

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Association for Los Angeles Deputy)
Sheriffs,)
 Petitioner,)
))
 v.))
))
Superior Court of the State of)
California, County of Los Angeles,)
))
Los Angeles County Sheriff's)
Department, et al.,)
))
 Real Parties in Interest.)

Docket No. S243855

SUPREME COURT
FILED

JUN 22 2018

Jorge Navarrete Clerk

Deputy

**Second Appellate District, Div. Eight, No. B280676
L.A. Superior Court No. BS166063
Honorable James C. Chalfant, Judge**

**AMICUS BRIEF OF CALIFORNIA PUBLIC DEFENDERS
ASSOCIATION AND LAW OFFICES OF THE PUBLIC DEFENDER
FOR THE COUNTY OF RIVERSIDE ON BEHALF OF REAL
PARTIES IN INTEREST**

STEVEN HARMON
Public Defender
County of Riverside
LAURA ARNOLD (177978)
Deputy Public Defender
4200 Orange St.
Riverside, CA 92501
Phone: (951) 304-5651
Fax: (951) 304-5605
Email: lbarnold@rivco.org
Truefiling: LOPDAppellate-
Unit@rivco.org

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page No.

INTRODUCTION 6

ARGUMENT

WITHOUT THE AVAILABILITY OF *BRADY* LISTS,
CALIFORNIA'S *PITCHES* STATUTES ARE
UNCONSTITUTIONAL, BECAUSE THEY ELEVATE
STATE-CREATED CONFIDENTIALITY RIGHTS OF
PEACE OFFICERS OVER THE DUE PROCESS RIGHTS
OF THE CRIMINALLY-ACCUSED AND, IN PRACTICE,
RESULT IN SYSTEMIC CONCEALMENT OF FAVORABLE
AND EXCULPATORY EVIDENCE 8

CONCLUSION 20

CERTIFICATE OF WORD COUNT

PROOF OF SERVICE

TABLE OF AUTHORITIES

	Page No.
CALIFORNIA CASES	
<i>Alford v. Superior Court</i> (2003) 29 Cal.4th 1033.....	12
<i>Alvarez v. Superior Court</i> (2004) 117 Cal.App.4th 1107.....	19
<i>Ballard v. Superior Court</i> (1966) 64 Cal.2d 159.....	9
<i>Carruthers v. Municipal Court</i> (1980) 110 Cal.App.3d 439.....	20
<i>Cash v. Superior Court</i> (1959) 53 Cal.2d 72.....	9
<i>Chambers v. Appellate Div. of Superior Court</i> (2007) 42 Cal.4th 673.....	19
<i>City of Los Angeles v. Superior Court (Brandon)</i> (2002) 29 Cal.4th 1.....	11
<i>City of Santa Cruz v. Municipal Court</i> (1989) 49 Cal.3d 74	16, 19
<i>City of Tulare v. Superior Court</i> (2008) 169 Cal.App.4th 373.....	20
<i>Hill v. Superior Court</i> (1974) 10 Cal.3d 817.....	9
<i>Honore v. Superior Court of Alameda County</i> (1969) 70 Cal.2d 162.....	10
<i>Kelvin L. v. Superior Court</i> (1976) 72 Cal.App.3d 823	10, 20
<i>People v. Gaines</i> (2009) 46 Cal.4th 172.....	12
<i>People v. Husted</i> (1999) 74 Cal.App.4th 410.....	14
<i>People v. McShann</i> (1958) 50 Cal.2d 802.....	10
<i>People v. Mooc</i> (2001) 26 Cal.4th 1216.....	18
<i>People v. Riser</i> (1956) 47 Cal.2d 566.....	8

<i>People v. Sanderson</i> (2010) 181 Cal.App.4th 1334.....	17
<i>People v. Superior Court (Biggs)</i> (1971) 19 Cal.App.3d 522.....	10
<i>People v. Superior Court (Johnson)</i> (2015) 61 Cal.4th 696	11, 12, 13
<i>People v. Thompson</i> (2006) 141 Cal.App.4th 1312.....	16
<i>Pitchess v. Superior Court</i> (1974) 11 Cal.3d 531	<i>passim</i>
<i>Powell v. Superior Court</i> (1957) 48 Cal.2d 704.....	9
<i>Price v. Superior Court</i> (1970) 1 Cal.3d 836.....	10
<i>Warrick v. Superior Court</i> (2005) 35 Cal.4th 1011	14, 16, 19

FEDERAL CASES

<i>Brady v. Maryland</i> (1963) 373 U.S. 83.....	<i>passim</i>
<i>Gordon v. United States</i> (1953) 344 U.S. 414.....	8
<i>United States v. Reynolds</i> (1953) 345 U.S. 1	9

PENAL CODE

Section 832.5.....	10, 18
Section 832.5, subdivision (a), subparagraph (2).....	10
Section 832.5, subdivision (b).....	10
Section 832.7.....	<i>passim</i>
Section 832.7, subdivision (a).....	10

Secondary Sources

<i>Confronting California's Continuing Prison Crisis: The Prevalence and Severity of Mental Illness Among California Prisoners on the Rise</i> , available in PDF online at https://www-cdn.law.stanford.edu/wp-content/uploads/.../Stanford-Report-FINAL.pdf	15
Freeman, James, <i>The relationship between lower intelligence, crime and custodial outcomes: a brief literary review of a vulnerable group</i> , <i>Vulnerable Groups & Inclusion</i> , 3:1, 14834, DOI: 10.3402/vgi.v3i0.14834, available in PDF online at https://www.tandfonline.com/doi/full/10.3402/vgi.v3i0.14834	15

Grant, Demond M. and White, Evan J., *Influence of Anxiety on Cognitive Control Processes*. (Dec. 2016), available online at <http://psychology.oxfordre.com/view/10.1093/acrefore/9780190236557.001.0001/acrefore-9780190236557-e-74> 15

Traynor, *Ground Lost and Found in Criminal Discovery* (1964) 39 N.Y.U.L. Rev. 228.. 9

OTHER STATE CASES

People v. Davis (1884) 52 Mich. 569..... 8

EVIDENCE CODE

Section 1040..... 9

Section 1041..... 9

Section 1042, subdivision (e)..... 10

Section 1043..... *passim*

Section 1043, subdivision (a)..... 14

Section 1043, subdivision (b)..... 14

Section 1045..... 10, 19, 21

Section 1045, subdivision (b)..... 18

Section 1046..... *passim*

IN THE SUPREME COURT OF THE CALIFORNIA

Association for Los Angeles Deputy Sheriffs,)	Docket No. S243855
)	
Petitioner,)	(Court of App. No. B280676;
)	Super. Ct. No. BS166063)
v.)	
)	
Superior Court of the State of California, County of Los Angeles,)	AMICUS BRIEF OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND LAW OFFICES OF THE PUBLIC DEFENDER FOR THE COUNTY OF RIVERSIDE ON BEHALF OF REAL PARTIES
)	
Los Angeles County Sheriff's Department, et al.,)	
)	
Real Parties in Interest.)	

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

California Public Defenders Association (“CPDA”) and the Law Offices of the Public Defender for the County of Riverside (“LOPD”) respectfully submit the following brief in support of Real Parties in Interest, Los Angeles County Sheriff’s Department and the County of Los Angeles.

INTRODUCTION

It is extremely troubling that, in 2018, in the State of California, we are still struggling with a concept that has been well-understood by the high courts of other states for over a century. In a criminal proceeding,

[t]he state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the state has no such interest; its interest is that accused parties shall be acquitted, unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution,

or to show that it is unworthy of credence, the defense should be given the benefit of it.

(*People v. Davis* (1884) 52 Mich. 569, 573-574.)

It is also troubling that California law enforcement officers are permitted to continue playing hide-the-ball when, as long ago as 1957, this court recognized that “the state has no interest in denying the accused access to all evidence that can throw light on issues in the case,” and in particular, “has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.” (*People v. Riser* (1956) 47 Cal.2d 566, 486; see also *Gordon v. United States* (1953) 344 U.S. 414, 419 [upon a good cause showing being made by a criminal defendant, the government must disclose documents or information in its possession tending to impeach a prosecution witness as to important and material matters directly bearing on the issue of guilt].)

While an exception has always existed for information which *must* “be kept confidential for the purposes of effective law enforcement,” (*Riser, supra.*, at p. 486), in California, one exception seems to have eclipsed the rule – the exception pertaining to peace officer personnel records, codified in Penal Code¹ section 832.7. It is the hope of amici that, with this case, this court will once again clarify that state statutes creating privileges and granting confidentiality rights to material prosecution witnesses in criminal proceedings do not take precedence over the

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

Due Process Clause of the United States Constitution and *never* outweigh the right of a criminally accused man, woman, or child, to receive a fair trial.

ARGUMENT

WITHOUT THE AVAILABILITY OF *BRADY* LISTS, CALIFORNIA'S *PITCHESS* STATUTES ARE UNCONSTITUTIONAL, BECAUSE THEY ELEVATE STATE-CREATED CONFIDENTIALITY RIGHTS OF PEACE OFFICERS OVER THE DUE PROCESS RIGHTS OF THE CRIMINALLY-ACCUSED AND, IN PRACTICE, RESULT IN SYSTEMIC CONCEALMENT OF FAVORABLE AND EXCULPATORY EVIDENCE

Before section 832.7 was enacted, an accused in a criminal prosecution could compel disclosure of privileged or confidential official information possessed by the government by demonstrating “that the requested information [would] facilitate the ascertainment of the facts and a fair trial” and that he could not “ ‘readily obtain the information through his own efforts.’ ” (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537 (“*Pitchess*”), citing *Cash v. Superior Court* (1959) 53 Cal.2d 72, 75, *Powell v. Superior Court* (1957) 48 Cal.2d 704, 707, *Traynor, Ground Lost and Found in Criminal Discovery* (1964) 39 N.Y.U.L. Rev. 228, 244, *Hill v. Superior Court* (1974) 10 Cal.3d 817, 819, and *Ballard v. Superior Court* (1966) 64 Cal.2d 159, 167.) Where claims of “official privilege” (Evid. Code, §§ 1040, 1041) were invoked to deprive a criminally accused of information regarding a material witness as to the issue of the defendant’s guilt, if it could be shown that the information may be helpful to the defendant and that nondisclosure would deprive him of a fair trial, dismissal was required. (*Pitchess, supra*, 11 Cal.3d 531 at p. 539, citing *United States v. Reynolds* (1953) 345 U.S. 1,

12, *Price v. Superior Court* (1970) 1 Cal.3d 836, 842-843, *Honore v. Superior Court of Alameda County* (1969) 70 Cal.2d 162, 167-168; *People v. McShann* (1958) 50 Cal.2d 802, 806-811, and *People v. Superior Court (Biggs)* (1971) 19 Cal.App.3d 522, 533.) Additionally, since 1965, a trial judge, when sustaining a claim of official privilege, has been required to make a finding of fact adverse to the prosecution with regard to any issue to which the privileged information is material. (Evid. Code, § 1042, subd. (a); *Kelvin L. v. Superior Court* (1976) 72 Cal.App.3d 823, 830.) The enactment of section 832.7 and Evidence Code sections 1043, 1045, and 1046 changed all that with regard to one type of official record, citizens' complaints of misconduct by California peace officers.

Section 832.5, enacted in 1974, requires law enforcement agencies to investigate and maintain records of citizens' complaints against peace officers for a period of at least five years. (§ 832.5, subd. (a) (2), (b).)² Section 832.7, enacted four years later, makes these records "confidential" and not subject to disclosure, even in a criminal proceeding and even to prosecutors, "except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (§ 832.7, subd. (a);

² This mandatory five-year minimum period for preserving complaints was not in the original version of section 832.5 enacted in 1974. The statute soon had to be amended by Senate Bill No. 1436, enacted in 1978, because law enforcement agencies were routinely throwing away citizen complaints and related agency reports and findings at the conclusion of the investigation. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 11, citing Assem. Com. On Criminal Justice, Analysis of Proposed Draft of Sen. Bill No. 1436 (1977-1978 Reg. Sess.) Aug. 28, 1978, p. 6 [five-year retention period intended to "conform" to the five-year "period of discovery"].)

People v. Superior Court (Johnson) (2015) 61 Cal.4th 696, 714 [“prosecutors, as well as defendants, must comply with the *Pitchess* procedures if they seek information from confidential personnel records”].)

It is undeniable that, since 1978, an unhealthy tension has existed between the *Pitchess* statutes and the due process principles underlying *Brady v. Maryland* (1963) 373 U.S. 83 (“*Brady*”) and its progeny³. On numerous occasions this court has been asked for guidance. The issue was first presented to this court in *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1 (“*City of Los Angeles*”), in which this court explained that the *Pitchess* scheme and the *Brady* scheme “employ different standards of materiality” (*City of Los Angeles v. Superior Court, supra*, 29 Cal.4th at p. 7.) The *Pitchess* procedures, which come into play prior to trial, create “both a broader and lower threshold for disclosure than does the high court’s decision in *Brady*” and, unlike with *Brady*, the *Pitchess* discovery scheme entitles a defendant to information that will “facilitate the ascertainment of the facts” at trial [citation], that is, ‘all information pertinent to the defense.’ ” (*Id.*, at p. 14.) Notably, in *City of Los Angeles*, this court expressly declined to address “whether Penal Code section 832.7, which precludes disclosure of office records ‘except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code,’ would be constitutional if it were applied to defeat

³ Amici respectfully directs the court to the briefs of the parties and other amici for a thorough discussion of *Brady* and other cases of the United States Supreme Court addressing the right of a criminally accused to disclosure of favorable material evidence possessed by the prosecution team.

the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*.” (*Id.*, at p. 12, fn. 2.)

The following year, in *Alford v. Superior Court* (2003) 29 Cal.4th 1033, this court, after concluding that peace officer personnel records retain their confidentiality vis-a-vis the prosecution, declined to address whether a prosecutor’s receipt of this information would create an obligation under *Brady*, in future cases where the officer is a material witness, to provide the defense with disclosed information which bears on the officer’s credibility or which is significantly exculpatory. (*Id.*, at p. 1046, fn. 6.)

In *People v. Gaines* (2009) 46 Cal.4th 172, this court once again clarified that the “weighing process for screening out unwarranted discovery requests is *not* akin to the inquiry into whether a particular error in denying discovery was prejudicial” and held that a convicted defendant, seeking relief based on the trial court’s erroneous denial of his pre-trial *Pitchess* motion, must demonstrate a reasonable probability of a different outcome had the evidence been disclosed. (*Id.*, at pp. 182.)

Most recently, in *People v. Superior Court (Johnson)* 61 Cal.4th 696 (“*Johnson*”), this court again declined to decide whether a district attorney is required, under *Brady*, to disclose to the defendant information contained in the investigating law enforcement agency’s personnel files, holding that such information is equally accessible to the defendant, under the *Pitchess* procedures. (*Johnson, supra*, 61 Cal.4th at p. 715.)

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

(*Id.*, at p. 716.) In *Johnson*, this court rejected the defendant's argument that the *Pitchess* procedures are inadequate to protect his rights, noting that the procedures have coexisted with *Brady* for a long time and expressing confidence "that trial courts employing *Pitchess* procedures will continue to ensure that defendants receive the information to which they are entitled." (*Johnson, supra*, at pp. 719-720.) Based on the experience of your amici, this court may have dismissed too quickly the defendant's argument that the *Pitchess* procedures are inadequate to protect the fundamental constitutional rights of the criminally accused in California's courts.

In practice, the process of obtaining *Pitchess* discovery is very labor-intensive and time-consuming, undeniably necessitating lengthy delays in criminal proceedings that compromise a defendant's statutory and constitutional speedy trial rights. The process begins, of course, with the filing of a written motion, identifying the proceeding in which discovery is sought, the party seeking discovery, the name of the peace officer whose records are requested, and a description of the type of records sought, supported by affidavits showing good