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,

Case No. S243855

Court of Appeal for the Second Appellate District
Civil No.: B280676

Los Angeles County Superior
Court No.: BS166063

AMICUS CURIAE OFFICE OF THE FEDERAL DEFENDER OF LOS ANGELES'S BRIEF IN SUPPORT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al.

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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,	Case No. S243855 Court of Appeal for the Second Appellate District Civil No.: B280676 Los Angeles County Superior Court No.: BS166063

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

Amicus Curiae Office of the Federal Defender of Los Angeles provides the following brief in support of Real Parties in Interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles:

I. APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Office of the Federal Public Defender of Los Angeles (FPDO) hereby requests leave to file the accompanying *amicus curiae* brief per Cal. Rules of Court, rule 8.520(f).

No individual or organization other than the FPDO made any monetary contribution to fund the preparation or submission of the brief in the pending proceeding.

Alyssa D. Bell, Deputy Federal Public Defender, authored the brief, with the advice and comments of Hilary Potashner, the Chief Federal Public Defender for the Central District of California.

The FPDO represents indigent defendants in Federal Court pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. The Central District of California encompasses seven counties (Los Angeles, Orange, Ventura, Riverside, San Bernardino, Santa Barbara and San Luis Obispo) and has a population of over 19 million people. The FPDO represents the majority of people charged with federal crimes in the Central District. Our representation starts from the day of initial appearance through the resolution of the case by trial or plea, and in the event of sentencing. After sentencing, we continue to represent our clients on appeal before the Ninth Circuit and the United States Supreme Court.

As the institutional defender for indigent persons accused of federal crimes, the FPDO has a direct interest in all issues of criminal law, and a particular interest in the preservation of our clients' *Brady* rights. Moreover, with significant frequency, our cases originate from State and local law enforcement agencies. It is thus of vital importance to the FPDO that all *Brady* material, including that maintained in otherwise-confidential officer personnel files, be provided to the United States Attorney's Office when it is the prosecuting agency, and ultimately, to our clients.

II. INTRODUCTION

This Court granted review of the divided opinion in *ALADS v. Superior Court*, 13 Cal.App.5th 413 (2017), and has asked the parties to address the following question:

> When a law enforcement agency creates an internal *Brady*[1] 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?

Simply put, the constitution requires provision of an internal *Brady* list to the prosecution, and, to the extent that list is not updated contemporaneously with impeachment material as it enters peace officer personnel files, also requires individual *Brady* disclosures as to each potential law enforcement witness. Absent such basic procedural safeguards, the prosecuting agency cannot fulfill its duty to disclose material, exculpatory evidence to the defense.

The Association for Los Angeles Deputy Sheriffs ("ALADS") urges this Court to conclude that the prosecution must file a *Pitchess* motion, as

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[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

to every law enforcement witness, in order to learn of the mere existence of *Brady* information in a peace officer's personnel file. Its argument stems from a premise that is plainly wrong: "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*." (*ALADS* Brief in Opposition at 32.)[2] The Supreme Court of the United States rejected this notion more than thirty years ago, holding that it is the prosecution's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995), and both California and Federal courts have time-and-again concluded that *Brady* material includes prior acts of misconduct that are documented in an officer's personnel file. *See, e.g., Milke v. Ryan*, 711 F.3d 998, 1012-19 (9th Cir. 2013); *City of Los Angeles v. Superior Court of Los Angeles County (Brandon)*, 29 Cal.4th 1, 14 (2002).

The rule ALADS proposes is both unconstitutional and entirely unworkable. In the Federal system, the Federal Defender's Office (FPDO) relies upon the United States Attorney's Office (USAO) to fulfill its *Brady*

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[2] ALADS is not the first to make this argument, but this Court has yet to squarely reject it. *See People v. Superior Court (Johnson)*, 61 Cal.4th 696, 715 (2015) ("Defendant argues that the district attorney has an obligation under *Brady* to provide material exculpatory information possessed by any member of the prosecution team, including the police department. The district attorney and police department respond that although in general the prosecutor's obligation to provide *Brady* material extends to what the police know, the obligation extends only to what the police know *about the specific case* and does not go so far as to include confidential personnel records the police department maintains in its administrative capacity. We need not resolve this dispute, because we conclude instead that the prosecution has no *Brady* obligation to do what the defense can do just as well for itself.") (emphasis in original).

obligations, so that we may vindicate the rights of those clients subjected to unlawful searches, seizures, and arrests. Absent *Brady* alerts, the USAO is hamstrung - it can provide only the *Brady* material within its possession or control, and it relies, in turn, upon State law enforcement's voluntary disclosure of such material. If it does not know such material exists, it cannot fulfil its constitutional duty.

As a practical matter, it is entirely unclear how the USAO would go about filing a *Pitchess* motion in State court, absent a pending State prosecution, to obtain *Brady* material subject to disclose in Federal court. Yet, if this Court finds that even the fact of the existence of *Brady* material in a peace officer's file can only be disclosed pursuant to a *Pitchess* motion, a novel procedure must be invented, and the courts will be burdened with its implementation.

The FPDO's recent experience defending cases arising from traffic stops along the I-5 corridor underscores the need for *Brady* alerts to ensure that the constitution's fundamental protections are afforded to Federal defendants. As discussed in detail herein, each case involved the same arresting officer, Los Angeles County Sheriff's Department (LASD) Deputy James Peterson, a Deputy who is likely on LASD's *Brady* list. The USAO represented that it had disclosed all of the *Brady* material within its possession; yet, exculpatory evidence relating to Deputy Peterson's prior acts of dishonesty that the USAO *did not* possess was critical to the dismissal of these cases. In light of the increasing partnership between State and Federal law enforcement in Federal prosecutions, this critical divide between peace officers and prosecuting agencies must be closed.

Our nation's constitution compels rejection of ALADS's position, disclosure of LASD's *Brady* list, and provision of individual *Brady* alerts to all prosecuting agencies, whether State or Federal.[3]

III. ARGUMENT

A. A Well-Functioning System of *Brady* Alerts Is Required to Assure the Prosecuting Agency Is Aware of Material Exculpatory or Impeachment Evidence in Peace Officer Personnel Files

1. Legal Framework

The basic principles of *Brady* and its progeny are not subject to dispute. Due process imposes an "inescapable" duty on the prosecutor "to disclose known, favorable evidence rising to a material level of importance." *Kyles*, 514 U.S. at 438. Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 674-76 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The prosecutor is charged with knowledge of any *Brady* material of which the prosecutor's office or the investigating police agency is aware. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam).

In accordance with these principles, this Court has explained that "the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. The duty

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[3] To be clear, the FPDO believes that the constitution requires provision of LASD's *Brady* list to the USAO when it is the prosecuting agency. And, to the extent the *Brady* list is not updated contemporaneously with impeachment information as it enters an officer's personnel file, or where the relevant State law enforcement agency has not created a *Brady* list, it requires individual *Brady* disclosures to assure that the defense is ultimately made aware of the presence of *Brady* material in each potential law enforcement witness's personnel file.

extends to evidence known to others acting on the prosecution's behalf, including the police." *Johnson*, 61 Cal4th at 709. "The duty to disclose exists even though there has been no request by the accused," *id.* (quotation marks and citation omitted), and, for "*Brady* purposes, evidence is material if it is reasonably probable its disclosure would alter the outcome of trial." *Id.* at 709-10.

2. ALADS's Administrative/Investigative Distinction Is Untenable

ALADS devotes the first section of its legal discussion to arguing that the vast majority of exculpatory or impeachment information in peace officer personnel files falls outside of *Brady*'s ambit. Specifically, ALADS contends that

> 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. . . . [However,] when a law enforcement agency maintains information about a peace officer in his or her personnel file, it is acting in an administrative, nor 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.

(ALADS Brief in Opposition at 32).

ALADS's position is unsupportable and this Court should squarely reject it. Impeachment evidence meeting *Brady*'s materiality threshold will *necessarily* at times be found within a peace officer's personnel file, and will relate to prior acts of misconduct - those involving different cases and different defendants (i.e., different investigations). This Court's precedents have therefore assumed, although they have not directly held, that *Brady*

can mandate disclosure of material compiled in an otherwise confidential personnel file.

For example, in *Brandon*, the Court considered whether California's statutory 5-year limitation on court-ordered disclosure of complaints of police officer misconduct violates due process or the supremacy clause. 29 Cal.4th at 1. The Court concluded that the statute is not unconstitutional on its face, since it countenances only "routine" destruction of complains "whose exculpatory value to a specific case is not readily apparent[.]" *Id.* at 12. The Court was careful to caution, however, that "[i]n holding that *routine* record destruction after five years does not deny defendants due process, we do not suggest that a prosecutor who discovers facts underlying an old complaint of officer misconduct, records of which have been destroyed, has no *Brady* disclosure obligation." *Id.* (emphasis in original). Quite to the contrary, the Court concluded, *Brady* requires disclosure of material impeachment evidence, even where California's statutory discovery procedures would otherwise not permit it. *Id.* at 14 (adopting California Attorney General's position that "citizen complaints older than five years that the trial court after in chambers review finds to be 'exculpatory,' as defined by *Brady*, may be subject to disclosure, notwithstanding the five-year limitation in section 1045(b)(1).") (some quotation marks omitted). As to the specific facts presented in the case, the Court concluded that a 10-year-old complaint of peace officer misconduct was subject to *Brady* disclosure provided that it was material, but found that the particular complaint fell short of that standard. *Id.* at 15-16.

As the foregoing makes clear, *Brandon* considered whether impeachment evidence contained in an officer personnel file, related to an entirely separate case involving a separate defendant, was subject to *Brady* disclosure. The Court concluded that *Brady mandated* its disclosure, provided that the complaint was material. *Brandon* did not even suggest

that the complaint fell outside of *Brady*'s ambit because it was placed in the officer's personnel file as part of the law enforcement agency's administrative (rather than investigative) functions. If such a principle found any support in the federal constitution, or California law, surely the Court would have mentioned it.

This Court's recent decision in *Johnson* lends further support for the conclusion that ALADS's administrative/investigative distinction is untenable. There, the Court considered whether the prosecution fulfills its *Brady* obligations by providing the defense with notice that a peace officer personnel file contains *Brady* material, but does not file a *Pitchess* motion to obtain such material. *Johnson*, 61 Cal.4th at 715-717. The Court reasoned that "the prosecution and the defense have equal access to confidential personnel records of police officers who are witnesses in a criminal case," and concluded that it was preferable for the defense, rather than the prosecution, to access such material through the *Pitchess* process, since the defense is best poised to make strategic decisions in the defendant's best interest. *Id.* The Court again assumed that records in a peace officer's personnel file documenting past instances of misconduct, involving different cases and different defendants, are subject to disclosure under *Brady*. Were such misconduct records categorically exempt because the relevant law enforcement agency compiled them in its administrative rather than investigative capacity, this principle would have, at the very least, factored into the Court's analysis, if not proved dispositive.

The Ninth Circuit has gone one step further than this Court, and has held, in no uncertain terms, that "the government has a *Brady* obligation 'to produce any favorable evidence *in the personnel records*' of an officer." *Milke v. Ryan*, 711 F.3d 998, 1016 (9th Cir. 2013) (quoting *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984)) (emphasis added). The facts in *Milke* are particularly instructive. There, the Ninth Circuit considered

whether a state prosecutor had violated his *Brady* obligations when he failed to disclose impeachment material contained in an officer's personnel file. *Id.* at 1002-03. The defendant-mother was charged with the capital murder of her son, and allegedly confessed to a peace officer during an untaped exchange while the two were alone together in an interrogation room. *Id.* at 1002. The defendant's "alleged confession, as reported by [the officer], was the only direct evidence linking [the defendant] to the crime," making the officer's credibility a central issue in the case. *Id.* at 1018. The court found of particular relevance the prosecution's failure to disclose to the defense a citizen complaint, lodged more than a decade prior, that the officer had taken "sexual liberties" with a female motorist while alone with her following a traffic stop, and lied about it to his supervisors. *Id.* at 1011. That incident, the court stated, evinced "a misogynistic attitude toward female civilians and a willingness to abuse his authority to get what he wants." *Id.* at 1012. The court ultimately granted habeas corpus relief, vacated the defendant's conviction and death sentence, and ordered the State to produce the entire personnel file to the defense (or to the trial court for *in camera* inspection, were there portions of the file that the State believed fell outside of its *Brady* obligations). *Id.* at 1019.

Of note here, the Ninth Circuit found that the constitution, Supreme Court precedent, and its own precedents compelled the conclusion that impeachment evidence contained in the officer's personnel file, unrelated to the defendant or her case, was indisputably subject to *Brady* disclosure, and took the extraordinary remedy of granting federal habeas relief. *Id.* at 1012-13.

All of these cases stem from the common-sense proposition that impeachment will not always relate to the investigation into the defendant, and can arise from a peace officer's prior misdeed - one that may only be documented, if at all, in his or her personnel file. Where such impeachment

is material to the case at bar, *Brady* requires its disclosure to the defense, whether the prosecution arises in State or Federal court. This Court should take this opportunity to affirm these principles, explicitly.

ALADS's contrary reading of the law stems from two faulty premises. First, ALADS contends that *Brady* places the duty of disclosure "solely and exclusively" upon the prosecution, and therefore, that law enforcement is "simply" an agent, free of constitutional obligations. (Opposition Br. at 29; *see also id.* at 46 ("*Brady* neither contemplates nor imposes an obligation on the Department. *Brady* imposes an obligation solely on the prosecution.") A number of federal courts have reached the opposite conclusion. As the Sixth Circuit has explained, although the Supreme Court in *Kyles* established a prosecutorial "duty to learn of any favorable evidence known to the others acting on the government's behalf ... including the police," 514 U.S. at 437, "this does not imply that the police have no role to play in ensuring that the state complies with its obligations under *Brady*, or that the police cannot commit a constitutional violation analogous to the deprivation recognized in *Brady*." *Moldowan v. City of Warren*, 578 F.3d 351, 378 (6th Cir. 2009); *see also Banks v. Dretke*, 540 U.S. 668, 675-76 (2004) ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."). Indeed,

> Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime. As a practical matter then, *Brady*'s ultimate concern for ensuring that criminal defendants receive a "fundamentally fair" trial, demands that "*Brady*'s protections also extend to actions of other law enforcement officers such as investigating officers."

Moldowan, 578 F.3d at 378 (quoting *Bagley*, 473 U.S. at 675 (explaining that the "purpose" of the *Brady* rule is "to ensure that a miscarriage of justice does not occur")); *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008).

In addition to these practical justifications, the Sixth Circuit explained, "it is evident that the constitutional principles recognized in *Brady* apply just as equally to similar conduct on the part of police," who "can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material." *Id.* at 378-79. *See also Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure ... The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.").

Accordingly, ALADS is incorrect that law enforcement agencies are free from constitutional obligations. Law enforcement cannot, consistent with due process, shield *Brady* material from disclosure to the prosecution.[4] And, this Court must not countenance a system that generates an informational rift between critical members of the prosecution team.

Second, ALADS relies near-exclusively upon *People v. Superior Court (Barrett)*, 80 Cal.App.4th 1305 (2000), but that decision does not support the sweeping conclusion that it draws. The Court, addressing discovery disputes arising in a prison homicide case, considered whether

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[4] Yet the practical effect of the current system, at least with respect to Federal defendants (as the cases discussed *infra* make plain), is to create an untenable risk that such due process violations will occur, and will go undetected.

the defendant could compel discovery from the Department of Corrections relating to its investigation into his conduct. *Id.* at 1317. The Court concluded that discovery was proper for records compiled while the Department was conducting its investigation, but that records predating the homicide and "kept by CDC in the course of running the prison" could only be obtained via a subpoena. *Id.* at 1318. This was so, the Court reasoned, because the Department of Corrections was not part of the investigative team, but was instead a third party, as to records that related only to "the regular course of running Calipatria State Prison[.]" *Id.*

Barrett at most stands for the proposition that a law enforcement agency is not acting in its capacity as a member of the prosecution team when it compiles records in the course of running the agency. Records fitting this description presumably exist within peace officer personnel files. For example, law enforcement agencies must pay employer taxes and issue W-2 statements. Such information would not be subject to disclosure, *Barrett* holds, even where the agency is also investigating a crime. It is difficult to fathom how such information would fall within *Brady*'s ambit, however, and *Barrett* did not discuss *Brady* in the context of drawing its administrative/investigative distinction. Surely *Barrett* cannot justify precluding LASD from providing the *Brady* list, nor any State law enforcement agency from providing individual *Brady* alerts, to the prosecution.[5]

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[5] ALADS also cites to an unreported federal district court case stating that the "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*, 2009 WL 2821424, *8 (C.D. Cal. 2009). The court made this statement in the course of applying the strictures of the AEDPA and the retroactivity jurisprudence established in *Teague v. Lane*, 489 U.S. 288 (1989), as well as opining that "[m]ere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in

For all of these reasons, the FPDO urges this Court to reject ALADS's attempt to narrow *Brady*'s parameters. Properly construed, *Brady*'s protections can only be afforded to criminal defendants through a well-functioning system of alerts - a *Brady* list coupled with individualized disclosures - that ensures material exculpatory and impeachment evidence is disclosed to the prosecution and reaches the defense.

B. Absent *Brady* Alerts, Vital Impeachment Evidence Is Not Reaching the United States Attorney's Office and Federal Defendants

In the practical experience of the Federal Defender's Office, absent *Brady* alerts, critical evidence subject to disclosure is not reaching the USAO when it works in partnership with State law enforcement.

A recent series of cases epitomizes this predicament. Over the past months, the FPDO has defended persons stopped on the I-5 corridor allegedly for minor traffic violations, and arrested upon the search of their vehicles and the discovery of contraband therein. Many cases involved the same arresting officer, Los Angeles County Sheriff's Department Deputy James Peterson, a Deputy who, as noted above, is likely on LASD's *Brady* list. In each case, the USAO represented that it had disclosed all of the *Brady* material within its possession. Yet, exculpatory evidence relating to Deputy Peterson's prior acts of dishonesty *that the USAO did not possess* was critical to the dismissal of these cases.

Deputy Peterson has been involved in eight cases prosecuted in the Central District of California.[6] Of these, "the Government has ... dismissed

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camera inspection, much less reversal for a new trial." *Id.* (quotation marks and citation omitted). It has no precedential nor persuasive value, and arguably stands in direct contradiction to the rule announced in *Kyles*.

[6] (1) *United States v. Rafael Gonzalez Arellano*, Case No. CR 14-00410-BRO; (2) *United States v. Jonathan Jovani Becerra-Alvarez*, Case

[*five*] [ ] for reasons relating to Deputy Peterson's conduct during traffic stops." (Minute Order Granting Motions to Suppress, *United States v. Flores*, Case No. CR 16-00833-CAS, Dkt No. 156, at 8 (July 3, 2017); *see also* Los Angeles Times, He made large drug busts along a stretch of the 5 Freeway. Now an L.A. County deputy's credibility is questioned in court (Jul. 14, 2017).[7] In opposition to motions to suppress filed in the four most recently dismissed cases—*Barajas*, *Bon*, *Flores*, and *Bretado-Lopez*—the USAO disclaimed any reliance on Deputy Peterson, even though he was the only officer present when the stops in those cases were initiated. (Minute Order Granting Defendant's Motion to Suppress Evidence, *United States v. Bretado-Lopez*, Case No. CR 17-00006-JAK, Dkt. No. 68, at 12 (Sept. 12, 2017) ("The Government has elected not to rely on any direct testimony by Deputy Peterson. This is apparently the result of its concerns whether he would present as a credible witness.").)

By way of further background, pursuant to its *Brady* obligations, the USAO disclosed to the FPDO that Deputy Peterson made inconsistent statements related to whether he obtained consent to search the defendant's vehicle in *Gonzalez Arellano*.[8] The USAO dismissed *Gonzalez Arellano*

No. MJ 15-00877; (3) *United States v. Israel Eric Ayala*, Case No. CR 15-00085-SVW; (4) *United States v. Alberto Junior Barajas*, Case No. CR 17-00169-JFW; (5) *United States v. Victor Bon*, Case No. CR 17-00181-JFW; (6) *United States v. Cesar Alejandro Castillo Flores, et al.*, Case No. CR 16-00833-CAS; (7) *United States v. Claudio Bretado-Lopez*, Case No. CR 17-00006-JAK; and (8) *United States v. Luis Santos*, Case No. CR 16-00849-DSF.

[7] *Available at* http://www.latimes.com/local/lanow/la-me-sheriff-drug-arrests-20170712-story.html.

[8] Specifically, pursuant to its *Brady* obligations, the USAO produced "(1) a ... letter describing the sequence of events leading up to the dismissal of the *Arellano* Case, including Peterson's initial report from the traffic stop in *Arellano* and Peterson's declaration in relation to the

due to concerns about Deputy Peterson's credibility, and soon after, dismissed *Barajas*.

After receiving this and other *Brady* material, the FPDO requested that the USAO conduct a review of Deputy Peterson's personnel file and produce any *Brady* material therein. The USAO responded: "I requested the opportunity to review the personnel files of the Deputy James Peterson ... for any evidence of perjurious conduct, acts of dishonesty, or other exculpatory information. In response, I have reviewed the files provided to me that LASD deemed responsive to the request. I have not reviewed Deputy Peterson's complete personnel file and *such file is not available to me*." (Joint States Report Re: Meet and Confer and List of Outstanding Discovery Requests, Case No. CR 16-00833-CAS, Dkt No. 60, at 10 (Apr. 24, 2017) (emphasis added).)

The FPDO subsequently subpoenaed Deputy Peterson's complete personnel file. LASD moved to quash, arguing, *inter alia*, that the defense was not entitled to exculpatory materials therein because the USAO had

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Arellano Case; (2) "a ... letter describing two prior disciplinary incidents in 1998 and 2002 from Peterson's personnel file as well as the LASD Internal Affairs Bureau ("IAB") decision to refer Peterson to the Los Angeles County District Attorney's Office, which decided there was insufficient evidence to bring charges against Peterson; (3) ... a memorandum by [then-prosecuting AUSA] Kim describing her meetings with witnesses in the *Arellano* Case; (4) three letters by Kim to *Arellano*'s defense counsel about Peterson ...; (5) notes written by AUSA Jake Nare [the prosecuting attorney in the *Flores* matter] based upon his own review of the LASD IAB investigation into Peterson's conduct in the *Arellano* Case; (6) handwritten notes from the IAB interview of Kim relating to Peterson's conduct in the *Arellano* Case; (7) the LASD Internal Criminal Investigations Bureau ("ICIB") report on Peterson's conduct in the *Arellano* Case; (8) the LASD IAB report on Peterson's conduct in the *Arellano* Case." (Minute Order Re Motions to Quash Subpoenas, *United States v. Flores*, Case No. CR 16-00833-CAS, Dkt No. 115, at 3-4 (May 8, 2017).

already reviewed the file and produced any materials subject to *Brady*. (Los Angeles County Sheriff's Department's Motion to Quash the defendant's Subpoena for Peace Officer Personnel Records, *United States v. Flores*, Case No. CR 16-00833-CAS, Dkt No. 84, at 2 (May 2, 2017).) In fact, of course, the USAO was *not* permitted to review Deputy Peterson's complete misconduct record. (*See* Joint Status Report, *supra*, at 10.) The Court ordered the personnel file produced *in camera*, and, over LASD's objection, ordered additional *Brady* material produced to the defense. (Minute Order re Ex Parte Application for Production of Impeachment Documents, *United States v. Flores*, Case No. CR 16-00833-CAS, Dkt No. 137, at 1-3 (June 2, 2017).)

Those *Brady* disclosures became relevant to successful motions to suppress in *Flores*, *Bon*, and *Bretado-Lopez*.[9] There can be little question, therefore, that the USAO was unable to fulfill its constitutional obligations because it had no knowledge of *Brady* evidence in Deputy Peterson's personnel file. A *Brady* alert would have prompted the USAO to seek *in camera* review of the full file, or, were the alert conveyed to the defense, prompted the defense to do the same. That the defense undertook these steps independently is immaterial - absent a *Brady* alert, Federal judges may be loath to condone what appears to be a fishing expedition for *Brady*

[9] The government moved to dismiss a fourth case, *Barajas*, in advance of a suppression hearing after it apparently determined that, although Deputy Peterson and a second officer submitted sworn declarations stating that they had conducted an inventory search of the defendant's vehicle, no inventory search had actually occurred. (*See* Minute Order Granting *Ex Parte* Application to Compel Production of Grand Jury Transcripts, *United States v. Flores*, Case No. 16-0833, Dkt No. 144, at 3 n.2 (June 13, 2017).) *See also id.* at 4 ("The Government appears to have acknowledged in the *Barajas* Case that Peterson's declaration in that case may have been inaccurate — Peterson stated that he conducted an inventory search of the Barajas vehicle and the Government appears to have determined that no such search occurred.").

material. *See Bowman Dairy Co v. United States*, 341 U.S. 214, 221 (1951) (noting that a subpoena may not be used in Federal court to conduct a "fishing expedition to see what may turn up."); *see also United States v. Nixon*, 418 U.S. 683, 699-700 (1974) (subpoena is not intended as a "means for discovery in criminal cases").

Although the Peterson cases represent the most recent example of the need for *Brady* alerts - both through dissemination of the *Brady* list and via individual disclosures - they are not unique. In *United States v. Hector*, 2008 WL 2025069 (C.D. Cal. 2008), the district court granted the defendant a new trial after, *inter alia*, the USAO failed to provide *Brady* information in a State law enforcement officer's file to the FPDO. *Id.* at *1. The government made the following representation to the court: "[w]e are not aware of any impeachment information for the police officers who may be testifying. I use the word 'aware' because we do not have possession, custody, or control over the disciplinary files of the police officers." *Id.* at *4. In fact, the officer's personnel file contained "a sustained complaint ... for submitting an arrest report that he knew contained inaccurate information" - a fact the court deemed "exculpatory[.]" *Id.* at*7-8. *Hector* thus exemplifies the need for *Brady* alerts: because the USAO was unaware of the *Brady* material in the officer's file, the defendant suffered the unconstitutional prejudice of a trial premised on incomplete and misleading evidence.

These cases make plain that, absent *Brady* alerts, there is a breakdown between State law enforcement agencies and the USAO. The effects of the Court's ruling in this case will therefore extend far beyond the State's criminal justice system. Where *Brady* material is not produced to the USAO, it may never reach defendants in the Federal system. And, while the FPDO was able successfully to compel the production of exculpatory evidence that led to dismissal of the majority of the cases described above,

it is impossible to know how often our clients have sustained convictions where the disclosure of *Brady* material would have compelled the opposite result.

IV. CONCLUSION

Brady's "purpose is . . . to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. "The Supreme Court has ... stressed the central premise of *Brady*; even though an individual prosecutor may win a conviction, society as a whole loses when that conviction is wrong." *Gonzalez v. Wong*, 667 F.3d 965, 981 (9th Cir. 2011).

For this, and all of the reasons stated herein, the Federal Defender of Los Angeles urges the Court to conclude that the constitution mandates the provision of a *Brady* list, and individual *Brady* disclosures, to the prosecution in both State and Federal cases.

Respectfully submitted,

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Federal Public Defender

DATED: April 9, 2018

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 4,601 words, including the footnotes and excluding the Title Page, Table of Contents, Table of Authorities, Certificate of Word Count, and Proof of Service. I used the Word Count Feature in Microsoft Word to calculate the word count.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 6, 2018, in Los Angeles, California.

Respectfully submitted,

HILARY POTASHNER
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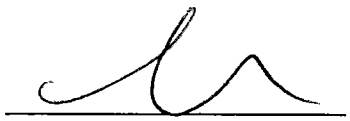
DATED: April 9, 2018



ALYSSA D. BELL
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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I electronically filed the foregoing **AMICUS CURIAE OFFICE OF THE FEDERAL DEFENDER OF LOS ANGELES'S BRIEF IN SUPPORT OF THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al.** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: April 9, 2018

GERARDO INZUNZA HIGUERA

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