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

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> *"Society wins not only when the guilty are convicted but when criminal trials are fair . . . ."*[1]

I. INTRODUCTION

Jim McDonnell was elected Sheriff of Los Angeles County in 2014 on the heels of Lee Baca's early retirement.[2] Baca was plagued by controversy for years,[3] and his attempts to cover up misconduct within the department ultimately led to his conviction for obstruction.[4] 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.[5] McDonnell planned to disclose this information to the prosecutorial offices that handle LASD cases to strengthen the integrity of criminal investigations and prosecutions.[6]

The reform effort quickly hit a barrier with a history originating in that same department.[7] 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.[8] For four years following

1. Brady v. Maryland, 373 U.S. 83, 87 (1963).

2. Rick Orlov, *Election 2014: Jim McDonnell Defeats Paul Tanaka to Become Los Angeles County Sheriff*, L.A. DAILY NEWS (Aug. 28, 2017, 7:22 AM), http://www.dailynews.com/2014/11/04/election-2014-jim-mcdonnell-defeats-paul-tanaka-to-become-los-angeles-county-sheriff/ [https://perma.cc/FNG3-2DDD].

3. *See Sheriff Lee Baca to Retire at End of the Month*, CBS L.A. (Jan. 7, 2014, 10:45 AM), http://losangeles.cbslocal.com/2014/01/07/sheriff-lee-baca-expected-to-step-down-after-16-years-of-service/ [https://perma.cc/YE6X-4DPD].

4. *Ex-LA County Sheriff Lee Baca Convicted in Jail Corruption Case*, CBS NEWS (Mar. 15, 2017, 6:16 PM), https://www.cbsnews.com/news/ex-la-county-sheriff-lee-baca-found-guilty-in-jail-corruption-case/ [https://perma.cc/M7CX-QERZ]. Baca, who was recently diagnosed with Alzheimer's disease, was eventually given a three-year sentence but continues to appeal his case. *Ex-Sheriff Lee Baca Asks 9th Circuit to Let Him Remain Free During Appeal*, L.A. TIMES (July 24, 2017, 9:10 PM), http://www.latimes.com/local/lanow/la-me-baca-20170724-story.html [https://perma.cc/E5EC-U9HB]. Baca petitioned the Ninth Circuit in late July of 2017 to allow him to remain free while he appeals his conviction. *Id.*

5. Frank Stoltze, *What's Behind the Fight over the Identities of 300 Problem LA Sheriff's Deputies*, KPCC (July 13, 2017), http://www.scpr.org/news/2017/07/13/73772/what-s-behind-the-fight-over-the-identities-of-300/ [https://perma.cc/XX86-58ZM].

6. *Id.*

7. *See generally* Pitchess v. Superior Court, 11 Cal. 3d 531 (1974).

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

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Sheriff Who Modernized Agency, Dies, L.A. TIMES (Apr. 5, 1999), http://articles.latimes.com/1999/apr/05/news/mn-24341 [https://perma.cc/6JPC-29DW]. Pitchess, like Sheriff McDonnell, sought to reform the department by vigorously investigating officer misconduct. *Id.* He died in 1999 at the age of eighty-seven. *Id.*

9. Katherine J. Bies, Note, *Let the Sunshine in: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 130 (2017) (citation omitted).

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 . . . .").

11. Brady v. Maryland, 373 U.S. 83, 87 (1963).

12. Ass'n for L.A. Deputy Sheriffs v. Superior Court (*ALADS*), 221 Cal. Rptr. 3d 51, 68, 73 (Ct. App. 2017).

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

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14. *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 763 (2015).

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 peace 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).

16. United States v. Agurs, 427 U.S. 97, 111–12 (1976).

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)).

18. Giglio v. United States, 405 U.S. 150, 153–55 (1972).

19. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1437–38 (2011).

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

21. Abel, *supra* note 14, at 751.

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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23. United States v. Ruiz, 536 U.S. 622, 629 (2002) (citing *Weatherford*, 429 U.S. at 559).

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).

25. *See* Pitchess v. Superior Court, 11 Cal. 3d 531, 539–40 (1974).

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

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(June 21, 2001), http://www.nytimes.com/2001/06/21/us/stanley-mosk-88-long-a-california-supreme-court-justice.html.

29. *See* Bies, *supra* note 9, at 127.

30. *Id.*

31. *Id.* Record shredding became a concern for the drafters of the *Pitchess* statutes and may help to explain why the statute sought to curtail access to personnel files. *See* Neri, *supra* note 28, at 307.

32. Bies, *supra* note 9, at 127.

33. Abel, *supra* note 14, at 763; Bies, *supra* note 9, at 129. That the *Pitchess* statutes were not meant to strengthen the rights of the accused, but rather to strengthen the ability of police agencies to curtail access to exculpatory evidence, can in part be understood through the lens of public choice theory. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993). California legislators, following the *Pitchess* decision, faced mounting pressure from a powerful interest group—peace officer unions—coupled with considerable political risks in taking the side of criminal defendants. *See id.* at 1088–95. At the same time, they had few disincentives to gratifying peace officer unions, which they could do at no consequence to taxpayers. *See id.* at 1095. In this context, the decision to curtail the rights of criminal defendants can be understood as a rational outcome of the political incentives that cause legislatures to undervalue the rights of the accused. *See id.* at 1095–96.

34. Neri, *supra* note 28, at 306 (citation omitted).

35. Bies, *supra* note 9, at 129 (citation omitted).

36. *Id.* at 130.

37. City of Santa Cruz v. Mun. Court, 49 Cal. 3d 74, 81 (1989).

personnel records and all information obtained from them, and (2) records of citizen complaints.[38] 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.[39] Once disclosure is triggered, a judge conducts an *in camera* review of the file and determines what records, if any, to disclose.[40]

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.[41] Because the defendant is often seeking information to impeach an officer-witness,[42] such evidence regularly falls under *Brady*.[43] However, the *Pitchess* statutes, like their judicial-decision counterpart, make no mention of prosecutorial *Brady* obligations.[44] 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.[45]

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.[46] At the same time, *Pitchess* confidentiality limits prosecutorial access to peace officers' personnel files.[47] Thus, prosecutors cannot assess whether there is *Brady* material in an officer's personnel file without first making a *Pitchess* motion.[48]

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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.
41. People v. Superior Court (*Johnson*), 61 Cal. 4th 696, 720 (2015).
42. *Id.* at 722.
43. *See* Kyles v. Whitley, 514 U.S. 419, 437–40 (1995).
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).
48. People v. Gutierrez, 6 Cal. Rptr. 3d 138, 146–47 (Ct. App. 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.[49] This means a prosecutor must allege plausible misconduct on the part of the officer-witness and link that misconduct to a defense theory.[50] Were this practicable, the resulting disclosure still would be subject to the limitations found in the *Pitchess* statutes.[51] There remains a significant risk that a criminal defendant will be left without material to which he or she is constitutionally entitled.[52]

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."[53] 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.[54]

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.[55] The court held that prosecutors are required to file a *Pitchess*

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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).

51. Neri, *supra* note 28, at 315.

52. *Id.*

53. Abel, *supra* note 14, at 764–65, 773. Several District Attorney's offices have also begun compiling their own internal *Brady* lists. Jeff McDonald, *DA Keeps Secret List of Bad Cops*, SAN DIEGO UNION TRIB. (July 26, 2014, 11:31 AM), http://www.sandiegounion tribune.com/news/watchdog/sdut-da-secret-brady-list-bad-cops-2014jul26-htmlstory.html [https://perma.cc/R52K-YXJM?type=image].

54. Abel, *supra* note 14, at 764–65.

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.[56] 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."[57]

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.[58]

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.[59] 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.[60] 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.[61] Further, the policy would minimize prosecutorial liability

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duty to conduct defendant's investigation for him." *Id.* at 715 (quoting People v. Morrison, 34 Cal. 4th 698, 715 (2004)).

56. *Johnson*, 61 Cal. 4th at 714.

57. *Id.* at 721 (emphasis added).

58. *See* Tim White, *Does the Brady Issue Impact You?*, ALADS DISPATCHER 20, Nov. 2016, at 20, 20, https://alads.blob.core.windows.net/wfiles/dispatcher/pdf/pdf_XXXIII_11.pdf [https://perma.cc/2V4R-P9VW] (describing the use of *Brady* lists by the LASD as a "diabolical plan [and a] detrimental, career and morale killing scheme[]").

59. Ass'n for L.A. Deputy Sheriffs v. Superior Court (*ALADS*), 221 Cal. Rptr. 3d 51, 59–60 (Ct. App. 2017). The categories of misconduct included in the panel's investigation were "(1) Immoral Conduct, (2) Bribes, Rewards, Loans, Gifts, Favors, (3) Misappropriate 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." *Id.* at 60 (citations omitted).

60. *Id.* The LASD went so far as to send letters to affected deputies, stating that no portion of their personnel files would be disclosed absent a *Pitchess* motion. *Id.*

61. *Johnson*, 61 Cal. 4th at 714; *see also ALADS*, 221 Cal. Rptr. 3d at 60.

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 *Brady* list is slated to be a material witness in a criminal proceeding, *Brady* requires the disclosure of the officer's name to the prosecutor.[64] Although the disclosure of the name would violate *Pitchess* confidentiality, *Brady* overrode the state-law restrictions.[65] The court issued a preliminary injunction prohibiting the LASD from disclosing the *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 *Pitchess* motion.[66]

A. The Decision of the Court of Appeal

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 *Brady* list without first complying with the *Pitchess* statutes.[67] Thus, the court addressed the following questions: (1) are the names of deputies on the *Brady* list in and of themselves confidential?; and (2) if the names are confidential, does *Pitchess* confidentiality prevent their disclosure once an officer becomes a potential material witness?[68]

Based on *Johnson* and the dicta within it, the answer to these questions should have been *no*. Nowhere in *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 *Brady* list and used the existence of the list to fashion parts of its central

62. CAL. PENAL CODE § 141 (West 2018); *see also* Tony Saavedra, *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. *Id.*

63. *ALADS*, 221 Cal. Rptr. 3d at 61.

64. *Id.* at 62–63.

65. *Id.* at 62

66. *Id.* at 64. The trial court included a series of "'clarifying' principles" meant to specify the scope of the injunction. *Id.* These principles noted that the LASD was not precluded by any part of the injunction from creating and maintaining an internal *Brady* list, from using membership on the *Brady* list as a basis for deputy reassignment, or from disclosing to prosecutors future *Brady* lists that include only non-sworn employees. *Id.*

67. *Id.*

68. *See id.* at 66.

holding.[69] 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.[70] 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.[71] Instead, the court held that the names of officers on the *Brady* list are themselves confidential and cannot be disclosed.[72]

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,[73] to support the conclusion that peace officers' names are themselves confidential.[74] 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.[75] The cases sought to determine the extent of allowable disclosure in light of *Pitchess* confidentiality.[76] Ultimately, the *Copley Press* cases struck a balance between

69. People v. Superior Court (*Johnson*), 61 Cal. 4th 696, 720–21 (2015) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

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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of personal privacy." CAL. GOV'T CODE § 6254(c). However, the California Supreme Court has held that this provision does not exempt *entire* personnel files, only those portions where the privacy interests of peace officers outweigh the public's interest in disclosure. *POST*, 42 Cal. 4th at 299 (quoting CAL. GOV'T CODE § 6254(c)).

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).

82. Commission on Peace Officers Standards & Training v. Superior Court (*POST*), 42 Cal. 4th 278, 295–96 (2007).

83. *Id.* at 286.

84. *Id.* at 295–96, 298–99.

85. Long Beach Police Officers Ass'n v. City of Long Beach, 59 Cal. 4th 59, 72–73 (2014).

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.[86] 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.[87] 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.[88]

In stark contrast to *ALADS*, the *Copley Press* cases involved public disclosures to news outlets.[89] The court relaxed *Pitchess* confidentiality in this highly public setting where no competing constitutional interest existed.[90] 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.[91] The court's reliance is misguided for two reasons. First, the court disregarded the difference between disclosure to prosecutors and disclosure to news outlets.[92] Prosecutors and police agencies are both part of the prosecutorial team under longstanding *Brady* case law.[93] 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.

93. *See In re* Steele, 32 Cal. 4th 682, 697 (2004); Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).

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.[94] 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.[95]

Second, the court applied the broad ruling found in *Copley Press* while ignoring the decisions in *POST* and *Long Beach* that followed it.[96] *POST* established a baseline that names themselves are not confidential, subject to certain exceptions.[97] *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.[98] Names, then, are only confidential when they link an officer to the results of internal investigations or disciplinary actions.[99]

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.[100] 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.[101] To the contrary, such records remain confidential and undisclosed.[102] Thus, under the *Copley Press* cases, and *Long Beach* in particular, the names of officers on *Brady* lists should not be confidential.[103]

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.*
97. *See* Commission on Peace Officers Standards & Training v. Superior Court (*POST*), 42 Cal. 4th 278, 298 (2007); *see also* Long Beach Police Officers Ass'n v. City of Long Beach, 59 Cal. 4th 59, 71–73 (2014).
98. *Long Beach*, 59 Cal. 4th at 71–72.
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*

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.

106. People v. Mooc, 26 Cal. 4th 1216, 1228–32 (2001).

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*.").

110. *ALADS*, 221 Cal. Rptr. 3d at 71–72; *see also* People v. Gutierrez, 6 Cal. Rptr. 3d 138, 145–46 (Ct. App. 2003).

necessarily means that no *Brady* disclosure is required.[111] This theory largely disregards the fact that *Pitchess* disclosure hinges on a showing of known or suspected misconduct.[112] On the other hand, *Brady* is an expedition into evidence largely unknown to the criminal defendant.[113] If *Brady* evidence inside a personnel file is also unknown to the prosecutor, then *Pitchess* confidentiality will prevent constitutionally required disclosure from occurring.[114]

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.[115] However, when it came to *Johnson*, the court disregarded the California Supreme Court's praise of *Brady* lists.[116] 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.[117] 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

111. *Gutierrez*, 6 Cal. Rptr. 3d at 147.
112. Neri, *supra* note 28, at 312.
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=NiIwLSIkXkw3W0BJSCFdTEhIQEw0UDxTJyIuJz9SICAgCg%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 "cav[ing] 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.constantcontact.com/ALADS—Statement-on-the-Sheriff-s-Decision-to-Appeal-the-Brady-Decision.html?soid=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 Sherriff 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

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11, 2017, 9:45 PM), http://www.latimes.com/local/california/la-me-brady-decision-20170612-story.html [https://perma.cc/JXK2-WCR2].

123. *See* People v. Mooc, 26 Cal. 4th 1216, 1225–26 (2001).

124. People v. Superior Court (*Johnson*), 61 Cal. 4th 696, 715 (2015).

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_57eff9b7e4b024a52d2f4d65 [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.[129] 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.[130] *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.[131] 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.[132]

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

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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 OF 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, 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. 622, 634–35 (Ct. App. 2017).

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.[133] The new rule allows for minimal disclosure of peace officer information to effectuate full *Brady* disclosure.

B. Reforming California Brady *Procedures: Looking to the Federal System*

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

The DOJ policy could serve as a model solution to the *Pitchess*/*Brady* problem. By adopting a disclosure duty like that found in the federal system, the California legislature or police agencies themselves could remedy the *Brady*/*Pitchess* tension without having to abrogate the *Pitchess* statutes. The officer holds the right to confidentiality, and the officer's disclosure would not constitute a violation of that right.[138] Further, under the *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

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133. *See* Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455–56 (1962).

134. A decision by the court that effectively bars the use of *Brady* lists could spur statutory attempts to break through the *Pitchess* confidentiality barrier, as was the case following the *Copley Press* decision. *See* Bies, *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 *Copley Press*. *Id.* at 136–37.

135. Abel, *supra* note 14, at 760.

136. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-5.100 (2014).

137. *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 than 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. *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." *Id.* § 9-5.100.

138. Pasadena Police Officers Ass'n v. Superior Court, 192 Cal. Rptr. 3d 486, 507 (Ct. App. 2015).

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]

139. *See* Serrano v. Superior Court, 224 Cal. Rptr. 3d. 622, 634–36 (Ct. App. 2017).
140. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).