



COUNTY OF LOS ANGELES SHERIFF CIVILIAN OVERSIGHT COMMISSION

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September 28, 2017

Honorable Tani Cantil-Sakauye
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Letter of Amicus Curiae Supporting Petition for Review in *Association for Los Angeles Sheriff Deputies v. Superior Court*, B28067, Reported at 13 Cal.App.5th 413

Dear Chief Justice Cantil-Sakauye:

The Los Angeles County Sheriff Civilian Oversight Commission (COC) urges this Court to review the divided district court of appeal opinion in *ALADS v. Superior Court*, 13 Cal.App.5th 413 (2017) because the majority held that California's *Pitchess* provisions¹ prohibit Los Angeles County Sheriff Jim McDonnell from notifying District Attorney Jackie Lacey (DA Lacey) about 300 deputies who have serious misconduct in their personnel files. Without such notice, Lacey cannot discharge her constitutional duty to disclose material exculpatory evidence to the defense as required by *Brady v. Maryland*, 373 U.S. 83 (1963). Because the majority has violated the letter and spirit of *Brady*, and its opinion threatens the continued viability of the procedures in many California counties where law enforcement agencies notify District Attorneys about officers who have exculpatory material in their personnel files, its opinion should be reviewed and reversed.

I. Amicus Curiae COC's Interest in the Case

The Los Angeles Board of Supervisors created the nine-member COC in 2016 to build trust between the Los Angeles Sheriff's Department (LASD) and local communities it serves by promoting greater transparency, accountability, and "best practices" reforms. In March 2017, the COC adopted a resolution supporting Sheriff McDonnell's giving DA Lacey a *Brady* list because this cooperation between LASD and the District Attorney's Office represents a best practice that will result in better *Brady* compliance, better prosecutive decisions, and fairer trials. The COC now writes in support of Sheriff McDonnell's petition for review because the DCA opinion prohibits LASD from following through on an important and much needed reform regarding *Brady* disclosure.

¹ California has statutory protections that prohibit or restrict litigants from discovering information in police personnel files. See Cal. Penal Code § 832.7; Cal. Evid. Code §§ 1043, 1045. The various protections are collectively known as "*Pitchess* provisions" based on the case that inspired the legislation. See *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974) (en banc).

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II. The DCA's Opinion Invalidates a Best Practice Regarding *Brady* Disclosure That Ought to Be Encouraged

The United States Supreme Court held in *Brady* that a prosecutor who failed to disclose material exculpatory evidence violated the defendant's right to due process. 373 U.S. at 87. The Court later clarified that *Brady* requires a prosecutor to disclose any information that could impeach a prosecution witness's credibility. See *Giglio v. United States*, 405 U.S. 150 (1972). The Court in *Kyles v. Whittley*, 514 U.S. 419 (1995), held that, for *Brady* purposes, exculpatory evidence known to the police is attributable the prosecutor because both are members of the "prosecution team."

Despite this trilogy of United States Supreme Court cases, the majority in this case held that Sheriff McDonnell is prohibited from giving the DA Lacey a *Brady* list, even though--as noted by the dissent--such a list is likely the only way the prosecutor would ever know about impeachment evidence in a confidential police personnel file. Without that knowledge, the prosecutor will be unable to disclose impeachment evidence about a police witness, in clear violation of *Brady*.

The majority justifies relieving DA Lacey of her *Brady* obligations regarding police personnel files by dividing the "prosecution team" into prosecutors and police, and then pronouncing that the former have no ability to retrieve exculpatory evidence from the latter. 13 Cal.App.5th at 438 ("Since the prosecution has no general access to or constructive possession of law enforcement personnel files, it cannot be expected to review and disclose information from them.") Not only is this approach at odds with the very concept of a "prosecution team," but also the United States Supreme Court has already rejected prosecution ignorance of exculpatory evidence within the possession of the police as a legal excuse for not disclosing *Brady* evidence. *Kyles*, 514 U.S. at 437-38 (rejecting state's request to excuse nondisclosure of exculpatory evidence "known only to police investigators and not the prosecutor" and holding that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police"). California's *Pitches* provisions cannot and should not obviate a prosecutor's "duty to learn of" and disclose impeachment evidence in a police personnel file.

The United States Supreme Court has twice admonished prosecutors and police officers to work together to develop best practices that facilitate *Brady* disclosure: "Procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information in each case to every lawyer who deals with it." *Kyles*, 514 U.S. at 438, quoting *Giglio*, 405 U.S. at 154. Consistent with this admonition, the Association of Chiefs of Police long ago advised its members of their "affirmative duty" to seek out impeachment material, including material contained in the personnel files. Nat'l Law Enforcement Policy Ctr. Int'l Association of Chiefs of Police, *Brady* Disclosure Requirements 4 (2009). Sheriff McDonnell's compilation of a *Brady* list to be given only to the Los Angeles County District Attorney is a concrete

example of implementing “procedures and regulations” to ensure that the prosecution complies with *Brady*.

Sheriff McDonnell is not alone in seeking to give the prosecution notice of *Brady* evidence in a deputy’s personnel file. Since 2010, the San Francisco Police Department has notified the District Attorney that an officer’s personnel file contains *Brady* evidence—a practice this Court recently referred to as “laudable.” *People v. Superior Court (Johnson)*, 61 Cal.4th 696, 721 (2015). According to a recent law review article, one quarter of all counties in California implement the same type of *Brady* notification procedures as San Francisco uses. 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, 764 (2015). The California Attorney General has also issued a formal opinion concluding that law enforcement agencies’ notifying the prosecution that there is *Brady* evidence in an officer’s personnel file is permissible under *Pitchess*. 98 Ops. Atty. Gen. 54 (2015).

Few states have police personnel file confidentiality procedures that are as restrictive as California’s *Pitchess* provisions. *Brady’s Blind Spot*, 67 Stan. L. Rev. at 762 (referring to California as the “poster child” of “no access” jurisdictions, but listing New Hampshire, Colorado and Vermont as states with very restrictive access to police personnel files). But even in these restrictive states, either the courts or the legislature have crafted exceptions to confidentiality for *Brady* disclosure. *Id.* at 766-70. The majority’s refusal to make any accommodation whatsoever for *Brady* solidifies California’s status as an outlier in providing constitutionally-required access to *Brady* evidence in police personnel files.

III. Conclusion

Sheriff McDonnell’s attempt to give DA Lacey a *Brady* list is a best practice reform that will result in more constitutionally-required disclosures of exculpatory evidence prior to trial, which in turn will reduce the number of reversals and wrongful convictions caused by *Brady* non-compliance. The COC urges this Court to grant review to remove inappropriate and unconstitutional roadblocks to the disclosure of exculpatory impeachment information in police personnel files.

Respectfully submitted,

Robert C. Bonner, Chair

RCB:mc

c: Brian K. Williams, Executive Director