduct by a Board of Rights or Civil Service Commission that reflects on a prosecution witness's truthfulness, bias or moral turpitude" as a type of impeachment evidence that generally must be disclosed to the defense. (See LADA Legal Policy Manual, Chapter 14, attached as Exhibit "A" to Real Parties' Request for Judicial Notice ("RJN"), p. 264.) Such evidence is information that would generally be contained in a personnel file.

With respect to criminal conviction information on witnesses, the current policy further provides that, "[t]o ensure compliance with the *Brady* rule and Penal Code section 1054.1(d) and to avoid the respective burdens placed on the law enforcement agencies' custodians of records, the courts, and the LADA by repetitive *Pitchess* motions," all law enforcement agencies in Los Angeles County have agreed to provide certain information to the LADA's office whenever a police officer, who has testified for the prosecution in the past or is reasonably believed will testify in the future, is arrested or convicted. The information that is to be provided to the LADA's office from law enforcement agencies includes the employee name, employee number, arrest date, arresting agency, charges, etc. (See RJN Exhibit "A," p. 264.)

The policy also specifically discusses the procedure to be followed when LADA receives a *Brady* alert from a law enforcement agency:

> DDAs are occasionally put on notice that a peace officer witness's personnel file may contain potential impeachment information when, for example, they learn that the peace officer has been placed on leave pending an administrative investigation, or, pursuant to a legally valid written policy, a law enforcement agency notifies the LADA that a peace officer employee's personnel file contains potential impeachment information. [footnote citing to the October 13, 2015, Attorney General

> Opinion, 98 Ops.Cal.Atty.Gen. 54] Under these circumstances, DDAs must bring the possible existence of impeachment evidence to the attention of the defense.[footnote citing to *Johnson, supra,* 61 Cal.4th at 705, 715, 7016, 722] DDAs also have a right, but not an obligation, to bring a *Pitchess* motion.

(See RJN Exhibit "A," pp. 275-276.)

The bottom line is that ALADS' suggestion that the term "*Brady* list" is confined to the meaning set forth in one recently enacted provision of the POBRA is without merit. Many law enforcement departments maintain their own *Brady* lists independently of prosecutors, and ALADS' assertion that they do not is simply wrong.

VI. *BRADY* ALERTS ALLOW THE *PITCHESS* PROCEDURES TO BE USED IN AN EFFICIENT MANNER WHEREAS A PROHIBITION ON *BRADY* ALERTS WILL UNDULY BURDEN THE TRIAL COURTS

Because this Court recognizes that any favorable evidence known to others acting on the government's behalf (i.e., the prosecution team) is imputed to the prosecution, and therefore the *Brady* disclosure obligation encompasses both the duty to ascertain as well as divulge evidence known only to other members of the prosecution team (see *In re Brown, supra*, 17 Cal.4th at pp. 879-880), it follows that the prosecution is ***required*** to ascertain whether a peace officer who may be testifying as a material witness in a criminal trial has impeachment information in his or her personnel records. In other words, prosecutors cannot just put their heads in the sand.

As this Court explained in *Johnson*, where the prosecution has been provided a *Brady* alert from a law enforcement agency, then the prosecution satisfies its duty to ascertain and divulge potential

impeachment information by sharing with the defense whatever information it has received from the investigating agency, i.e., the *Brady* alert. Once the prosecutor has shared the *Brady* alert with the defense, due process is satisfied and nothing more is required of the prosecutor because the defense can then bring its own *Pitchess* motion to seek discovery of whatever impeachment information may actually be contained in the officer's personnel records. (*Johnson*, 61 Cal.4th at p. 716.) Although ALADS continues to be dismissive of the underlying factual circumstances in *Johnson*, the *Johnson* decision only makes sense and provides meaningful guidance when *Brady* alerts are permissible under *Pitchess*.

However, if this Court adopts ALADS' overly restrictive interpretation of the *Pitchess* statutes to preclude even the sharing of an officer's name between members of the prosecution team, and as a result law enforcement agencies are prohibited from providing *Brady* alerts to prosecutors absent a granted *Pitchess* motion, then it logically follows that prosecutors will be ***required*** to bring *Pitchess* motions for every officer who will be serving as a material witness in a case.[7] This is because there will be no other way for the prosecution to legally ascertain whether an officer has impeachment information in his or her personnel file. Absent universal *Pitchess* motion filings there would be an unreasonable risk that impeachment evidence in a peace officer's personnel file will go undiscovered, even if known by the law enforcement agency itself. Such

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[7] As discussed in greater detail below, there is a substantial risk that many such *Pitchess* motions would be denied when there is no *Brady* alert or other basis for believing that an officer's personnel file contains potential *Brady* material.

an outcome is directly contrary to this Court's closing in *Johnson*: "***we believe that the Pitchess procedures can, and must, be employed in a way that ensures compliance with defendants' due process rights to receive exculpatory information without unduly burdening trial courts***." (*Johnson*, *supra*, 61 Cal.4th at p. 722 [Emphasis added].)

While ALADS contends that allowing *Brady* alerts will result in the over-filing of *Pitchess* motions (Answer Brief, p. 64), that assertion defies logic and common sense. To the contrary, universal or widespread use of *Brady* alerts furthers the Court's desired goal of ensuring compliance with defendants' due process rights while avoiding an undue burden upon the trial courts by minimizing the number of *Pitchess* motions being filed. If *Brady* alerts are regularly and consistently given by law enforcement agencies to prosecutors, *Pitchess* motions would be more likely to be filed by prosecutors only when a *Brady* alert is provided since the absence of an alert would more strongly indicate the absence of *Brady* material in an officer's personnel file. (See, e.g., *Serrano*, *supra,* 16 Cal.App.5th at p. 774.) This would avoid the need for prosecutors to file *Pitchess* motions in every case where a police officer is going to be called as a material witness just to satisfy their duty to ascertain and divulge impeachment information to the defense.

Interpreting the *Pitchess* statutes to permit *Brady* alerts not only ensures the *Pitchess* procedures are employed efficiently, but also furthers ALADS' professed goal of protecting peace officers from unwarranted invasions of privacy related to their personnel records. Again, when *Brady* alerts are permitted and consistently provided, *Pitchess* motions will generally only be filed in cases where a *Brady* alert has been given to the prosecution, the prosecution determines the employee is a material witness,

and the prosecution then shares the information with the defense. This will limit the number of peace officers who have no impeachment information in their personnel records from having their records potentially subjected to *in camera* inspection by the courts on *Pitchess* motions that were filed simply because there was no other way for the prosecution or defense to ascertain that the records contained no such impeachment information. In an effort to "protect" the small minority of peace officers whose personnel records contain impeachment information from having their names disclosed to the prosecution, ALADS would rather inconvenience everyone — the courts, the prosecutors, the defense and every single peace officer who will be a material prosecution witness at trial — by requiring *Pitchess* motions in every case where an officer is deemed a material witness.

ALADS points out that "[f]or nearly 40 years *Brady* and *Pitchess* have coexisted without the need for the prosecutor to file a *Pitchess* motion in every single case" and then asks "Why now?" The answer to that question is simply that, prior to the underlying Court of Appeal decision in *Association for Los Angeles Deputy Sheriffs v. Superior Court* ("*ALADS*") (2017) 13 Cal.App.5th 413 no published decision had ever ruled that *Brady* alerts violated the *Pitchess* statutes. Accordingly, law enforcement agencies routinely notified prosecutors when officers had potential impeachment information in their personnel files, and even where that did not occur, a prosecutor's office might simply ask the agency if any such information existed.

The sharing of information between two members of the prosecution team ensured that *Pitchess* motions would only be filed by the prosecution when there actually was impeachment information believed to be in a specific officer's personnel files. The present need to file a *Pitchess* motion

in every case in which a peace officer may testify is solely the unfortunate end result of the *ALADS* Court's determination that, absent a properly filed and granted *Pitchess* motion, the prosecution has no ability to ascertain whether a peace officer has potential impeachment information in his or her file. (*Id.* at 439.)

ALADS also ignores the fact that the *Pitchess* process does not apply in federal courts. Because Los Angeles County deputies can work on multi-jurisdictional task forces along with federal agents on cases tried in federal court, deputies are periodically required to testify in federal court. Under such circumstances, and given ALADS' position that the *Pitchess* statutes are sacrosanct, would the Department now be prohibited from providing a *Brady* alert or *Brady* evidence to a federal prosecutor? Might refusal to provide such information upon request by a federal prosecutor, constitute obstructing an investigation by a federal court? Or is providing either a *Brady* alert or access to personnel files to a federal prosecutor permissible (as there is no federal *Pitchess* procedure), but not to a state prosecutor given the availability of the *Pitchess* process? If the Court concludes that *Brady* alerts are permissible under *Pitchess,* no such dichotomy is created.

VII. WITHOUT *BRADY* ALERTS, THE *PITCHESS* MOTION PROCEDURE RUNS THE RISK OF VIOLATING DUE PROCESS RIGHTS

It bears repeating that if prosecutors are required to bring *Pitchess* motions in every case where an officer will serve as a material witness at trial, it is unclear whether a prosecutor can establish the requisite "good cause" to obtain *in camera* inspection of an officer's personnel files absent a *Brady* alert or any other reason to believe an officer actually has

exculpatory or impeachment information in his or her file. (See, e.g., *Serrano, supra,* 16 Cal.App.5th at pp. 774-776.) Evidence Code section 1043, subd. (b)(3) specifically requires "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and ***stating upon reasonable belief that the governmental agency identified has the records or information from the records***." (Emphasis added.) As previously stated, without *Brady* alerts, attempts to pursue *Brady* material through the *Pitchess* process will frequently occur in a factual vacuum, devoid of any basis for believing an officer has *Brady* information in his or her file. Any *Pitchess* motions that are filed under such circumstances will, by definition, be "fishing expeditions." (*See* generally *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 93-94 [holding *Pitchess* motions must be supported by affidavits setting forth specific facts to prevent "fishing expeditions"].)[8]

While ALADS has taken the position that a prohibition on *Brady* alerts does not raise any constitutional concerns because either the prosecution or defense may file a *Pitchess* motion, ALADS fails to appreciate that there is a difference between having the ability to file a *Pitchess* motion and the ability to have a *Pitchess* motion ***granted.*** In the recent *Serrano v. Superior Court* case, which was published after this Court granted review, the trial court denied a *Pitchess* motion finding that even a

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[8] It is unclear whether a *Pitchess* motion that is filed without the requisite cause or information to justify the granting of a motion might be considered frivolous, potentially subjecting the filing attorney to sanctions. (See, e.g., Code of Civil Procedure section 128.7.)

Brady alert was insufficient to establish the requisite good cause necessary to grant the motion. On appeal, the Second District Court of Appeal held that, under *Johnson*, the fact the prosecutor had already notified the defendant that the deputy's personnel file contained potential *Brady* material was in fact sufficient to trigger *in camera* inspection of the deputy's personnel files under the *Pitchess* process, even without an affidavit describing specific misconduct. (*Serrano, supra,* 16 Cal.App.5th at p. 774.)

While the *Serrano* case, and *Johnson* before it, make clear that a notification that an officer has potential *Brady* material in his or her personnel file can suffice to support the granting of a *Pitchess* motion, a determination that *Brady* alerts from a law enforcement agency to the prosecutor violates *Pitchess* will significantly restrict the availability of this alternate method of triggering an *in camera* inspection. Moreover, if this Court interprets the *Pitchess* statutes as precluding *Brady* alerts, and the alternative method for prevailing on a *Pitchess* motion as set forth in *Serrano* is unavailable, there is a real probability that even if an officer has troves of impeachment information in his or her personnel file which would undermine confidence in a subsequent conviction, that information might never be discovered because the *Pitchess* statutes create an unreasonable and potentially unconstitutional roadblock to securing the information. *Brady* alerts are necessary to prevent such an injustice. As the *Serrano* Court noted, "Our high court's decision in *ALADS* will not affect this case because Serrano has already been informed there is potential *Brady* material in Deputy Halloran's personnel file, **but it will determine how often the issue we address here arises in the future.**" (*Serrano, supra,* 16 Cal.App.5th at p. 771 [Emphasis added].)

Because criminal defendants are constitutionally entitled to *Brady* information, in the same way prosecutors will be required to bring *Pitchess* motions for all officers who may serve as material witnesses at trial, despite being completely ignorant of the existence of impeachment information in the officers' personnel records, courts may similarly have no choice but to conduct an *in camera* review of the personnel records identified by every *Pitchess* motion that is filed simply because that is what due process requires. Accordingly, to avoid this unnecessary, impractical and burdensome outcome, we urge this Court to hold that law enforcement agencies may properly disclose to prosecutors the names and employee numbers of employees with potential *Brady* material in their personnel file without violating the *Pitchess* statutes.

VIII. CONCLUSION

For each of the foregoing reasons, Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles, respectfully request that this Court overturn the Court of Appeal's opinion and hold that law enforcement agencies, as members of the prosecution team, are permitted to provide *Brady* alerts without the need for a court order on a properly filed *Pitchess* motion.

Dated: April 3, 2018 LIEBERT CASSIDY WHITMORE

By: */s/ Alex Y. Wong*
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IX. CERTIFICATE OF WORD COUNT

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

I, Alex Y. Wong, certify in accordance with California Rules of Court, Rule 8.520(c)(1) that this brief (excluding the items that are not counted toward the maximum length) contains 6,802 words as calculated by the Microsoft Word 2010 software with which it was written.

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

Executed on April 3, 2018, in Los Angeles, California.

By: */s/ Alex Y. Wong*
Alex Y. Wong
Attorney for Real Parties in Interest

X. PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On **April 3, 2018**, I served the foregoing document(s) described as **REAL PARTIES IN INTEREST'S REPLY BRIEF ON THE MERITS** in the manner checked below on all interested parties in this action addressed as follows:

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/s/ Beverly T. Prater
Beverly T. Prater