S243855

IN THE SUPREME COURT OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,
Petitioner,

v.

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

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT et al.,
Real Parties in Interest.

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

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

RESPONSE TO AMICI CURIAE BRIEFS

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INTRODUCTION

The theme of the amici curiae briefs filed in support of real parties in interest, the Los Angeles County Sheriff's Department, the County of Los Angeles, and Jim McDonnell, the Sheriff of

Los Angeles County, (collectively, the Department), is that this Court should unravel the 40-year-old statutory scheme enacted in 1978 after *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). The theme extends well beyond the issue on review, namely the propriety of Brady alerts by the Department to the prosecution absent compliance with the *Pitchess* statutes, and also interferes with the province of the Legislature.

This Court should adhere to the issue on review and maintain legislative and judicial boundaries. Following the *Pitchess* statutes and viewing them together with the constitutional protections of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny provide the answer to the issue on review: Compliance with the *Pitchess* statutory scheme is required before disclosure of a peace officer's name and identifying number in connection with the fact that officer may have relevant exonerating or impeaching information in his or her confidential personnel file. This Court, therefore, should affirm the decision of the Court of Appeal.

LEGAL DISCUSSION

I.
COMPLIANCE WITH THE *PITCHESS* STATUTES SATISFIES *BRADY*.

A. *Brady* and *Pitchess*, Though Protecting Separate Rights, Have Operated in Tandem for Decades, Through Which *Pitchess* Compliance Can Satisfy *Brady* Obligations.

As the Association for Los Angeles Deputy Sheriffs (ALADS) demonstrated in its Answer Brief on the Merits (ABOM), *Brady* and *Pitchess*, though protecting separate rights, have worked in tandem for decades. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 719-720 ["*Brady* requirements and *Pitchess* procedures have long coexisted"]; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1473 (*Gutierrez*) ["two schemes operate in tandem"].) The tandem operation works because, if the prosecution or the defense seeks information on whether a deputy has exonerating or impeaching information in his or her

personnel file, the prosecution or the defense can file a *Pitchess* motion. If such information exists in the personnel file, the *Pitchess* procedures will lead to its discovery. In this way, the *Pitchess* statutory scheme has facilitated compliance with *Brady* and its progeny.

The Department argues against this long-standing tandem operation. It seeks to undo the 40-year-old *Pitchess* scheme, all by claiming a federal constitutional obligation under *Brady* gives it permission to disclose a peace officer's name and identifying number in connection with the fact that officer may have exonerating or impeaching information in his or her personnel file. This Court appears to make a similar assumption in its issue on review by asking whether under *Brady* the Department *may* make such disclosure absent compliance with *Pitchess*. Yet, as ALADS has explained, a constitutional obligation cannot justify a permissive act. (ABOM 47.) Thus, the position of the Department inherently is flawed.

Several of the Department's amici curiae, although supporting disclosure in the form of a Brady alert from law enforcement to the prosecution, recognize the flaw in the Department's argument. They maintain that, if justified by the federal constitution under *Brady* and its progeny, the disclosure is not permissive, but rather mandatory. (See, e.g., Brief of ACLU of Southern California et al. at p. 48 ["Either [the Court of Appeal in this case] was wrong to conclude that Brady alerts violate the *Pitchess* statutes, or it was right and the *Pitchess* statutes are unconstitutional unless this Court interprets them to make a system of Brady alerts mandatory in every jurisdiction"]; Brief of Fed. Defender of Los Angeles at p. 7 ["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"].)

This conflict between the Department's position on the one hand – that Brady alerts are permissive but justified by a federal constitutional obligation – and the position of some amici curiae on the other – that Brady alerts are mandatory – shows that the entities supporting Brady alerts are not sure which way to turn. The problem, however, can be solved. It can be solved not by a debate over permissive versus mandatory and, if mandatory, how such a requirement would ever be defined, regulated, and enforced. Instead, the problem can be solved in the manner the courts have been interpreting *Brady* and *Pitchess* for decades, that is, by viewing them in tandem as protecting separate rights.

In this way, the prosecutor, not law enforcement, makes the determination of materiality – the touchstone of *Brady*. "[T]he fundamental construct of *Brady* . . . makes the prosecutor the initial arbiter of materiality and disclosure. [Citation.]" (*United States v. Lucas* (9th Cir. 2016) 841 F.3d 796, 809; see *Kyles v. Whitley* (1995) 514 U.S. 419, 421 (*Kyles*) ["state's obligation under *Brady* . . . to disclose evidence favorable to the defense, turns on

the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention"].) The Department's proposed Brady alerts from it to the prosecution make the materiality determination that of the law enforcement agency. It is not. Under *Brady*, materiality and what constitutes Brady information is the prosecutor's job. That is why prosecutors maintain Brady lists, as provided for in Government Code section 3305.5 (section 3305.5) in the Public Safety Officers Procedural Bill of Rights Act (POBRA). Brady alerts from law enforcement to the prosecution, therefore, would upset the materiality determination placed on the prosecutor by *Brady*.

This misplaced materiality determination inherent in Brady alerts from law enforcement to the prosecution is highlighted by amici curiae supporters of the Department, who recognize the flaw and conflict with *Brady* in leaving the materiality determination to law enforcement. (Brief of Law

Professors at p. 13.) Indeed, a deputy could be placed on the Department's version of a Brady list for a reason that in no respect is related to materiality in a particular criminal prosecution. The Department's act in placing a deputy on its Brady list does not mean the deputy's status is material to a prosecution, nor does it mean the status should be disclosed. Yet, under the Department's proposed Brady alert system, and even that approved by the trial court to allow disclosure in a pending criminal prosecution, the Department is making the materiality determination with respect to a criminal prosecution. Again, such a system impermissibly allows the Department to usurp the prosecutor's job to determine what is material in a particular criminal prosecution.

The Department, in its reply brief, confirms its position that it, rather than the prosecution, makes the materiality determination under its proposed Brady alert system. Although the trial court's order in this case permitted disclosure for any peace officer witness in a pending criminal prosecution, and this

Court used similar language in its issue for review, the Department, in its reply brief, has attempted to narrow its proposed disclosure. It now says that, for a Brady alert to issue, the deputy witness in the pending criminal prosecution must be *material*. (RBOM 6 & fn. 1, 8, 14, 18, 22, 23, 24-25, 26, 29.) The Department's narrowing of its proposed disclosure to only material witnesses at this late stage of the game is curious. Mostly, however, it highlights the improprieties of the Department's reliance on *Brady* to justify its proposed Brady alert system. *Brady* and its progeny simply do not allow, let alone require, law enforcement to make materiality determinations. That, in conjunction with *Brady* disclosure responsibilities in general, rests with the prosecution.

The Department and its amici curiae supporters also take issue with ALADS's position that *Brady* does not impose disclosure obligations on law enforcement because the prosecution is the entity responsible for disclosure. (ABOM 45-48.) For example, the Department says that "[a]n investigating

agency's required disclosures may need to be made to the prosecutor, rather than to the defense, but they are disclosure obligations nonetheless." (RBOM 12; see also Brief of Attorney General at pp. 12-13, 17.) But, *Brady* and its progeny say nothing about required disclosures from law enforcement to the prosecution. Rather, they strictly are about what the prosecution must disclose to the defense based on materiality in a particular criminal prosecution as determined by the prosecutor.

In fact, "*Brady* is not violated by requiring disclosure only after an in camera review conditioned upon a showing of materiality. [Citation.]" (*Gutierrez, supra*, 112 Cal.App.4th at p. 1476.) That is all ALADS seeks to enforce here – the required in camera review under the *Pitchess* statutes. As a result, the continued attempt by the Department and its amici curiae supporters to create a disclosure obligation from law enforcement to the prosecution under *Brady* fails.

Indeed, the Department and its amici curiae supporters are attempting to turn *Brady* into what it is not – a vehicle for

discovery in a criminal case. "'[T]he prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense.' [Citations.] *Brady* did not create a general constitutional right to discovery in a criminal case.' [Citation.]" (*Gutierrez, supra*, 112 Cal.App.4th at p. 1472; see *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 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"].)

Rather, it is *Pitchess* that is a vehicle for discovery in a criminal case. That is why compliance with the *Pitchess* statutory scheme, the vehicle for discovery of peace officer personnel records, is the method through which the prosecution or the defense may obtain discovery of information regarding peace officers when it is material to a criminal prosecution. (*Gutierrez, supra*, 112 Cal.App.4th at p. 1474 ["statutory *Pitchess* procedures implement *Brady* rather than undercut it"].)

ALADS does not argue the information the Department seeks to disclose is precluded from disclosure; on the contrary, the information can be disclosed by compliance with the *Pitchess* statutory scheme. In other words, *Brady* is not a discovery route, but *Pitchess* is, so the information the Department seeks to disclose can be disclosed. That is the whole purpose of the *Pitchess* statutory scheme.

As the United States Supreme Court has held, "'procedures and regulations can be established to carry [the prosecutor's] burden [under *Brady*] and to insure communication of all relevant information on each case to every lawyer who deals with it.' [Citation.]" (*Kyles*, *supra*, 514 U.S. at p. 438.) In California, the *Pitchess* statutory scheme is the method the Legislature has enacted with respect to peace officer personnel records to ensure communication that complies with *Brady*. Accordingly, it is not Brady alerts by law enforcement to the prosecution that enable *Brady* compliance. Rather, following the vehicle California has set up for discovery of peace officer personnel records allows for

disclosure of information in those records to the prosecution and the defense.

In sum, compliance with the *Pitchess* statutory scheme can satisfy *Brady* such that the disclosure obligation and materiality determination remain with the prosecutor as *Brady* and its progeny have mandated for decades.

B. In Attempting To Justify Brady Alerts, the Department and Its Amici Curiae Fail To Recognize the Historical Joint Operation of *Brady* and *Pitchess*.

The Department and its amici curiae attempt to justify law enforcement Brady alerts through a series of rationales that, when analyzed, are no justification at all. From reliance on federal cases, which do not operate under California's *Pitchess* statutory scheme, to unpersuasive case law and statutory analyses, to a distortion of the amount of information conditionally privileged by the *Pitchess* statutory scheme, the rationales serve only to demonstrate the flaws in the

Department's argument that it may, if it chooses, give Brady alerts to the prosecution absent compliance with the *Pitchess* statutes.

The Department and many of its amici curiae cite a number of federal cases, which they say demonstrate the need for Brady alerts from law enforcement to the prosecution to prevent the unconstitutional nondisclosure of *Brady* information. Federal prosecutions, however, are different and should not be judged under the same standards as state prosecutions in California where the *Pitchess* statutes apply. In California, a procedure that facilitates *Brady* compliance (*Kyles*, *supra*, 514 U.S. at p. 438) needs to accommodate the *Pitchess* statutory scheme enacted and maintained by the Legislature for 40 years.

In fact, federal cases based on federal law and nondisclosure of *Brady* material demonstrate that *Pitchess* is not the problem. In federal court, *Pitchess* does not apply. (*Moore v. Gonzalez* (E.D. Cal., July 22, 2013, No. 2:11-CV-3273 AC P) 2013 WL 3816012, at **5* ["*Pitchess* procedures do not apply in federal

court"]; *Fenstermacher v. Moreno* (E.D. Cal., Dec. 7, 2010, No. 1:08-CV-01447-SKO PC) 2010 WL 5185510, at *2 ["[c]ourt is unaware of any authority suggesting that California's *Pitchess* motion process is applicable in federal court"]; see also *Bryant v. Armstrong* (S.D. Cal. 2012) 285 F.R.D. 596, 604 [rejecting argument that federal courts must apply state privilege law as well as the procedures applicable to peace officers' personnel records and *Pitchess* motions].) Thus, peace officer personnel records do not have the same conditional privilege as in California state court.

The nondisclosures of *Brady* material in federal court show that it is not the *Pitchess* statutory scheme preventing defendants from obtaining information. For example, the Federal Defender of Los Angeles argues that Brady alerts must be mandatory, but it fails to account for the fact that the *Pitchess* statutory scheme does not even apply in federal court. (Brief of Fed. Defender of Los Angeles at pp. 8-9, 18.) If the Federal Defender in

Los Angeles is not obtaining *Brady* material, it is not because of the *Pitchess* statutes.

Specifically, federal cases like *Milke v. Ryan* (9th Cir. 2013) 711 F.3d 998 (*Milke*), relied on by several amici curiae, do not further the Department's proposed Brady alert system. (See, e.g., Brief of ACLU of Southern California et al. at pp. 26-30.) These federal cases do not suggest that compliance with the *Pitchess* statutes for disclosure of peace officer names and identifying number in connection with discipline would result in *Brady* violations. Instead, such cases demonstrate that, had *Pitchess* procedures been applicable and used by either the prosecution or the defense, the potential impeaching information would have been disclosed to the defense before trial. Moreover, in *Milke*, at least some of the undisclosed evidence was in the public record, not solely in a peace officer personnel record subject to a conditional privilege per state statute. (*Milke*, at pp. 1017-1018.) As a result, the need for compliance with a state discovery statute did not cause the suppression of *Brady* material.

The Department and many of its amici curiae supporters also attempt to distinguish *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 (*Copley Press*) and similar authority from this Court. They claim *Copley Press* and its progeny are not applicable in the context of this matter because such cases did not involve a criminal defendant's constitutional right to exculpatory and impeaching information. Consequently, according to the Department and many of its amici curiae supporters, the *Pitchess* statutes do not prohibit the disclosure of a peace officer's name and identifying number in connection with the fact that he or she may have exonerating or impeaching information in his or her personnel file. (See, e.g., Brief of San Francisco Public Defender at p. 3.)

Copley Press and its progeny, however, did not distinguish based on who is receiving the information but on what information is being disclosed under a plain-language interpretation of the *Pitchess* statutes. In other words, *Copley Press*'s holding is not dependent on the audience for the

information sought to be disclosed, but rather on the content of the information subject to disclosure. As applicable here, the name of the deputy and his or her identifying number do not pose a problem under the *Pitchess* statutes. (See Brief of San Francisco Public Defender at p. 5.) But, disclosure of the deputy's name and identifying number in connection with discipline, that being the fact that the deputy is on the Department's version of a Brady list because his or her personnel file may contain exculpatory or impeaching information, is the trigger for compliance with the *Pitchess* statutes. (*Commission on Peace Officer Performance Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 295 ["legislative concern [in adopting Pen. Code, §§ 832.7 and 832.8] appears to have been with linking a named officer to the private and sensitive information listed in [§] 832.8," including discipline]; *Copley Press, supra,* 39 Cal.4th at

pp. 1297-1298 [*Pitchess* statutes protect from disclosure peace officer's identity linked with discipline].)[1/]

The Department and many of its amici curiae supporters also continue to misread *Johnson*, *supra*, 61 Cal.4th 696. For example, the San Francisco Public Defender seems to think that *Johnson* sanctioned the procedure of law enforcement providing the prosecution with a Brady list. (Brief of San Francisco Public Defender at i.) *Johnson*, however, did no such thing. It did not sanction the distribution of law enforcement's version of a Brady list to the prosecution in general, nor did it address the legality under *Pitchess* of a specific Brady alert from law enforcement to the prosecution. Another amicus curiae supporter ignores *Johnson* by arguing that "any system that requires the defense to make a request for *Brady* material, through a *Pitchess* motion or otherwise, squarely violates due process." (Brief of ACLU of

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[1/] The Attorney General recognizes that a Brady alert from law enforcement to the prosecution violates the *Pitchess* statute per *Copley Press* and its progeny. (Brief of Attorney General at p. 23.)

Southern California et al. at p. 31.) *Johnson*, however, recognized that *Pitchess* is a way to comply with *Brady* and that *Brady* material can be disclosed through the *Pitchess* statutory scheme. (*Johnson*, at pp. 715-722.)

In fact, *Johnson* solidified that "the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records." (*Johnson, supra*, 61 Cal.4th at p. 705.)[2/] *Johnson* also decided that, when the prosecutor receives exculpatory or impeaching information about a peace officer

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[2/] A number of the Department's amici curiae have used the instant case as a vehicle to reargue a plea for prosecutors to have unfettered access to a peace officer's personnel file. That issue was decided in *Johnson* and is not before the Court in the instant case. Moreover, as this Court determined, such access would conflict with the *Pitchess* statutes, which embody the Legislature's conclusion that peace officer personnel records are conditionally privileged. The place for amici curiae to argue to the contrary is in a legislative forum, not before this Court.

witness, it must tell the defense based on its *Brady* obligation, but need not make its own *Pitchess* motion. (*Id.* at pp. 705-706.) In reaching these conclusions, *Johnson* emphasized the confidentiality of peace officer personnel records and the need, for both the prosecution and the defense, to follow the *Pitchess* statutes to obtain information from them. (*Id.* at pp. 712-714.) And *Johnson* reasserted the long-standing proposition that, through the *Pitchess* statutes, "'the Legislature has attempted to protect the defendant's right to a fair trial and the officer's interest in privacy to the fullest extent possible.' [Citation.]" (*Id.* at p. 711.) *Johnson*, therefore, does not sanction, let alone mandate, Brady alerts from law enforcement to the prosecution, as the Department and its amici curiae suggest.

In addition to misreading case law, the Department and several of its amici curiae also improperly use section 3305.5 in an attempt to justify law enforcement Brady alerts. For example, the San Francisco District Attorney states, "The language of section 3305.5 specifically recognizes the name of an officer,

whose personnel file may contain potential *Brady* information, will be provided to the prosecution to create a list. By using this clear language, the Legislature intended to create an exception to the confidentiality provision of section 832.7." (Brief of San Francisco District Attorney at p. 14; see also *id.* at pp. 14-16, 17.) Section 3305.5 does no such thing.

Section 3305.5 recognizes a Brady list as a tool of the *prosecution* and precludes punishment of a peace officer by the law enforcement agency because the *prosecution* placed his or her name on a Brady list developed by the *prosecution*. Section 3305.5 does not say one word about law enforcement giving identifying information about a peace officer in connection with discipline to the prosecution. (See Brief of San Francisco Police Department at p. 28.) Instead, section 3305.5 synergizes with *Brady* and the responsibilities of the prosecution. Contrary to the position of the San Francisco District Attorney, the Legislature would not have used section 3305.5 to create an exception to the *Pitchess* statutes without even mentioning *Pitchess* or revising

the language of those statutes. Although section 3305.5 does not necessarily prohibit a law enforcement agency from maintaining a Brady list, the statute does not authorize it, as it pertains only to prosecutorial agencies, and thus cannot justify Brady alerts from law enforcement to the prosecution.

Moreover, Brady alerts cannot be justified on the theory that confidential personnel records might not be the sole source of information leading to a law enforcement agency's decision to place a peace officer on its own version of a Brady list. To the extent a Brady list created by law enforcement would derive from sources other than personnel records, as the Department suggests through a conviction (e.g., RBOM 16), such information is equally accessible by the prosecution and the defense. It is only the information from confidential personnel records that is at issue and thus subject to disclosure after compliance with the *Pitchess* statutes. In short, the attempts to justify Brady alerts from law enforcement to the prosecution fail. They are based on a misreading of case law, section 3305.5, and the limited nature of

the conditionally privileged information protected by the *Pitchess* statutes.

II.
ATTEMPTING TO AVOID THIS TANDEM OPERATION, THE DEPARTMENT, AND ITS AMICI CURIAE, CREATE UNNECESSARY PANIC ABOUT POTENTIAL *BRADY* VIOLATIONS.

The Department and its amici curiae maintain that, absent Brady alerts from law enforcement to the prosecution, information required to be disclosed under *Brady* will go undisclosed. They further maintain that, absent Brady alerts from law enforcement to the prosecution, the only way to avoid these nondisclosures is for the prosecution to file a *Pitchess* motion as to every peace officer testifying in a case, a solution they deem unworkable for the parties and the trial courts. (E.g., Brief of Attorney General at pp. 24-25.) But this is not the result that must follow from a determination that the *Pitchess*

procedures can be used to facilitate *Brady* compliance so that the two protections continue to work in tandem.

As noted, under *Brady*, it is the prosecutor's job to determine materiality, and thus the prosecutor can and should decide when to file a *Pitchess* motion as to a testifying peace officer witness. By the same token, the defense, based on its own theories of the case, can and should decide when to file a *Pitchess* motion as to a testifying peace officer witness. (See *People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049 ["Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him"]; see also *People v. Zaragoza* (2016) 1 Cal.5th 21, 52.) This approach coincides with this Court's determination in *Johnson* that "[a] police officer does not become the target of an investigation merely by being a witness in a criminal case." (*Johnson, supra*, 61 Cal.4th at p. 714.) This Court also stated in *Johnson* that "[t]he *Pitchess* procedures should be reserved for cases in which officer credibility is,