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.	Case No. S243855 Second Appellate District, Division 8 No. B280676 Los Angeles County Superior Court No. BS166063
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al., Real Parties in Interest.	

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, BY AND THROUGH THE SAN FRANCISCO POLICE DEPARTMENT, IN SUPPORT OF REAL PARTIES IN INTEREST LOS ANGELES COUNTY SHERIFF'S DEPARTMENT et al.

The Honorable Judge James C. Chalfant

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by and through the SAN FRANCISCO
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APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

The City and County of San Francisco, by and through the San Francisco Police Department ("Police Department"), hereby applies to file the enclosed amicus curiae brief in support of Real Parties in Interest Los Angeles County Sheriff's Department et al.

In 2010, the Police Department adopted a formal *Brady* notification policy to ensure that criminal defendants are informed of the existence of potentially exculpatory information while respecting the statutory rights of peace officers to privacy in their personnel records. San Francisco's policy will be familiar to this Court, which addressed it three years ago in an opinion that lauded its role in the *Pitchess* process and appended it in full. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 721 & appen.) In the instant case, both the majority and the dissent in the Court of Appeal discuss the same San Francisco policy lauded in *Johnson*. Notwithstanding this Court's praise for it, the majority finds it unlawful.

The policy was developed in consultation with the District Attorney's Office, the San Francisco Police Officers Association, and other stakeholders. In the litigation in this Court, it was supported by the Police Department, the District Attorney, and the defendant, represented by the San Francisco Public Defender. The Police Department seeks to file the enclosed brief because it continues to believe that its policy is an important and lawful measure to protect both the confidentiality of peace officer personnel records and the defendant's right to a fair trial.

Petitioner and Real Parties dispute whether the federal Constitution *requires* law enforcement agencies to provide *Brady* notifications to the prosecution. The proposed amicus brief argues that the *Pitchess* scheme

does not prohibit a *Brady* notification regardless of the answer to that question, which this Court therefore need not decide.

Pursuant to Rule 8.520(f)(4), applicant certifies that no party or counsel for a party has authored the proposed amicus brief in whole or in part, and that no person or entity has made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal.

Dated: May 4, 2018

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ISSUE PRESENTED

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.)

INTRODUCTION

In jurisdictions where peace officer personnel records do not receive statutory protection, the prosecution may examine the personnel file of a law enforcement witness to determine whether it contains any information that must be disclosed under *Brady*. *Johnson* established that California is different: The Legislature has protected the confidentiality of peace officer personnel files by shielding them from prosecutorial inspection, instead requiring the court to review them in camera and make the disclosure decision.

Under this system, the prosecution and/or the defense must decide whether to file a *Pitchess/Brady* motion requesting that the court conduct such a review, and the court must decide whether to grant it, requiring the officer's employing agency to submit the records in camera. Because often neither the litigants nor the court have a basis to know whether *Brady* material is likely to exist, *Brady* notifications play a narrow but vital role by streamlining their decision-making in a category of cases where in camera

review is unquestionably warranted—i.e., where the officer will testify as a prosecution witness and the employing law enforcement agency knows that the personnel file contains information that may be subject to disclosure. Without revealing the substance of the information, the notification ensures that the court will at least conduct a review to determine whether there is anything to which the defendant is entitled.

Such a notification is lawful under the *Pitchess* statutes regardless of whether the Constitution compels the law enforcement agency to provide it. While there are many ways in which the statutory scheme protects the confidentiality of personnel records, it is not intended to protect an interest in avoiding in camera review in cases where the appropriateness of such review is beyond doubt. To the contrary, the legislative history of the *Pitchess* statutes demonstrates that they were intended to ensure the disclosure of information that protects the defendant's right to a fair trial; it is necessary to the functioning of such a system that the court will actually review records to determine whether anything must be disclosed. Moreover, the rule Petitioner ("ALADS") advocates undermines the purposes of the statutory scheme *without* protecting the confidentiality interests that the Legislature determined were worthy of protection. Indeed, because the result of that rule may be more rather than fewer *Pitchess* motions, it risks subjecting a greater number of officers' personnel to judicial scrutiny without doing anything to protect the confidentiality of peace officers who do have *Brady* information in their files, and about whom the law enforcement agency therefore would have provided a notification.

As discussed below, ALADS's construction of the *Pitchess* statutes is not supported by the statutory language, the legislative history, or the

practical consequences of the proposed rule. The cases on which it relies—which arose in the context of public records requests, and which neither mentioned *Brady* nor had any cause to examine the scheme's intended purposes in protecting the right to a fair trial—do not support such a rule either. And because the Legislature has elsewhere recognized the role of *Brady* lists in ensuring that defendants receive exculpatory information (Gov. Code, § 3305.5, subd. (e)), it is not reasonable to conclude that the Legislature intended to prohibit law enforcement agencies from providing prosecutors with the notifications that would allow them to develop such a list in the first place.

DISCUSSION

I. THE COURT NEED NOT DECIDE WHETHER *BRADY* NOTIFICATIONS ARE CONSTITUTIONALLY COMPELLED IN ORDER TO DETERMINE WHETHER THEY ARE PERMITTED BY THE *PITCHESS* STATUTES

Real Parties begin by arguing that the Los Angeles County Sheriff's Department is constitutionally required to notify prosecutors of the existence of potential *Brady* material in peace officer personnel files; ALADS responds in turn that the Department has no such constitutional obligation. (OBM at 16-20; ABM at 27-32.) Adjudicating this issue in Real Parties' favor would essentially moot the question of whether the *Pitchess* statutes permit it, although this Court has previously held that the *Pitchess* process "operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.)[1] Nonetheless, starting with the constitutional dispute arguably takes matters up in the wrong order. (See,

[1] "The statutory scheme is set forth in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7 and 832.8." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

e.g., *Wolston v. Reader's Digest Ass'n, Inc.* (1979) 443 U.S. 157, 160 [noting "general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues"]; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 ["this Court will not decide constitutional questions where other grounds are available and dispositive"]); *Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1077, fn.4 [citing *Wolston* and declining to reach constitutional issue where matter can be resolved by statutory interpretation].) By asking first whether a *Brady* notification is permissible under the *Pitchess* statutes, this Court would be required to resolve the constitutional dispute only if it answered that question in the negative.

This is not to say that it is unnecessary to consider federal constitutional law when answering the question of statutory interpretation presented here; the Court has explained that the defendant's right to a fair trial must inform the analysis of the *Pitchess* scheme's operation. (*Mooc*, *supra*, 26 Cal.4th at p. 1225 [the *Pitchess* procedure "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"].) But it is enough here to proceed from core principles already established by this Court: The *Pitchess* scheme provides the procedural mechanism for the disclosure of *Brady* information in peace officer personnel files; the threshold for obtaining in camera review is low (and is satisfied by the *Brady* alert along with an explanation of the relevance of the officer's credibility); and following such review, the court must order the disclosure of any information that satisfies *Brady*'s materiality standard. (*People v. Superior*

Court (Johnson) (2015) 61 Cal.4th 696, 721-22.)[2] As discussed below, one need not go farther than that to conclude the *Pitchess* statutes do not prohibit a law enforcement agency from alerting the prosecution to the potential existence of *Brady* information in the personnel file of a peace officer witness.

II. THE *PITCHESS* STATUTES DO NOT PROHIBIT A LAW ENFORCEMENT AGENCY FROM PROVIDING A *BRADY* NOTIFICATION TO THE PROSECUTION

A. The Statutory Language Does Not Prohibit a *Brady* Notification

The Court's "fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) The starting point for that analysis is the statutory language, considered in the context of the statutory framework as a whole; where it "permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*) Moreover, courts should not embrace a literal interpretation "that would result in absurd consequences the Legislature did not intend." (*Ibid.*; *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 125 [literal interpretation should "neither undermine[] clear legislative policy nor produce[] absurd results"].)

Subdivision (a) of Penal Code section 832.7 provides:

> Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be

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[2] *Johnson* also concluded that the *Brady* notification itself was information that the prosecution was required to disclose to the defense once it had received it, but did not hold that law enforcement agencies are constitutionally required to provide that notification in the first place. (61 Cal.4th at p. 715.)

> disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

When the Court examined this language in *Johnson*, it concluded that the exception for "investigations or proceedings" in the second sentence does not apply to a review for *Brady* material, and accordingly that the Legislature's intent was that prosecutors would not have "direct access to peace officer personnel records" for the purpose of complying with *Brady*. (61 Cal.4th at pp. 713-714.)

A *Brady* notification plainly does not disclose any personnel records to the prosecution. The majority opinion below concluded, however, that it does disclose "information obtained from these records." (*Assoc. of Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 435, review granted Oct. 11, 2017 [hereafter *ALADS*].) The dissent disagreed, noting that it reports only "the fact, known to the Department, that there may be *Brady* material in the officer's personnel records." (*Id.* at p. 453 (conc. & dis. opn. of Grimes, J.).) The notification is generic; it does not disclose the facts or circumstances of any incident, whether there was any citizen complaint against the officer, what discipline (if any) was imposed, or in what particular way the information may qualify as *Brady* material. There is a difference between disclosing the fact that certain kinds of information may exist, and disclosing substantively what the information is, and the phrase "information obtained from those records" does not clearly establish the Legislature's intent. Because the phrase could reasonably be interpreted to refer only to the information in the records, and not to the

mere fact that certain information may exist, it is necessary to consider the additional aids to interpretation discussed below.[3]

B. The *Pitchess* Statutes Were Not Intended to Protect an Interest in Avoiding In Camera Review of Personnel Files That Contain Potential *Brady* Material

The *Pitchess* statutes were enacted four years after the decision from which they take their name. The decision had two components. First, it held that the defendant had a due process right to "compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial," which in the instant case involved records from a sheriff's department unit that investigated citizen complaints of official misconduct. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-537.) Second, it held that the sheriff's department could avoid disclosing the records only under the "official information" privilege in Evidence Code section 1040, which the department had expressly refrained from invoking because it would result in "a dismissal of charges against the defendant or a directed verdict against the prosecution on the issue to which the excluded material relates." (*Id.* at p. 539.)[4] The Court

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[3] The majority below also relied on *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1297, which cited subdivision (c) of Section 832.7—an exception for summary and statistical data that does not identify the individuals involved—to conclude that the statute prohibits dissemination of information that links a peace officer's name to the existence or disposition of complaints against him or her in response to a public records request. The disagreement between the majority and the dissent focused primarily on the extent to which that decision applies in the *Brady* context, rather than on the statutory language itself, and we address it separately below. (*Infra*, Section II.D.)

[4] The department instead asserted a common law privilege of confidentiality, but the Court concluded that no such privilege existed after the enactment of the Evidence Code, and found the department's strategy misconceived in any event, because a court is "equally compelled to dismiss a prosecution when material evidence is withheld from a defendant on a common law claim of governmental confidentiality." (*Id.* at p. 539 & fn. 5.)

thus protected the defendant's right to due process by allowing the sheriff's department to withhold the records (on a successful invocation of the official information privilege) only at the price of a directed verdict or dismissal of the charges.

To the Legislature, it was an intolerable bargain. It enacted the *Pitchess* statutes to prevent law enforcement agencies from jeopardizing criminal prosecutions by invoking a privilege to refuse to produce personnel records (as contemplated in the Court's decision), or—as reports presented to the Legislature alleged—by systematically destroying them in a misguided attempt to avoid the dilemma. (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 393-394 [discussing legislative history]; *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 293 [same].) The scheme is therefore *less* protective of confidentiality than what preceded it at least insofar as it requires a law enforcement agency to preserve the records for a minimum of five years (Pen. Code, § 832.5(b)), and insofar as it removes any privilege to withhold them altogether. (*Commission On Peace Officer Standards*, 42 Cal.4th at p. 293 ["The new legislation required that those records be maintained, but provided assurances to peace officers that such records would remain confidential *except as necessary in order to ensure a fair trial in civil or criminal proceedings*"], emphasis added.)

The statutory scheme protects peace officers' confidentiality in other ways. It begins with an express declaration that personnel records are confidential. (Pen. Code, § 832.7, subd. (a).) It prohibits their disclosure except by motion with notice to the officer, and—as this Court held in *Johnson*—it shields the files from routine inspection by prosecutors and instead requires the court to review any potentially responsive records in

camera before ordering production of relevant information, subject to protective orders. (See *ibid.*; Evid. Code, §§ 1043, 1045; *Johnson*, 61 Cal.4th at p. 714.)

It is necessary to the design and functioning of such a scheme that courts will actually review the records in appropriate cases. And appropriate cases include, at a minimum, those in which the prosecution will rely on the testimony of a law enforcement witness determined by the employing agency to have information in his or her personnel file that may be subject to disclosure under *Brady*. (*Johnson*, 61 Cal.4th at p. 721 [police department's *Brady* notification along with some explanation of the relevance of the officer's credibility satisfies necessary showing to obtain in camera review].) The *Brady* notification thus serves to "streamline" (*ibid.*) the process of obtaining in camera review in a particular category of cases in which such review is clearly warranted. That is why *Johnson* properly characterized the establishment of San Francisco's procedure as "laudabl[e]" (*ibid.*)—a characterization that ALADS is compelled to acknowledge, but cannot explain. (ABM at 57.)

By urging a construction of the *Pitchess* scheme that would prohibit law enforcement agencies from ever providing a *Brady* notification, ALADS seeks to protect a confidentiality interest that the Legislature has *not* found to be worthy of protection; i.e., an interest in avoiding in camera review of personnel records in cases where good cause plainly exists for it. The *Pitchess* scheme protects confidentiality in numerous ways, but that is not one of them; to the contrary, it is one area in which the Legislature determined that confidentiality must yield. ALADS's proposed construction therefore upsets the balance the Legislature struck. (See *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53 ["The statutory

scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense"].)

C. ALADS's Proposed Construction of Section 832.7 Is Undermined by Its Practical and Policy Consequences

Where there is uncertainty in the statutory language, "it is appropriate to consider 'the consequences that will flow from a particular interpretation'" and "'to favor the construction that leads to the more reasonable result.'" (*Copley Press*, *supra*, 39 Cal.4th at p. 1291, citations omitted.) That rule weighs heavily against a construction of Section 832.7 that would preclude any *Brady* notification: The consequences are bad for criminal defendants, peace officers, and courts.

As Justice Grimes observed in her dissent, if this Court were to decide that law enforcement agencies are prohibited from ever providing a *Brady* notification, both prosecutors and defense counsel are likely to conclude that the only way to safeguard the right to a fair trial is to seek the court's review of personnel files at least in every case in which the prosecution intends to rely on the testimony of a peace officer witness. (*ALADS*, *supra*, 13 Cal.App.5th at p. 454 (conc. & dis. opn. of Grimes, J.).) In such cases, the officer's credibility is potentially at issue, and lawyers on both sides will regard his or her personnel records as an important source of possible impeachment information.

ALADS dismisses this concern by asserting that "[f]or nearly 40 years *Brady* and *Pitchess* have coexisted without the need for the prosecutor to file a motion in every single case." (ABM at 62.) Yet on the next page, ALADS acknowledges Justice Grimes' observation that law enforcement agencies throughout the state have been providing *Brady* tips

to the prosecution "for years," not through a formalized procedure such as the one adopted by San Francisco in 2010, but "in response to informal requests from prosecutors." (ABM at 63 [quoting *ALADS*, 13 Cal.App.5th at p. 455 (conc. & dis. opn. of Grimes, J.)].)[5] ALADS does not dispute that the practice has occurred, and simply argues that it violates *Pitchess* as much as any formal procedure does. (ABM at 64.) But that is just the point: ALADS advocates a rule that would prohibit both formal *Brady* notification procedures and informal *Brady* tips in response to prosecutorial requests—practices that "for years" have allowed the system to function without the need for regular prosecution motions.[6]

When law enforcement agencies are able to provide *Brady* alerts, courts may approach the threshold showing of good cause differently depending on whether the agency has done so for the officer in question. As the Second District Court of Appeal recently held, when the employing agency has provided a *Brady* notification, there is no need for the moving party to allege specific officer misconduct—a requirement that, in the absence of a *Brady* notification, serves to limit fishing expeditions in *Pitchess* motions. (*Serrano v. Superior Court* (2017) 16 Cal.App.5th 759, 776.)

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[5] Justice Grimes also remarked that the trial court stated that it assumed that the practice has been occurring for as long as *Brady* itself has existed, although she added that she did not know whether the trial court's assumption was correct. (*Ibid.*) A formal notification protocol offers several advantages over a system of informal *Brady* tips: It helps ensure that the identification of officers with potential *Brady* material in their personnel files is done by appropriate personnel pursuant to regular procedures, and based on publicly articulated standards.

[6] It is also possible that prosecutors have chosen not to file motions, but that possibility does not establish that the system has worked well without them; it may simply mean that courts have not reviewed personnel records in camera notwithstanding the law enforcement agency's knowledge that *Brady* material exists, and in most cases the existence of that material has never come to light.

But if this Court were to prohibit law enforcement agencies from ever alerting the prosecution to the existence of potential *Brady* material, the percentage of motions that are effectively fishing expeditions would necessarily grow. And in most cases, there would be no way for the trial court to distinguish a motion that has some reasonable prospect of uncovering *Brady* material from one that does not.

While *Johnson* emphasized that the burden of showing good cause is "not high," a court might require prosecutors or defense counsel to allege specific officer misconduct even though they have no real reason to know what it could be, or the court might otherwise find that they failed to identify anything from which a "rational inference" that the agency has the requested information may be drawn. (*Johnson*, *supra*, 61 Cal.4th at p. 721.) As a consequence, in many cases the court would not review the records in camera even when the law enforcement agency knows that the personnel file contains information that is potentially subject to disclosure (and in which good cause would unquestionably be established under a *Brady* alert system). This approach unacceptably makes guesswork and chance the primary guardians of the defendant's right to a fair trial, and leads to outcomes that are contrary to the legislative intent embodied in the *Pitchess* scheme, including potentially placing convictions at risk.

Other courts might move in the opposite direction. At least in any case in which a peace officer's credibility may be relevant, courts may order law enforcement agencies to furnish personnel records for in camera review in response to nearly every *Pitchess* motion. But a regime in which a significantly greater number of officers have their personnel files scrutinized by the court—an increase consisting almost entirely of officers who have no information meeting the standards for disclosure and who

would not have been the subject of a *Brady* alert—is hardly an advance for the confidentiality of personnel records, and imposes its costs on officers who have done nothing wrong. Moreover, it unnecessarily increases the burden on trial courts, which will find themselves regularly engaging in reviews of personnel records that yield nothing. (Cf. *City of Los Angeles*, *supra*, 29 Cal.4th at p. 15, fn. 3 ["We do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady* ... requires its disclosure"].)

Thus, while the consequences of ALADS's interpretation of Section 832.7 could break in two different directions, the fact that they are both negative and would hinder the purposes of the statutory scheme is an additional reason to reject it. (*Copley Press*, *supra*, 39 Cal.4th at p. 1291 ["our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results"].)

D. This Court's CPRA Cases Do Not Establish That *Brady* Notifications Violate the *Pitchess* Statutes

ALADS, like the majority in the Court of Appeal, relies on three cases involving requests for documents under the California Public Records Act ("CPRA") in which this Court construed subdivision (a) of Section 832.7 to preclude the disclosure of information that links a peace officer's name to the existence or disposition of complaints against him or her. (See *Copley Press*, *supra*, 39 Cal.4th at p. 1297; *Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 295; *Long Beach Police Officers Assn. v.*