Reconciling Brady and Pitchess: Association for Los Angeles Deputy Sheriffs v. Superior Court, and the Future of Brady Lists

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Reconciling Brady and Pitchess: 
Association for Los Angeles Deputy Sheriffs v. Superior Court, and 
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RYAN T. CANNON*

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I. INTRODUCTION

Jim McDonnell was elected Sheriff of Los Angeles County in 2014 on the heels of Lee Baca’s early retirement. Baca was plagued by controversy for years, and his attempts to cover up misconduct within the department ultimately led to his conviction for obstruction. Consequently, McDonnell’s first move as Sheriff was to establish a panel of commanders tasked with reviewing Los Angeles Sheriff’s Department (LASD) personnel and identifying deputies with founded allegations of misconduct. McDonnell planned to disclose this information to the prosecutorial offices that handle LASD cases to strengthen the integrity of criminal investigations and prosecutions.

The reform effort quickly hit a barrier with a history originating in that same department. In a 1974 case against Los Angeles County Sheriff, Peter Pitchess, the California Supreme Court held that criminal defendants could access peace officer personnel records.

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6. Id.  
8. Id. at 538–40. Sheriff Pitchess, known for modernizing the Los Angeles County Sheriff’s Department during his twenty-three-year tenure, was both revered within the law enforcement community and highly criticized by the public. Myrna Oliver, Peter Pitchess,
the decision, law enforcement agencies, their unions, and prosecutorial offices railed against what they considered to be court-endorsed “fishing expeditions” into personnel files.9 Animosity toward access to personnel files shaped the statutory codification of Pitchess in 1978, which made personnel files confidential.10 Now, Pitchess confidentiality threatens to foreclose Sheriff McDonnell’s reform efforts and erode the due process rights afforded to criminal defendants in Brady v. Maryland.11

This Note will address the tension created by Association for Los Angeles Deputy Sheriffs v. Superior Court (ALADS), in which the California Court of Appeal for the Second District held that disclosing to prosecutors the names of peace officers with potential Brady material in their personnel files violates Pitchess confidentiality.12 Part II will briefly survey the backdrop against which the Pitchess statutes were passed and the inherent conflict between Pitchess and Brady. Part III will dissect the appellate court’s decision in ALADS and argue that the decision misapplied California Supreme Court precedent. Finally, Part IV will discuss the future of Pitchess and Brady in light of the California Supreme Court’s upcoming review of the case and offer possible solutions to the Pitchess/Brady problem.

II. BACKGROUND

Prosecutorial Brady obligations and statutory Pitchess confidentiality developed in two very different contexts, despite the decisions sharing similar underlying rationales.13 The tension that exists between the two doctrines

10. Id. at 129–32; see also CAL. PENAL CODE § 832.7 (West 2018) (“Peace officer or custodial officer personnel records . . . or information obtained from these records, are confidential . . . .”).  
13. Brady announced a due process right to favorable evidence for criminal defendants and Pitchess articulated a discovery process grounded in fundamental fairness. Compare Brady; 373 U.S. at 86, with Pitchess, 11 Cal. 3d at 538–40.
stems from the fact that the legislature’s codification of Pitchess failed to account for prosecutorial Brady obligations.14

A. Prosecutorial Brady Obligations

In Brady, the Supreme Court of the United States held that the Fourteenth Amendment’s Due Process Clause requires prosecutors to turn over evidence favorable to criminal defendants when that evidence would be “material either to guilt or to punishment.”15 The Court’s subsequent decisions further defined Brady requirements for prosecutors: Brady material must be turned over regardless of whether the defense makes a request,16 and the obligation extends to evidence in the possession of the entire prosecutorial team, “including the police.”17 Brady material also includes impeachment material:18 evidence of dishonest acts, bias, motive, and any other evidence tending to affect witness credibility.19 Such evidence falls under Brady because the credibility of a witness is often “determinative of guilt or innocence”20 and is vital to cases that hinge on peace officer testimony.21

While Brady requires prosecutors to disclose favorable evidence to the defense, Brady did not create a general constitutional right to discovery in criminal cases.22 Nowhere is this distinction more overt than in the case of impeachment evidence. Even though Brady requires disclosure of


15. Brady, 373 U.S. at 86–87. Evidence is material when it has a “reasonable probability” of affecting the outcome of a case, with “reasonable probability” being “a probability sufficient to undermine confidence in the [case’s] outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). In assessing materiality, courts look to how the undisclosed evidence, as a whole, may or may not have affected the outcome of the case, rather than the probative value of each individual piece of Brady material. See Kyles v. Whitley, 514 U.S. 419, 436–37 (1995). Additionally, it is important to note that even an inadvertent failure to disclosure material evidence can constitute a Brady violation. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).


17. Kyles, 514 U.S. at 437–40. The prosecutorial team comprises all those acting “on the government’s behalf,” including the police agency that investigated the crime. Id. at 437. Knowledge of evidence favorable to the defense held by members of the prosecutorial team is automatically imparted on the prosecutor who is liable for the disclosure of all exculpatory information or evidence that any member of the prosecutorial “team actually or constructively possesses.” In re Steele, 32 Cal. 4th 682, 697 (2004) (quoting People v. Superior Court, 80 Cal. App. 4th 1305, 1315 (2000)).


20. Giglio, 405 U.S. at 154 (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).


22. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case, and Brady did not create one . . . .”).
impeachment evidence, there is no mandate as to when such a disclosure must occur because *Brady* is not a constitutional discovery doctrine.\(^{23}\) To the contrary, the United States Supreme Court explicitly held that under *Brady* such evidence does not need to be disclosed to a criminal defendant before the individual enters into a guilty plea.\(^{24}\)

**B. The Pitchess Decision**

Ten years after *Brady*, the California Supreme Court addressed the pretrial disclosure of peace officer personnel records.\(^{25}\) The court held that criminal defendants could compel the discovery of information from a peace officer’s personnel file by demonstrating that the requested information would “facilitate the ascertainment of the facts and a fair trial.”\(^{26}\) Such discovery “is based on the fundamental proposition that [the defendant] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.”\(^{27}\) Notably, *Pitchess* was decided on state-law grounds and never mentioned prosecutorial *Brady* obligations to disclose such evidence.\(^{28}\)

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\(^{24}\) *Id.*. The Court in *Ruiz* reasoned that the limited value of impeachment evidence was outweighed by the government’s interest in procuring plea bargains “that are factually justified, desired by defendants, and help to secure the efficient administration of justice.” *Id.* at 631. Lower courts initially took the *Ruiz* decision as an indication that *Brady* disclosure requirements as a whole are less applicable in the pretrial plea bargain context, but the Supreme Court has since moved in the opposition direction, indicating a willingness to regulate the plea bargain process through the application of *Brady* disclosure. *Lafler v. Cooper*, 566 U.S. 156, 157, 174 (2012); see also Gerard Fowke, Note, *Material to Whom?: Implementing Brady’s Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575, 590–92 (2013).


\(^{26}\) *Id.* at 536. Today, the scope of *Pitchess* motions has expanded to include lying or falsifying police reports, fabricating evidence, planting evidence, orientation bias, coerced confessions, and officer code of silence allegations. Michael Lampert, “*Disinfecting with Sunlight*”: Lessons from the Riverside County Sheriff’s Department Decision Affirming Hearing Officer Subpoena Powers in Public Safety Officer Discipline Cases, 66 LAB. L.J. 126, 127 (2015).

\(^{27}\) *Pitchess*, 11 Cal. 3d at 535 (citing *Hill v. Superior Court*, 10 Cal. 3d 812, 816 (1974)).

\(^{28}\) Miguel A. Neri, *Pitchess v. Brady*: The Need for Legislative Reform of California’s Confidentiality Protection for Peace-Officer Personnel Information, 43 McGeorge L. Rev. 301, 306 (2012). The decision was written by one of California’s most distinguished jurists, Justice Stanley Mosk, who served on the court for thirty-seven years and wrote 1,500 opinions. *Stanley Mosk, 88, Long a California Supreme Court Justice*, N.Y. TIMES
1. The Pitchess Statutes

Following the Pitchess decision, police agencies, their unions, and prosecutorial offices began a campaign to prevent criminal defendants from accessing peace officer personnel files.29 In one particularly dramatic episode, the Los Angeles City Attorney and the LAPD conspired to shred records of complaints against officers as a way of preventing discovery.30 The LAPD covertly destroyed four tons of police files during a single month in 1976.31 Judges were forced to dismiss over 100 cases connected to the destroyed files when the shredding came to light.32

Against this backdrop, the California legislature began drafting a statutory codification of the Pitchess process, the purpose of which would be to narrow the Pitchess holding and limit the disclosure of peace officer personnel files.33 The California Attorney General drafted the bill and noted that the law would stop “unreasonable and bad faith efforts to obtain access to a peace officer’s personnel file.”34 The California Highway Patrol advised that overzealous attorneys looking to turn the heads of jury members prompted the need for the law.35 Police unions wrote that the law would stop “fishing expeditions” used to escape criminal charges.36

The legislation codified the Pitchess procedure and confidentiality in Penal Code §§ 832.7 and 832.8, as well as Evidence Code §§ 1043 through 1045.37 The law makes two types of records confidential: (1) peace officer personnel...
personnel records and all information obtained from them, and (2) records of citizen complaints. Under the statutory scheme, disclosure in criminal or civil proceedings can occur only upon a motion showing the materiality of the information sought and a belief that the police agency has the records. Once disclosure is triggered, a judge conducts an in camera review of the file and determines what records, if any, to disclose.

In practice, the moving party must demonstrate a link between the proposed defense and how the information sought would support the defense or impeach the testifying officer’s version of events. Because the defendant is often seeking information to impeach an officer-witness, such evidence regularly falls under Brady. However, the Pitchess statutes, like their judicial-decision counterpart, make no mention of prosecutorial Brady obligations. The statutes are void of legal provisions that would facilitate prosecutors’ compliance with Brady because the California legislature failed to take Brady into account when drafting the law.

C. The Pitchess/Brady Tension

Pitchess confidentiality acts as a barrier to the disclosure of Brady material. Brady requires prosecutors to disclose material evidence—including impeachment evidence—held by any member of the prosecutorial team. At the same time, Pitchess confidentiality limits prosecutorial access to peace officers’ personnel files. Thus, prosecutors cannot assess whether there is Brady material in an officer’s personnel file without first making a Pitchess motion.

38. CAL. PENAL CODE § 832.7 (West 2018).
39. Id.; CAL. EVID. CODE § 1043.
40. CAL. EVID. CODE § 1045. The statutes exclude from disclosure complaints that are more than five years old, any conclusions made by officers investigating the complaints, and any facts “so remote as to make disclosure of little or no practical benefit.” Id. Courts generally disclose nothing more than “the names, addresses, and telephone numbers of complainants and witnesses, [as well as the] dates of the alleged incidents.” Neri, supra note 28, at 314.
42. Id. at 722.
44. Neri, supra note 28, at 309.
45. Id.
46. See Kyles, 514 U.S. at 437.
47. See Alford v. Superior Court, 29 Cal. 4th 1033, 1054 (2003).
The Pitchess statutes create practical barriers to conducting such an assessment. Prosecutors must satisfy the good cause requirement of a Pitchess motion before disclosure can occur. This means a prosecutor must allege plausible misconduct on the part of the officer-witness and link that misconduct to a defense theory. Were this practicable, the resulting disclosure still would be subject to the limitations found in the Pitchess statutes. There remains a significant risk that a criminal defendant will be left without material to which he or she is constitutionally entitled.

1. The Rise of Brady Lists

Police agencies developed their own solution to the Pitchess/Brady problem. By 2015, several counties had begun systematically reviewing personnel files for potential Brady information and compiling the names of officers with founded allegations of misconduct into “Brady lists.” A name would be turned over to a prosecutor any time an officer was a material witness in a case so that the prosecutor could make a Pitchess motion to review the file for Brady material or notify defense counsel to allow the defense to make a Pitchess motion.

The California Supreme Court briefly discussed, in dicta, the use of Brady lists in People v. Superior Court (Johnson), where disclosure from a Brady list occurred. The court held that prosecutors are required to file a Pitchess motion and should inform defense counsel of the fact that potential Brady material exists. As the court put it, “[t]he prosecutor ha[s] no constitutional

49. California Evidence Code § 1043 makes no distinction between prosecutorial and defense Pitchess motions when it describes the particular showing necessary to trigger review. See CAL. EVID. CODE § 1043 (West 2018).
50. See Warrick v. Superior Court, 35 Cal. 4th 1011, 1018 (2005). Requiring a prosecutor to think and act as a defense attorney is an impediment to successful prosecutorial Pitchess motions, in part because prosecutors do not have access to the criminal defendant’s version of events, but also because prosecutors are not naturally disposed to thinking and acting for the benefit of the defense. See Alex Kozinski, Preface, Criminal Law 2.0, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xxvii (2015) (noting the inherent difficulty for prosecutors to think and act as defense attorneys).
52. Id.
55. People v. Superior Court (Johnson), 61 Cal. 4th 696, 706 (2015) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). Johnson itself did not present the use of Brady lists as a material issue and instead focused on the ability of prosecutors to access personnel files after the initial disclosure from the Brady list occurs. Id. at 711–13. As for any continuing Brady obligation upon disclosure from a Brady list, the court held that a prosecutor is only required to inform defense counsel of the fact that she was notified that potential Brady material exists. Id. at 716. As the court put it, “[t]he prosecutor ha[s] no constitutional
motion to gain access to personnel files, even after they are notified of the existence of potential *Brady* information. However, the court never took issue with the disclosure of names from the *Brady* list. Rather, the court praised the use of the procedure: “In this case, the police department has *laudably* established procedures to streamline the *Pitchess/Brady* process.”

For a time, *Brady* lists appeared to be the solution to the *Pitchess/Brady* problem. Prosecutors fulfilled their disclosure obligations, and defendants gained access to exculpatory evidence. However, peace officers and their unions felt the use of *Brady* lists threatened the protections established by the *Pitchess* statutes.

III. ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS V. SUPERIOR COURT

The LASD panel finished reviewing personnel files in October of 2016 and found misconduct in the records of 300 deputies whose names were then compiled into a *Brady* list. The LASD intended to disclose this list to the prosecutorial offices that regularly handled LASD cases but refused to divulge the types of misconduct, the results of investigations into the allegations, or any disciplinary actions that followed. The policy appeared to comply with *Johnson’s* mandate that prosecutors be required to file a *Pitchess* motion before accessing personnel files following the initial disclosure from the list. Further, the policy would minimize prosecutorial liability...
under California Penal Code § 141, which in 2016 made it a felony for prosecutors to willfully falsify or withhold evidence.\(^{62}\)

The union representing Los Angeles sheriff’s deputies filed suit on November 10, 2016, seeking to enjoin the LASD from implementing the policy.\(^{63}\) The trial court held that, once a peace officer on a \textit{Brady} list is slated to be a material witness in a criminal proceeding, \textit{Brady} requires the disclosure of the officer’s name to the prosecutor.\(^{64}\) Although the disclosure of the name would violate \textit{Pitchess} confidentiality, \textit{Brady} overrode the state-law restrictions.\(^{65}\) The court issued a preliminary injunction prohibiting the LASD from disclosing the \textit{Brady} list or individuals on it, except when (1) the deputy becomes a potential witness in a criminal prosecution or (2) a court order compels disclosure following a \textit{Pitchess} motion.\(^{66}\)

\textit{A. The Decision of the Court of Appeal}\n
The union filed an immediate petition for a writ of mandate from the court of appeal seeking to strike those portions of the injunction that allowed LASD to disclose names from the \textit{Brady} list without first complying with the \textit{Pitchess} statutes.\(^{67}\) Thus, the court addressed the following questions: (1) are the names of deputies on the \textit{Brady} list in and of themselves confidential?; and (2) if the names are confidential, does \textit{Pitchess} confidentiality prevent their disclosure once an officer becomes a potential material witness?\(^{68}\)

Based on \textit{Johnson} and the dicta within it, the answer to these questions should have been \textit{no}. Nowhere in \textit{Johnson} did the California Supreme Court take issue with the police department’s initial disclosure of officers’ names to the prosecutor’s office. In dicta, the court praised the use of the \textit{Brady} list and used the existence of the list to fashion parts of its central

\begin{footnotesize}
\begin{enumerate}
\item CAL. PENAL CODE § 141 (West 2018); see also Tony Saavedra, \textit{New law: Prosecutors Face Felonies if They Falsify or Withhold Evidence}, ORANGE COUNTY REG. (Oct. 2, 2016, 7:35 AM), http://www.ocregister.com/2016/10/02/new-law-prosecutors-face-felonies-if-they-falsify-or-withhold-evidence/ [https://perma.cc/K49T-SQUS]. The law was passed largely in reaction to revelations of misconduct within the Orange County District Attorney’s office. \textit{Id.}
\item \textit{ALADS}, 221 Cal. Rptr. 3d at 61.
\item \textit{Id.} at 62–63.
\item \textit{Id.} at 62.
\item \textit{Id.} at 64. The trial court included a series of “clarifying” principles” meant to specify the scope of the injunction. \textit{Id.} These principles noted that the LASD was not precluded by any part of the injunction from creating and maintaining an internal \textit{Brady} list, from using membership on the \textit{Brady} list as a basis for deputy reassignment, or from disclosing to prosecutors future \textit{Brady} lists that include only non-sworn employees. \textit{Id.}
\item \textit{Id.}
\item See \textit{Id.} at 66.
\end{enumerate}
\end{footnotesize}
In accordance with Johnson, the appellate court should have upheld the LASD’s ability to make a disclosure limited to an officer’s name and presence on a Brady list. However, such a ruling would have been a clear blow to the overarching goal of the Pitchess statutes—curtailing disclosure of peace officer personnel records. That would prove too difficult for the court to accept, given the longstanding endorsement of Pitchess confidentiality by police agencies, unions, prosecutors, and lower courts in California. Instead, the court held that the names of officers on the Brady list are themselves confidential and cannot be disclosed.

1. The Confidentiality of Names: The Copley Press Cases

The appellate court relied on a series of cases, referred to here as the Copley Press cases, to support the conclusion that peace officers’ names are themselves confidential. The Copley Press cases involved various news agencies’ California Public Records Act (CPRA) requests for documents either located in or connected to peace officer personnel files. The cases sought to determine the extent of allowable disclosure in light of Pitchess confidentiality. Ultimately, the Copley Press cases struck a balance between

70. See Abel, supra note 14, at 763.
71. See Neri, supra note 28, at 303–04; Bies, supra note 9, at 129–31.
72. ALADS, 221 Cal. Rptr. 3d at 68 (citing Copley Press, Inc. v. Superior Court, 39 Cal. 4th 1272, 1297 (2006)).
73. The Copley Press line of cases are Long Beach Police Officers Ass’n v. City of Long Beach, 59 Cal. 4th 59 (2014); Commission on Peace Officers Standards & Training v. Superior Court (POST), 42 Cal. 4th 278 (2007); and Copley Press, 39 Cal. 4th 1272.
74. ALADS, 221 Cal. Rptr. 3d at 68 (citing Copley Press, 39 Cal. 4th at 1297).
75. Long Beach, 59 Cal. 4th at 64; POST, 42 Cal. 4th at 284, 286; Copley Press, 39 Cal. 4th at 1279.
76. Long Beach, 59 Cal. 4th at 67–69, 71; POST, 42 Cal. 4th at 292–93; see also Copley Press, 39 Cal. 4th at 1282, 1284–85. Pitchess confidentiality became an issue in the context of CPRA disclosure because the CPRA explicitly “does not require the disclosure of . . . [r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” CAL. GOV’T CODE § 6254(k) (West 2018). This portion of the CPRA incorporates the Pitchess statutes and the prohibitions against disclosure within them. Copley Press, 39 Cal. 4th at 1307 (first citing CAL. GOV’T CODE § 6254(k); and then citing CBS, Inc. v. Block, 42 Cal. 3d 646, 656 (1986)). One other provision of the CPRA appears to mirror the language of the Pitchess statutes: § 6254(c) exempts from disclosure “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion
records of factual information about an incident, which are not confidential, and records generated as part of an internal investigation of an officer in connection with an incident, which are confidential.77

The California Supreme Court first addressed the disclosure of peace officer names in Copley Press, Inc. v. Superior Court and took an expansive view of Pitchess confidentiality.78 The court held that Pitchess confidentiality extends beyond criminal and civil proceedings to third party disclosures.79 Thus, Pitchess confidentiality creates a barrier to the release of peace officer personnel records following a CPRA request.80 The court relied primarily on the legislative history and plain language of the Pitchess statutes to further hold that Pitchess confidentiality protects the names of peace officers from disclosure.81

Although Copley Press applied a broad reading of Pitchess confidentiality, the California Supreme Court backpedaled on disclosure restrictions just one year later in Commission on Peace Officer Standards and Training v. Superior Court (POST).82 The reporter in POST sought names and records unrelated to disciplinary actions or complaints.83 The court moderated its application of the Pitchess statutes and qualified its ruling in Copley Press by holding that the names of officers are generally not confidential unless disclosure of an officer’s name would directly link that officer to private information found in a personnel file.84

The final case in the Copley Press triad adhered to the narrow reading of Pitchess confidentiality found in POST.85 In Long Beach Officers

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77. Long Beach, 59 Cal. 4th at 72.
78. See Copley Press, 39 Cal. 4th at 1297–98.
79. Id. at 1284–85.
80. See id. at 1285–86. The reporter in Copley Press sought records related to a closed hearing in which a deputy sheriff appealed his termination from the San Diego County Sheriff’s Department. Id. at 1279. The reporter had previously attempted to gain access to the hearing but was denied. Id.
81. Id. at 1297. Since the passage of the Pitchess statutes, peace officer personnel files are one area where California courts have consistently erred on the side of curbing disclosure under CPRA requests. In other areas, courts have continuously narrowed those provisions of the CPRA that seek to protect public employee privacy. Alexandra B. Andreen, Comment, The Cost of Sunshine: The Threat to Public Employee Privacy Posed by the California Public Records Act, 18 CHAP. L. REV. 869, 870, 893 (2015).
83. Id. at 286.
84. Id. at 295–96, 298–99.
Association v. City of Long Beach, the court allowed the disclosure of the names of officers involved in shootings during a five-year period despite the fact that the disclosure linked those officers to investigations of the shootings found within their personnel files. The court further limited its decision in Copley Press, interpreting the case as merely restricting the disclosure of records generated in connection with an appraisal or discipline. Thus, under Long Beach, records of factual information about an incident could be disclosed, but records generated as part of an internal investigation into that officer’s conduct remained confidential.

In stark contrast to ALADS, the Copley Press cases involved public disclosures to news outlets. The court relaxed Pitchess confidentiality in this highly public setting where no competing constitutional interest existed. It should logically follow, then, that in a context where disclosure is not as public—or arguably not public at all—and where a constitutional interest conflicts with confidentiality, courts should err on the side of allowing the disclosure.

The ALADS court instead relied on the Copley Press cases to prevent the disclosure of officer names by holding that the names themselves are confidential. The court’s reliance is misguided for two reasons. First, the court disregarded the difference between disclosure to prosecutors and disclosure to news outlets. Prosecutors and police agencies are both part of the prosecutorial team under longstanding Brady case law. The

86. Id. at 71–72. The reporter was seeking records of police-involved shootings following the killing of thirty-five-year-old Douglas Zerby by two Long Beach City police officers. Id. at 64. The unarmed Zerby was shot while holding a water hose nozzle, which police mistook for a handgun. Richard Winton & Ruben Vives, Family of Man Killed by Long Beach Officers Awarded $6.5 Million, L.A. TIMES (Apr. 4, 2013), http://articles.latimes.com/2013/apr/04/local/la-me—water-nozzle-verdict-20130405 [https://perma.cc/33DX-BNA9]. Zerby’s family was awarded $6.5 million by a Santa Ana jury following the shooting. Id.

87. Long Beach, 59 Cal. 4th at 72–73.

88. Id. The court acknowledged the fact that the Pitchess statutes are silent as to whether names are protected from disclosure. Id. at 65. The POST court similarly noted that, had the Legislature intended on preventing the disclosure of names of peace officers, it very well could have included “names” on the list of “personal data” made confidential by § 832.8. POST, 61 Cal. 4th at 298 (quoting CAL. CIV. CODE § 832.8 (West 2018)).

89. See Ass’n for L.A. Deputy Sheriffs v. Superior Court (ALADS), 221 Cal. Rptr. 3d 51, 83–84 (Ct. App. 2017) (Grimes, J., dissenting).

90. See Long Beach, 59 Cal. 4th at 72–73.

91. ALADS, 221 Cal. Rptr. 3d at 68, 79–80.

92. See id. at 68–69.

dissemination of information between members of the prosecutorial team is distinguishable from disclosure to news outlets that intend to publish that information to the public at large. The appellate court dismissed this distinction, choosing instead to apply the broad confidentiality standard set down in *Copley Press* without any regard for the context in which that case was decided.

Second, the court applied the broad ruling found in *Copley Press* while ignoring the decisions in *POST* and *Long Beach* that followed it. *POST* established a baseline that names themselves are not confidential, subject to certain exceptions. *Long Beach* clarified that *Pitchess* confidentiality applies to the disclosure of records generated as part of internal investigations or disciplinary actions resulting from an officer’s conduct. Names, then, are only confidential when they link an officer to the results of internal investigations or disciplinary actions.

The names on a *Brady* list do not fall within this exception because the names themselves only link the officer to factual information about an incident, which *Long Beach* held was not confidential under the *Pitchess* statutes. Disclosure of a *Brady* list officer indicates to the prosecutor that the officer’s file may contain *Brady* material. Without more, disclosure does not link that officer to the results of investigations or disciplinary actions. To the contrary, such records remain confidential and undisclosed. Thus, under the *Copley Press* cases, and *Long Beach* in particular, the names of officers on *Brady* lists should not be confidential.

### 2. The Disclosure of Confidential Names

The *ALADS* court then had the task of reconciling *Brady* disclosure requirements with its conclusion that the names of peace officers on *Brady* lists are confidential. The court chose to ignore the conflict altogether.

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94. *ALADS*, 221 Cal. Rptr. 3d at 84 (Grimes, J., dissenting).
95. See id. at 68–69.
96. See id.
99. Id. at 72.
100. Id. at 72–73.
101. See *ALADS*, 221 Cal. Rptr. 3d at 60.
102. Id.
103. The Court in *Long Beach* stressed the importance of not reading § 832.8 “so broadly as to include every record that might be considered for purposes of an officer’s appraisal or discipline, for such a broad reading of the statute would sweep virtually all law enforcement records into the protected category of ‘personnel records.’” *Long Beach*, 59 Cal. 4th at 71–72 (quoting CAL. CIV. CODE § 832.8 (West 2018)).
rather than acknowledge and grapple with the existence of a real tension between prosecutorial *Brady* obligations and the *Pitchess* statutes.104

The *ALADS* court first noted that the California Supreme Court reviewed the *Pitchess* statutes in *People v. Mooc* and *City of Los Angeles v. Superior Court (Brandon)*, finding in both cases that *Pitchess* confidentiality violated neither *Brady* nor constitutional due process.105 This conclusion omits several crucial details. In *Mooc*, the California Supreme Court reviewed only the procedural requirements of disclosure under the *Pitchess* statutes.106 In no portion of the decision did the court engage in a substantive analysis of the constitutionality of *Pitchess* confidentiality in light of *Brady* disclosure or due process requirements.107

Brandon did address the constitutionality of one portion of the *Pitchess* statutes: the disclosure and destruction of complaints older than five years.108 Although the court concluded that this portion of the *Pitchess* statutes did not violate *Brady* or due process, the court explicitly reserved the question of whether *Pitchess* confidentiality would be unconstitutional were it to bar prosecutorial access to personnel files for *Brady* review.109 To say, then, that *Mooc* and *Brandon* do not suggest any tension between *Brady* obligations and *Pitchess* confidentiality ignores the fact that the issue was never discussed in *Mooc* and was specifically set aside in *Brandon*.

The *ALADS* court then looked to the recent holding in *People v. Gutierrez* that *Pitchess* confidentiality did not infringe on *Brady* disclosure requirements.110 The court of appeal in *Gutierrez* relied on a theory of reconciliation: because the threshold necessary to trigger *Pitchess* disclosure is lower than the standard for disclosure under *Brady*, a failure to make a showing under *Pitchess*

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104. This is largely what other lower courts have done: shield *Pitchess* confidentiality from any hint of conflict with *Brady* obligations. Abel, *supra* note 14, at 763; Neri, *supra* note 28, at 311.

105. *ALADS*, 221 Cal. Rptr. 3d at 71.


107. The *Mooc* decision contains only one citation to *Brady* and one reference to the Due Process Clause. *Id.* at 1226–27.

108. *City of Los Angeles v. Superior Court (Brandon)*, 29 Cal. 4th 1, 10–13 (2002).

109. *Id.* at 12 n.2 (“Because it is not presented here, we do not reach the question of whether Penal Code section 832.7, which precludes disclosure of officer records ‘except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code,’ would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*.”).

necessarily means that no Brady disclosure is required. This theory largely disregards the fact that Pitchess disclosure hinges on a showing of known or suspected misconduct. On the other hand, Brady is an expedient into evidence largely unknown to the criminal defendant. If Brady evidence inside a personnel file is also unknown to the prosecutor, then Pitchess confidentiality will prevent constitutionally required disclosure from occurring.

In sum, the appellate court’s reliance on Mooc, Brandon, and Gutierrez is largely misplaced. These cases do not adequately support Pitchess curtailment of prosecutorial Brady obligations, nor do they provide a sound basis for preventing police agencies from disclosing the names of officers with potential Brady information in their personnel files to prosecutors.

a. Dealing with Johnson

The ALADS court’s analysis of Johnson—where the California Supreme Court addressed the use of Brady lists in dicta—contradicts its reliance on Mooc and Brandon. The court cited Mooc and Brandon as authority for Pitchess confidentiality posing no conflict to Brady disclosure—a proposition not considered in those opinions. However, when it came to Johnson, the court disregarded the California Supreme Court’s praise of Brady lists. The court instead relied on the axiom that “[a]n opinion is not authority for propositions not considered” to conclude that Johnson was not legal approval of Brady list disclosure. Why this axiom did not affect the court’s reading of Brandon—where the California Supreme Court purposefully chose not to consider the conflict between Pitchess confidentiality and Brady disclosure—is unclear.

Thus, the court reconciled Brady and Pitchess confidentiality by concluding (1) Pitchess confidentiality prevents the disclosure of names from Brady lists to prosecutors, (2) no conflict between Pitchess confidentiality and

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111. Gutierrez, 6 Cal. Rptr. 3d at 147.
113. Id. at 312–13.
114. Id. at 313.
115. See ALADS, 221 Cal. Rptr. 3d at 71.
116. See id. at 76.
117. Id. Shortly after the Johnson decision, the California Attorney General, Kamala Harris, issued Published Opinion No. 12-401, which approved of a Brady list policy proposed by the California District Attorneys Association and opposed by the California Highway Patrol. See generally 98 Op. Cal. Att’y Gen. 54 (2015). The ALADS court addressed this opinion much in the same way that it dealt with the Johnson decision, by disregarding it on the grounds that it “does not discuss relevant precedent or undertake serious legal analysis in the context of the immediate case.” ALADS, 221 Cal. Rptr. 3d at 78.
Brady disclosure exists, and (3) the California Supreme Court’s praise for Brady lists in Johnson can be ignored.118

IV. THE FUTURE OF BRADY AND PITCHESS

In the wake of the ALADS decision, Pitchess confidentiality has expanded to the point where prosecutors face increased risks of regularly violating Brady disclosure obligations.119 On August 18, 2017, the LASD sought review of the ALADS decision by the California Supreme Court, and on October 11, 2017, the court granted review of the case.120

A. Potential Case Outcomes

As the court has agreed to hear the case, three potential outcomes can be hypothesized. First, the court could find that Pitchess confidentiality is unconstitutional when it bars prosecutors from fulfilling Brady requirements. Discarding all or portions of the Pitchess statutes is not outside the realm of possibilities. Brandon explicitly preserved the issue,121 and public support for sheltering police misconduct is at an all-time low, a perception the court is unlikely to disregard.122 However, it is doubtful that the court would

118. See ALADS, 221 Cal. Rptr. 3d at 71–73, 75–77.
119. See generally supra Section II.C.
120. Appellate Courts Case Information, CAL. CTS. (Aug. 31, 2018, 7:21 PM), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2220344&doc_no=S243855&request_token=NIiwLSIkXkw3W0BScFdTEhIqEw0UdxtJiUJy9SICAgCg%3D%3D [https://perma.cc/N8QX-HKUD]. The California Supreme Court asked the parties to brief two issues regarding Brady list disclosure when a peace officer becomes a potential witness in a criminal prosecution: whether (1) the name and identifying number of an officer on a Brady list may be disclosed, and (2) the fact that the officer may have relevant exonerating or impeachment evidence in the officer’s file may be disclosed. Id. The union, in a news release following the petition for review by the California Supreme Court, called the Sheriff’s decision to appeal the ruling “ill-advised” and characterized him as “caving” to outside groups. ALADS’ Statement on the Sheriff’s Decision to Appeal the Brady Decision, ASS’N L.A. DEPUTY SHERIFFS NEWS RELEASE, (http://myemail.constant contact.com/ALADS—Statement-on-the-Sheriff-s-Decision-to-Appeal-the-Brady-Decision.html?soiid=1119707513166&aid=MUJRiUOnjQU [https://perma.cc/CPZ8-BTRK].
121. City of Los Angeles v. Superior Court (Brandon), 29 Cal. 4th 1, 12 n.2 (2002).
122. See Andreen, supra note 81, at 888–89 (noting the effect that public opinion towards disclosure under CPRA requests has had on California courts). In the months leading up to the ALADS decision, advocacy groups gathered nearly 13,000 signatures for a petition to allow LASD to disclose the Brady list to prosecutors. Maya Lau, L.A. County Sheriff Can’t Give Prosecutors the Names of Problem Deputies, Appeals Court Rules, L.A. TIMES (July
reverse course to such a degree. The Pitchess statutes are largely accepted as a bedrock of California criminal law, and dismantling Pitchess confidentiality will fly in the face of nearly forty years of judicial efforts to protect it.123

Second, the court instead could double-down on Pitchess confidentiality. It could affirm the appellate court’s holding and avoid addressing the tension between Pitchess confidentiality and prosecutorial Brady obligations. Such a holding likely would include a re-articulation that prosecutors are under no Brady obligation to review personnel files, a finding that is supported by the court’s conclusions and dicta in Johnson.124 However, doubling-down on Pitchess confidentiality would inevitably produce new and greater problems.

The first problem would be for prosecutors. Without the aid of Brady list disclosures, prosecutors would be forced either to submit Pitchess motions in every case where a peace officer will be a material witness or be at continual risk of violating Brady.125 With the first course of action, the disadvantages are clear. Courts have noted the waste of time and resources that accompany filing prosecutorial Pitchess motions in every case.126 There are also structural impediments to prosecutorial Pitchess motions.127 As to the risk of potential Brady violations, prosecutors now face greater liability than ever before for failing to disclose material evidence.128

The second problem would be for those individuals whom the Brady and Pitchess decisions were meant to protect—criminal defendants. Prosecutors either have a duty to learn of potential Brady evidence in a peace officer’s personnel file, or they do not. If they do, the practical impediments to disclosure under Pitchess outweigh the risks of being caught committing a

125. See Ass’n for L.A. Deputy Sheriffs v. Superior Court (ALADS), 221 Cal. Rptr. 3d 51, 85 (Ct. App. 2017) (Grimes, J., dissenting).
126. See, e.g., Johnson, 61 Cal. 4th at 718–19.
127. See supra Section II.C; see also Neri, supra note 28, at 315.
128. See CAL. PENAL CODE § 141 (West 2018); Matt Ferner, Cheating California Prosecutors Face Prison Under New Law, HUFFPOST (Oct. 1, 2016, 7:15 PM), http://www. huffingtonpost.com/entry/california-prosecutor-misconduct-felony_us_57ef99b7e4b024a52 d2f4d65 [https://perma.cc/ULG7-QF5B]. Although prosecutors have absolute immunity from civil liability under § 1983 actions, prosecutorial offices may still face civil liability when there exists a pattern of Brady violations; that pattern is sufficient to establish notice; a failure to provide training would result in highly predictable constitutional violations; and those violations would be so predictable that failing to train amounts to a deliberate indifference toward, and conscious disregard for, criminal defendants’ Brady rights. See Connick v. Thompson 563 U.S. 51, 71 (2011). Thus, a failure to train prosecutors on how to meet their Brady disclosure standards in light of Pitchess confidentiality restrictions could provide a vehicle for municipal liability under § 1983.
Brady violation, prosecutors will not engage in the discovery process, and criminal defendants will be denied evidence to which they are constitutionally entitled. If prosecutors do not have such a duty, criminal defendants again will be denied access to potentially exculpatory evidence. This is a lose-lose situation for criminal defendants in California.

Third, rather than doubling-down on Pitchess confidentiality or scrapping it altogether, the court should hold that the disclosure of Brady list names to prosecutors is not a violation of Pitchess confidentiality. The Copley Press cases should be narrowed to distinguish disclosure of Brady list names to prosecutors from disclosure to news outlets. Pitchess confidentiality should be preserved while still allowing for robust Brady disclosure. Prosecutors would have a method of limiting their Brady liability, and criminal defendants would have access to exculpatory material.

Such a decision would also support a recent shift in the Pitchess process. In Serrano v. Superior Court, the Second District Court of Appeal held that neither the prosecution nor the defense must allege specific officer misconduct to trigger Pitchess review when that party declares it has been notified of potential Brady information in the officer’s personnel file.

In the absence of a conflicting decision by a California District Court of Appeal or review by the California Supreme Court, Serrano is binding

129. See United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting) (“A robust and rigorously enforced Brady rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence.”). On November 2, 2017, the California Supreme Court approved an amendment to the California Rules of Professional Conduct to strengthen the disclosure duties of prosecutors in criminal cases. Cal. Rules Prof’l Conduct 5-110 (2017). However, the effectiveness of the new rule will likely be undercut by the systematic underreporting of prosecutorial misconduct that occurs in California. Joel B. Rudin, The Supreme Court Assumes Errant Prosecutors will be Disciplined by Their Offices or the Bar: Three Case Studies that Prove That Assumption Wrong, 80 Fordham L. Rev. 537, 543 (2011). The problem of underreporting is compounded by the reluctance of professional organizations to sanction prosecutors for misconduct and the low likelihood of these sanctions being upheld on appellate review. Kozinski, supra note 50, at xl n.213.

130. See ALADS, 221 Cal. Rptr. 3d at 83–85 (Grimes, J., dissenting).

131. Serrano v. Superior Court, 224 Cal. Rptr. 3d 626–27.

132. See id. at 634. The primary support for the decision was the California Supreme Court’s ruling in Johnson, which held that notice of potential Brady material, together with an explanation of how the officer’s credibility may be relevant to the case, would satisfy the showing necessary to trigger Pitchess disclosure. Id. Defense counsel in Serrano received notice from the prosecutor, who had learned that the officer’s personnel file contained potential Brady material from the District Attorney’s online database of recurring witnesses. Id. at 626–27.
on all superior courts.\textsuperscript{133} The new rule allows for minimal disclosure of peace officer information to effectuate full \textit{Brady} disclosure.

\textbf{B. Reforming California Brady Procedures: Looking to the Federal System}

Were the California Supreme Court to rule against the disclosure of \textit{Brady} list officers, the California legislature and police agencies could look to the federal system for a potential solution.\textsuperscript{134} The Department of Justice (DOJ) has acknowledged that personnel files may contain \textit{Brady} material.\textsuperscript{135} To that end, the current version of the DOJ Manual for United States Attorneys has adopted a “\textit{Giglio} Policy,” meant to ensure the disclosure of impeachment material regarding investigative agency witnesses.\textsuperscript{136} The \textit{Giglio} Policy creates an affirmative obligation on the part of such witnesses to disclose potential impeachment evidence to prosecutors.\textsuperscript{137}

The DOJ policy could serve as a model solution to the \textit{Pitchess}/\textit{Brady} problem. By adopting a disclosure duty like that found in the federal system, the California legislature or police agencies themselves could remedy the \textit{Brady}/\textit{Pitchess} tension without having to abrogate the \textit{Pitchess} statutes. The officer holds the right to confidentiality, and the officer’s disclosure would not constitute a violation of that right.\textsuperscript{138} Further, under the \textit{Serrano} standard, such a disclosure would only need to be enough to allow the prosecutor or defense counsel to declare that the party has been notified

\begin{itemize}
\item \textsuperscript{133} \textit{See} Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455–56 (1962).
\item \textsuperscript{134} A decision by the court that effectively bars the use of \textit{Brady} lists could spur statutory attempts to break through the \textit{Pitchess} confidentiality barrier, as was the case following the \textit{Copley Press} decision. \textit{See} Bies, \textit{supra} note 9, at 136–38. The California legislature has twice considered “sunshine legislation” that would allow the public disclosure of peace officer disciplinary records, and provide greater access to personnel files, thus abrogating \textit{Copley Press}. \textit{Id.} at 136–37.
\item \textsuperscript{135} Abel, \textit{supra} note 14, at 760.
\item \textsuperscript{136} U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-5.100 (2014).
\item \textsuperscript{137} \textit{Id.} § 9-5.001. Evidence includes (i) “finding[s] of misconduct that reflect[] upon the truthfulness or possible bias of the employee,” (ii) “past or pending criminal charge[s],” (iii) “allegation[s] of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation,” (iv) “prior allegations by a judge that an agency employee has testified untruthfully, made . . . knowing false statement[s], . . . or illegally obtained confession[s],” and (v) “founded or pending allegations of misconduct that ‘cast a substantial doubt upon the accuracy of any evidence or testimony’ that the prosecutor intends to rely on” or that will bear on the admissibility of evidence. \textit{Id.} § 9-5.100. The rule affects all investigative employees from the “Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the Unites States Marshals Service, the [DOJ] Office of the Inspector General, and the [DOJ] Office of Professional Responsibility.” \textit{Id.} § 9-5.100.
\item \textsuperscript{138} Pasadena Police Officers Ass’n v. Superior Court, 192 Cal. Rptr. 3d 486, 507 (Ct. App. 2015).
\end{itemize}
of potential *Brady* information in a personnel file. 139 *Brady* disclosure could take place without doing away with the *Pitchess* statutes or their protections.

V. CONCLUSION

The threat that *Pitchess* confidentiality poses to prosecutorial *Brady* obligations is serious. *Pitchess* confidentiality is now impairing whole portions of *Brady* disclosure. In turn, this has increased the risk of criminal liability to prosecutors and prevented the reform of police agencies. At the same time, criminal defendants face greater barriers to obtaining exculpatory and impeachment evidence. Such a curtailment of the rights of criminal defendants affects many more than just the accused.

In light of these threats, the upcoming decision of the California Supreme Court in *ALADS* could pave the way for a state-wide system of inter-agency cooperation that would strengthen the integrity of the criminal justice system. It could, alternatively, forestall a balancing of the privacy rights of peace officers against the constitutional rights of criminal defendants and institutional constraints facing prosecutors. The court should keep in mind, then, that society necessarily loses when criminal trials are unfair, a corollary to Justice Douglas’s observation in *Brady* that “[s]ociety wins . . . when criminal trials are fair.” 140

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