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

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rules 8.208(e)(3) and 8.488, I certify that petitioner Association for Los Angeles Deputy Sheriffs knows of no person or entity with either (1) an ownership interest of 10 percent or more in the party (rule 8.208(e)(1)); or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (rule 8.208(e)(2)).

Dated: February 12, 2018

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ANSWER BRIEF ON THE MERITS

INTRODUCTION

For nearly 40 years, California's statutes governing discovery of peace officer personnel records, enacted in response to this Court's decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), have coexisted with the principles articulated by the United States

Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and its progeny. This coexistence has the two schemes working in tandem to protect separate rights – a defendant's right to obtain exculpatory or impeaching information material on the question of his or her guilt, and peace officers' right to keep their personnel records private. The Court of Appeal in this case upheld the coexistence. This Court should do the same.

Brady and its progeny do not create a right to discovery in a criminal case, but rather ensure that a defendant received a fair trial based on knowledge of exculpatory or impeaching information material on the question of his or her guilt. The duty to disclose under *Brady* is solely on the prosecutor and extends to information gathered in connection with investigation of the case against the defendant.

Pitchess is different. This Court's opinion in *Pitchess*, and the Legislature's codification of its principles in now what commonly are referred to as the *Pitchess* statutes, opened the door to limited discovery of confidential peace officer personnel records. Through the *Pitchess* statutes, a defendant, in some circumstances, may compel discovery of information in a peace officer's personnel file that is relevant to his or her ability to defend against a criminal charge.

In this case, the Los Angeles County Sheriff's Department, together with the County of Los Angeles and Jim McDonnell, the Sheriff of Los Angeles County, (collectively, "Department") established a list of deputy sheriffs whose records they believed contain potential

exculpatory or impeachment information under *Brady*. This is so even though such a list – termed a "Brady list" – is contemplated by statute as a list maintained by a prosecutorial agency, not by law enforcement. In addition to maintaining its own so-called Brady list, the Department announced its intention to turn over the list to the Los Angeles District Attorney's Office.

The Association for Los Angeles Deputy Sheriffs ("ALADS") brought a petition in superior court seeking injunctive relief to stop distribution of the list because doing so violated the *Pitchess* statutes.[1] Indeed, disclosure of the list would allow discovery of deputies' names and employee numbers in connection with discipline, which explicitly is prohibited unless ordered by a trial court after examination pursuant to *Pitchess* procedures. The superior court granted a limited preliminary injunction, but knowingly did so in a way that violates the *Pitchess* statutes, in fact renders them unconstitutional, disrupting the tandem operation of the *Brady* and *Pitchess* schemes. The Court of Appeal, in a two-to-one opinion, put the pieces back in place by striking the portion of the preliminary injunction that allowed the

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[1] ALADS is a recognized employee organization (Gov. Code, § 3500 et seq.) "and is the certified majority representative for non-supervisory peace officers of Bargaining Unit 611 in the County of Los Angeles. ALADS represents and negotiates on behalf of its members in labor relations with the [Department], concerning wages, benefits, working conditions, and other terms of employment." (PWM Exhs. 1-2.) Statutory references are to the Government Code unless otherwise specified.

Department to disclose to the District Attorney, absent compliance with the *Pitchess* statutes, names and employee numbers of affected deputies who are potential witnesses in a pending criminal prosecution.

This Court should affirm the decision of the Court of Appeal. The Department premises its desire to disclose information from its own Brady list to the District Attorney on its obligation under *Brady*. But the Department has no obligation under *Brady*. And the disclosure it seeks to make squarely violates the *Pitchess* statutes. As a result, the proper outcome in this case, which impacts all peace officers in the state, is achieved, as matters have worked for nearly four decades, by upholding the tandem operation of *Brady* and *Pitchess*. If either the prosecution or the defense wants to obtain information in a peace officer's personnel record, it can do so through *Pitchess*. Nothing else is required – whether based on the case law, the statutes or public policy and practical considerations. This Court should continue to support both *Brady* and *Pitchess* and prevent, as did the Court of Appeal, the Department's attempted disclosure of confidential peace officer information absent compliance with the statutory *Pitchess* scheme.

FACTUAL AND PROCEDURAL STATEMENT

A. In 2016, the Department Announces a New Policy To Give Prosecutorial Agencies Its Own Version of a Brady List on a Routine Basis and Without Regard for Peace Officer Protections in the *Pitchess* Statutes.

As contemplated in the Public Safety Officers Procedural Bill of Rights Act ("POBRA"), a "'Brady list' means any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is *maintained by a prosecutorial agency or office* in accordance with the holding in *Brady v. Maryland* (1963) 373 U.S. 83." (§ 3305.5, subd. (e), italics added.) Although not a prosecutorial agency or office, on October 14, 2016, the Department by letter to approximately 300 affected deputies announced the creation of its own version of a Brady list and its intent to give the list to the District Attorney and other prosecutorial agencies. (1 PWM Exhs. 3, 19-22.)

In this letter, the Department indicated that, "[i]n an effort to ensure that [it is] in compliance with [*Brady*], as well as with more recent directives from the California Supreme Court and our State's Attorney General," it had created its own version of a Brady list. (1 PWM Exhs. 20.) The list was made after it had "convened a

Commanders' Panel to evaluate individual employees' personnel records that may contain potential exculpatory or impeachment information." (*Ibid.*)

The Department claimed that, "in order to comply with our constitutional obligations, this letter . . . serves to advise you that we are *required* to provide the names of employees with potential exculpatory or impeachment material in their personnel file to the District Attorney and other prosecutorial agencies where the employee may be called as a witness." (1 PWM Exhs. 21, italics added.) The letter implied that the Department would turn over its list, with names and employee numbers, to the District Attorney absent compliance with *Pitchess* procedures. (*Ibid.*) *Pitchess* procedures would come into play only to the extent "that no portion of an investigation or contents of [a deputy's] file will be turned over to either the prosecution or the defense absent a court order." (*Ibid.*)

The Department also gave examples of performance deficiencies that it had used to include deputies on its list, including (1) immoral conduct; (2) bribes, rewards, loans, gifts, favors; (3) misappropriation of property; (4) tampering with evidence; (5) false statements; (6) failure to make statements and/or making false statements during departmental internal investigations; (7) obstructing an investigation/influencing a witness; (8) false information in records; (9) policy of equality – discriminatory harassment; (10) unreasonable force; and (11) family violence. (1 PWM Exhs. 19-20.) Although many

of these deficiencies involve serious misconduct, an act of much less seriousness, such as a deputy's providing false information on a time record on one occasion, also would qualify for inclusion on the Department's list.

ALADS sent letters to the Department on behalf of certain of its members, objecting to their inclusion on the list and the disclosure. (See 1 PWM Exhs. 4, 24.) The Department responded that it intended to "proceed with satisfying [its] Constitutional obligations under *Brady v. Maryland*" and would provide names and employee numbers of affected deputies to the Los Angeles District Attorney's Brady Compliance Unit after November 14, 2016. (1 PWM Exhs. 4-5, 25-26.)

B. ALADS Files a Petition for Writ of Mandate in Superior Court Seeking Injunctive Relief To Prevent Distribution of the Department's List.

ALADS, on behalf of its approximately 7,800 member deputies, filed in the superior court a petition for writ of mandate, seeking, among other things, injunctive relief to prevent the Department from releasing its list to the District Attorney. (1 PWM Exhs. 1-26, 33-76.) The foundation for the request for injunctive relief was that the Department had "unilaterally identified [affected] deputies as having a founded investigation in their personnel file, which led to disciplinary

action, and ha[d] been identified, solely by the [Department], as reflecting moral turpitude, untruthfulness, or bias." (1 PWM Exhs. 9-10.) ALADS sought to prevent this "[u]nilateral[] disclos[ure]." (1 PWM Exhs. 13, 15, 46.)

As ALADS demonstrated, in violation of the *Pitchess* statutes, "the Department is threatening to release the names of deputies specifically *in connection* with information that the personnel files of the named deputies include[] founded investigations for which they were previously disciplined. Even without releasing the content of the investigation, by releasing the names of deputies who may have 'potential exculpatory or impeachment material in their personnel file' as a result of 'a founded administrative investigation involving [certain deficiencies],' the Department is clearly releasing the names of deputies linked to confidential information in that deputy's personnel file, namely his or her prior discipline." (1 PWM Exhs. 54, original italics.)

The Department objected to a preliminary injunction (1 PWM Exhs. 82-101), but the parties agreed to temporarily halt distribution of the list (1 PWM Exhs. 106). In accordance, the trial court entered a temporary restraining order, preventing disclosure of the list, allowed the Department to file formal opposition to the requested injunctive relief, and set a hearing date. (1 PWM Exhs. 105-106.)

In its formal opposition, the Department claimed that it had "a legal duty to notify [the] prosecution" under *Brady* "of the names

of deputies who may have *Brady* material in their personnel files." (1 PWM Exhs. 130; see 1 PWM Exhs. 119-137.) The Department said that, regardless of the *Pitchess* statutory scheme, it could fulfill this "legal duty" either by "disclos[ing] the names on a case-by-case basis or . . . develop[ing] a mechanism whereby it provides prosecutors with a list of deputies who have sustained findings for policy violations involving moral turpitude, untruthfulness, or bias . . . ." (1 PWM Exhs. 130.) The Department relied on this Court's opinion in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, as well as a 2015 post-*Johnson* opinion by the Attorney General, 98 Ops. Cal. Atty. Gen. (2015) [2015 WL 7621362]. (E.g., 1 PWM Exhs. 131.) This is so, ALADS demonstrated, even though the propriety of a proposed practice to turn over peace officer names as part of a supposed *Brady* obligation was not at issue in *Johnson* and the Attorney General's opinion cited no authority for sanctioning the disclosure of names absent *Pitchess* compliance. (See 1 PWM Exhs. 169-183.)

C. The Trial Court Grants Limited Injunctive Relief, Which Improperly Fails To Account for Peace Officer Protections in the *Pitchess* Statutes.

The trial court granted a preliminary injunction. But it conditioned injunctive relief in a manner that failed to respect the protections afforded to peace officers under the *Pitchess* statues.

The trial court enjoined the Department from "[r]eleasing to the Los Angeles County District Attorney's Office, or any person, agency, or official outside the Sheriff's Department, the Sheriff's Department's 'Brady List' prepared, maintained, and described by the Sheriff's Department in its October 14, 2016 letter." (2 PWM Exhs. 302.) The trial court thus recognized that the Department's proposal to send its own version of a Brady List to the District Attorney, as some sort of free-floating obligation, was not required under *Brady* and its progeny and violated the *Pitchess* statutes. (See 1 PWM Exhs. 192-193; 2 PWM 210 ["there's no Brady obligation unless there's a criminal case and a criminal defendant. There's no Brady obligation floating in the air. It's got to be tethered to a case"].)

Despite precluding the Department from releasing its Brady list, the trial court allowed it to disclose individual names and employee numbers of deputies on the list. According to the preliminary injunction, the Department may not "[d]isclos[e] to the Los Angeles County District Attorney's Office, or any prosecutorial agency, the fact that any individual Deputy Sheriff's name or employee number appears on the aforementioned 'Brady List,' *unless* a criminal

prosecution is pending and the Deputy Sheriff at issue is involved in that prosecution as a potential witness, in which case the [Department] may disclose to the prosecutorial agency that the Deputy Sheriff is listed on the Sheriff's Department's 'Brady List' and/or may have 'Brady material' in his or her personnel file." (2 PWM Exhs. 302, italics added.) The trial court did *not* preclude the Department "from maintaining a 'Brady List' internally" or "from disclosing the fact that an individual Deputy Sheriff is listed on the . . . Department's 'Brady List' when a criminal prosecution is pending and the Deputy Sheriff at issue is involved in the pending prosecution as a potential witness." (2 PWM Exhs. 302-303.)

As a result, although the trial court granted preliminary injunctive relief, it did so in a manner that allows the Department to not only maintain its list, but also to release names and employee numbers to the District Attorney, without regard for the peace officer protections in the *Pitchess* statutory scheme. In other words, the trial court determined, the Department may release names and employee numbers absent compliance with the *Pitchess* statutes when a criminal prosecution is pending and a deputy sheriff is involved in that prosecution as a potential witness. (See 2 PWM Exhs. 302.)

D. ALADS Petitions for a Writ of Mandate in the Court of Appeal, Demonstrating the Trial Court's Preliminary Injunction Effectively Renders the Statutory *Pitchess* Scheme Unconstitutional.

Because the trial court's preliminary injunction permitted disclosure absent compliance with *Pitchess*, ALADS filed a petition for writ of mandate in the Court of Appeal.[2] ALADS argued the trial court's decision that the Department may release names of deputies when they are a potential witness in a pending criminal prosecution "is beyond any authority recognized by law and is, in fact, directly contrary to the Department['s] recognized statutory obligation to prevent from release to anyone, outside the context of a [*Pitchess*] motion pursuant to Evidence Code section[] 1043 et seq., the very information it has obtained the court's authorization to voluntarily release." (Mem. in Support of PWM 42.)

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[2] ALADS also appealed from the preliminary injunction order. (Code Civ. Proc., § 904.1, subd. (a)(6).) The Court of Appeal exercised its discretion to decide the matter by way of ALADS's petition for writ of mandate. According to the appellate court, quick resolution of the matter on a writ petition, rather than through appeal, was warranted because the *Pitchess* "procedure affects every state and local law enforcement agency in California, and potentially every state criminal prosecution wherein a state or local peace officer is a witness." (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2017) 13 Cal.App.5th 413, 429-430 (*ALADS*).)

In opposition, the Department argued that it, "as a law enforcement agency and member of the 'prosecution team,' owes an affirmative duty under *Brady* to disclose to prosecutorial agencies the names of employees involved in criminal prosecutions who the Department reasonably believes have exculpatory or impeachment information in their personnel files." (Prelim. Opp. 7.) According to the Department, "the trial court correctly determined that the . . . Department's constitutional *Brady* obligations trump peace officers' statutory privacy rights in the limited circumstance where there is a pending criminal case that requires disclosure of exculpatory evidence to the criminal defendant." (*Id.* at p. 19.) Indeed, the Department viewed its *Brady* obligations so broadly that it suggested the trial court's limit on disclosure to a pending criminal prosecution might constitute error. (*Id.* at 19, fn. 3.)

E. The Court of Appeal Grants the Writ Petition in Part By Striking the Improper Limits in the Preliminary Injunction That Violate the *Pitchess* Statutes.

The Court of Appeal presented the primary issue, and that relevant on this Court's review, as follows: "[W]hether a statewide statutory discovery procedure that has been in effect for nearly 40 years violates the Constitution, as construed in *Brady*, when enforced in the context of a filed criminal prosecution that includes as witnesses, peace officers with

founded allegations of misconduct, relevant to veracity, in their personnel files." (*ALADS, supra,* 13 Cal.App.5th at p. 429.)

The Court of Appeal reviewed *Brady* and *Pitchess*, as well as this Court's "express[] observ[ation] that the statutory *Pitchess* procedures do not violate either *Brady* or constitutional due process, but rather, supplement both." (*ALADS, supra,* 13 Cal.App.5th at p. 437, citing *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14, 16 (*City of Los Angeles*) [*Pitchess* operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information]; *People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1226 (*Mooc*) [*Pitchess* "viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence . . . now an established part of criminal procedure in this state"].) The appellate court determined that *Johnson, supra,* 61 Cal.4th 696 did not authorize the trial court's permitted disclosure, but rather supported compliance with the *Pitchess* statutes, and the Attorney General's 2015 opinion lacked justification to approve disclosure. (*ALADS*, at pp. 440-445.) Based on this review, the Court of Appeal granted writ relief to prevent the Department from disclosing to the District Attorney names on its version of a Brady list.

The appellate court concluded the Department could create a Brady list "for internal use only." (*ALADS, supra*, 13 Cal.App.5th at p. 436.) But the appellate court determined disclosure of names from the list was not permissible and to allow such disclosure would render the *Pitchess* statutes unconstitutional. (*Id.* at pp. 421-422.) In addition, the trial court's injunction allowing disclosure outside of *Pitchess* when a deputy on the Department's own Brady list is a "'potential'" witness in a pending criminal case was overbroad because "it treats potential witnesses identically regardless of their materiality" in conflict with *Brady*'s standard of materiality as a prerequisite to disclosure. (*Id.* at p. 440.) Accordingly, the appellate court directed, "the language in the injunction that allows the [Department], or any real party, to disclose the identity of any individual deputy on the *Brady* list to any agency or individual outside the [Department], absent a properly filed and granted *Pitchess* motion and corresponding court order, even if the affected deputy is a potential witness in a filed criminal prosecution, must be stricken." (*Id.* at p. 439.)

In a dissent, Justice Grimes concluded that "[t]his case does not present the question whether *Brady* principles *mandate* disclosure of officer names to the prosecutor. The trial court's injunction merely allows the Department to implement a determination that it can best fulfill its *Brady* obligations by giving the names of peace officers with

Brady material in their files to prosecutors when charges are pending. The injunction mandates nothing of the Department or any other law enforcement agency. [¶] The question presented to us is whether the *Pitchess* statutes preclude the disclosure of *Brady*-list names by the Department to the prosecutor in a pending prosecution. The courts have always viewed *Pitchess* 'against the larger background' of the prosecution's constitutional *Brady* obligations. [Citation.] We would do no more here, by finding no *Pitchess* violation in a procedure that is consonant with *Brady* obligations and that does not involve a prosecutor's perusal of any information in an officer's personnel file." (*ALADS, supra*, 13 Cal.App.5th at p. 458.)

F. This Court Grants the Department's Petition for Review, Directing the Parties To Brief a Question That in Many Respects Reflects the Trial Court's Preliminary Injunction.

This Court granted the Department's petition for review. It asked the parties to brief the following issue: "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.)"

As set forth in the discussion below, and contrary to the Department's position, the answer to the Court's question is that, in a pending criminal prosecution, disclosure of a peace officer's name and identifying number, along with the fact that officer may have relevant exonerating or impeaching information in his or her confidential personnel file, may be made only by court order on a properly filed *Pitchess* motion.

LEGAL DISCUSSION

I.

BRADY COMPLIANCE REQUIRES THE PROSECUTION TO PROVIDE THE DEFENSE EXCULPATORY OR IMPEACHING MATERIAL INFORMATION KNOWN TO THE INVESTIGATIVE TEAM.

In 1963, the United States Supreme Court held that the prosecution has an obligation under federal due process to disclose to the defense all evidence that is favorable to the defendant and material on the question of his or her guilt. (*Brady*, *supra*, 373 U.S. at p. 87.) Almost nine years later, the high court extended the *Brady* obligation to material evidence that impeaches a prosecution's witness,