POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization: C437 -- The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guests	General
July 31 2017	Assoc. for Los Angeles Deputy Sheriffs v. Superior Court: ***Brady*** Tips and ***Pitchess***	Jeff Rubin, Santa Clara County DDA Greg Dolge	30 Min.

This week's P&A discusses the recent California Court of Appeal case of *Association for Los Angeles Deputy Sheriffs Deputy v. Superior Court*, 2017 WL 2962901, addressing the question of whether it violates the *Pitchess* statutes for law enforcement agencies to voluntarily provide "*Brady* tips" to prosecutor's offices.

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to Mary Pat Dooley at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.

This is a joint edition of the Alameda County District Attorney's Office's Points and Authorities with Santa Clara County's Inquisitive Prosecutor's Guide. The case law in this week's P&A video is discussed by Alameda County Deputy District Attorney Greg Dolge and Santa Clara County Deputy District Attorney Jeff Rubin.

Jeff Rubin, the author of IPG, is the guest author of this handout for P&A.

Note from Jeff: If you have only 15 seconds to read this memo, just read the boxed headings for the gist of the holding. The remaining analysis explains the facts, rationale and consequences of the decision.

The Practice of Providing a List of Peace Officers with Potential *Brady* Information in Their Personnel Files to a District Attorney's Office Violates the Protections Given to Such Files by the *Pitchess* Statutes
***Association for Los Angeles Deputy Sheriffs* v. *Superior Court (Los Angeles* 2017 WL 2962901**

Facts and Procedural Background

In 2016, the Los Angeles Sheriff's Department ("Sheriff's Department") reviewed the personnel files of its deputies and compiled a list of approximately 300 individual deputies [out of close to 10,000 sworn deputies] who had at least one administratively founded allegation of misconduct involving moral turpitude*, conduct which might be used to impeach the deputy's testimony in a criminal prosecution. (at p.*3.)

***Editor's note:** "The categories of misconduct upon which the panel based its decisions were administratively founded violations of various sections of the Sheriff's Manual of Policy and Procedures": (1) Immoral Conduct; (2) Bribes, Rewards, Loans, Gifts, Favors; (3) Misappropriation of Property; (4) Tampering with Evidence; (5) False Statements; (6) Failure to Make Statements and/or Making False Statements During Departmental Internal Investigations ; (7) Obstructing an Investigation/Influencing a Witness; (8) False Information in Records; (9) Policy of Equality—Discriminatory Harassment; (10) Unreasonable Force; and (11) Family Violence. (at p. *3.)

The Sheriff's Department planned to send the list of these deputies, "identified by name and

serial number only, to the various prosecutorial agencies that handle cases investigated by the Sheriff's Department. (at p. *3.) "Details of investigations or portions of the deputies' personnel files would not be disclosed to the prosecutorial agencies until after a formal ***Pitchess*** motion and accompanying court order issued." (at p. *4.) Moreover, if the founded allegations against a deputy were eventually overturned or not proven during an appeal to the Los Angeles County Civil Service Commission, they would not be included on the proposed ***Brady*** list. (at p. *4.)

In the event a deputy on the list was, or became, a witness on a filed, or to be filed, prosecution, "the prosecutor could (1) make a motion pursuant to ***Pitchess*** and Evidence Code sections 1043 and 1045, to discover the conduct underlying the deputy's inclusion on the list, or (2) provide the information disclosed by the [Sheriff's Department] to the defense so it could make its own ***Pitchess*** motion." (at p. *3.)

The Sheriff's Department sent letters to deputies who were placed on the list of the planned notification to prosecutorial agencies. The letter explained that while the list was being sent pursuant to its discovery obligations under ***Brady***, the "records of the investigation itself, as well as the deputy's personnel file, would not be disclosed absent the appropriate ***Pitchess*** motion and corresponding court order." (at p. *3.) The letter warned of the possibility of assignment transfers to protect the integrity of criminal investigations in light of the disclosures.* However, the letter also stated that if such transfers were necessary, the deputies would be given proper notice and a hearing comporting with due process and any applicable union memoranda of understanding. The letter informed deputies that if they believed their name was improperly included on the list, to notify the department. (at p. *3.)

***Editor's note:** The rationale behind a transfer to "protect the integrity" of a criminal investigation is based primarily on the concern that the information in the file would reduce deputy's credibility and thus unnecessarily hinder the ability of the prosecution to obtain a conviction. (at pp. *4, *6.) A deputy with findings of misconduct sufficiently egregious to create this problem might need reassignment to a position that would not require the deputy to testify regularly in court on serious criminal cases.

The Sheriff's Department informed the deputies on the proposed list that "no punitive or disciplinary action against any affected deputy, other than that already imposed for the sustained allegations" would be imposed. (at p. *4.) The deputies were told that "[a]ny option utilized, including transfers or restriction of duties, would not result in reduction of salary, rank, or bonus pay." (at p. *4.)

Shortly thereafter, the Association of Los Angeles Deputy Sheriffs ("ALADS") filed a "petition for writ of mandate and complaint for temporary restraining order, preliminary injunction, and permanent injunction in the trial court." (at p. *4.) In sum, ALADS asked the trial court to prevent: (i) the disclosure of the "***Brady*** list or the identity of any individual deputy on the list to the district attorney or any other prosecutorial agency without a court order obtained pursuant to ***Pitchess*** and the ***Pitchess*** statutes"; (ii) the letter sent out by the Sheriff's Department (or any similar letters) from being maintained in any of the listed deputies' personnel files; (iii) the taking of "any punitive action, such as transfer or restriction of duties against any deputy identified on the ***Brady*** list"; (iv) the department from "placing any deputy on the ***Brady*** list based upon disciplinary action taken over one year after notice to the deputy of the alleged misconduct"; (v) the department from "placing any deputy on the ***Brady*** list based upon disciplinary action that was overturned or found not to be proven during an appeal by the deputy to the Los Angeles County Civil Service Commission"; and (vi) the department from "placing any deputy on the ***Brady*** list without first providing the deputy with an opportunity for administrative appeal." (at p. *4.)

***Editor's note:** The petition also asked for an injunction against parties other than the Sheriff's Department, i.e., the Sheriff himself (Jim McDonnell), Los Angeles County, and Does one through 50. In the interest of keeping things simple, we refer throughout to the collective real parties in interest as the Sheriff's Department or the "department."

The trial court issued an order for a preliminary injunction that prevented the Sheriff's Department from: "(1) disclosing the ***Brady*** list as a whole to any party outside the [department]; (2) disclosing the identity of any individual deputy on the ***Brady*** list to any party outside the [department], except a relevant prosecutorial agency, and then only if the deputy is a potential witness in a pending criminal prosecution; and (3) except as provided in (2) above, disclosing the identity of any individual deputy on the ***Brady*** list to any party outside the [department], including prosecutorial agencies, unless compelled by a court order issued after a properly filed and heard ***Brady*** or ***Pitchess*** motion." (at p. *5.)

The order clarified that: "(1) the [department] is not precluded from creating and maintaining an internal ***Brady*** list; (2) the [department] is not precluded from taking action against any deputy because he or she is on the ***Brady*** list, including transfer or restriction of duties; and (3) the [department] is not precluded from disclosing any future ***Brady*** list to prosecutorial agencies insofar as it consists only of non-sworn employees not subject to [the Peace Officer's

Bill of Rights Act] POBRA." (at p. *5.) "With respect to clarifying principle (2) above, the injunction adds that any deputy so affected by transfer, restriction of duty, or other action who believes the action to be punitive under POBRA, retains all administrative rights under POBRA to challenge and overturn such action." (at p. *5.)

ALADS then filed the immediate petition for writ of mandate in the appellate court asking for an order that would effectively prevent the Sheriff's department from: (i) maintaining an internal ***Brady*** list; (ii) disclosing the identity of any deputy on the list to prosecutorial agencies absent a properly filed ***Pitchess*** motion and accompanying court order in a criminal case where the deputy is a potential witness; (iii) "transferring, restricting duties of, or otherwise taking action against any deputy because he or she is on the ***Brady*** list"; and (iv) "creating and disclosing any future ***Brady*** list that includes only non-sworn employees outside the scope of POBRA." (at p. *7.)

***Editor's note:** The appellate court issued an opinion that was not joined in a significant respect by the concurring and dissenting opinion of one of the three justices on the panel. When referring to the two-justice majority opinion, we will refer to it alternately as the appellate court or the majority.

Holding

The appellate court made the following holdings:

1. The trial court's order is **valid** insofar as it prevents the *advance* disclosure of the identity of any deputy on the list to the prosecution, i.e., before the deputy is identified as a witness in a pending case. (at p. *10-*14.)

2. However, the trial court order is **invalid** and must be modified so that it does not allow the department "to disclose the identity of any individual deputy on the [Sheriff's Department's] ***Brady*** list to any individual or entity outside the LASD, ***even if the deputy is a witness in a pending criminal prosecution***, absent a properly filed, heard, and granted ***Pitchess*** motion, accompanied by a corresponding court order." (at p. *21, emphasis added by IPG.)

3. The order is **valid** insofar as it allows the Sheriff's department to maintain an internal ***Brady*** list and permits transferring or restricting the duties of deputies due to their placement on the list. (at p. *20.)

4. The order is **invalid** insofar as it includes any language that purports to address the Sheriff's Department "power or authority with respect to a ***Brady*** list involving non-sworn employees."

(at p. *21.)

Analysis

5. No Disclosure of the *Brady* List to Prosecutorial Agencies

The crux of the majority's reasoning rested upon three assumptions: (i) disclosure of the deputies' names violated the ***Pitchess*** statutes; (ii) disclosure could only be justified if the ruling in ***Brady*** required disclosure; and (iii) if disclosure was required, the ***Pitchess*** statutes had to be invalidated as unconstitutional. (at pp. *8-*19.) Indeed, the court identified the "primary issue in this case [as] whether the nearly 40-year-old California statutory scheme that governs discovery of peace officer personnel records, when applied to criminal cases, violates due process and is therefore unconstitutional." (at p. *1.)

The following is an expanded analysis of the majority's reasoning in support of its conclusion that the department could not release to prosecutorial agencies the identities of any deputies on the ***Brady*** list without the prosecutorial agency first complying with the ***Pitchess*** statutes (regardless of whether there was a pending criminal case in which the deputy was a witness):

a. The ***Pitchess*** statutes (Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045 lay out procedures for accessing peace officer personnel records and require both criminal defendants and prosecutors to file a written motion that establishes good cause for the discovery of information in law enforcement personnel records. If such a showing is made, the trial court then reviews the law enforcement personnel records in camera with the custodian, and discloses to the defendant any relevant information from the personnel file. (at p. *1.)

b. "Absent compliance with these procedures, peace officer personnel records, as well as information from them, are confidential and shall not be disclosed "in any criminal or civil proceeding[.]'" (at p. *1 citing to Pen. Code, § 832.7(a) & (f).)

c. "Records that cannot be disclosed absent compliance with the ***Pitchess*** procedures include the names or identities of peace officers to the extent such a disclosure also links the officers to disciplinary investigations in their personnel files." (at p. *1 [citing to ***Copley Press, Inc.* v. *Superior Court*** (2006) 39 Cal.4th 1272, 1297–1299; ***Long Beach Police Officers Assn.* v. *City of Long Beach*** (2014) 59 Cal.4th 59, 71–73; and ***Commission on Peace Officers Standards & Training* v. *Superior Court*** (2007) 42 Cal.4th 278, 295, 298–299].) "This rule applies even if the information connected to the identified officer is only generic in nature." (at p. *10.)

*__Editor's note:__ The dissenting opinion tried to distinguish the cases relied upon by the majority to find disclosure of even generic information about an officer barred on the ground those cases involved California Public Records Act requests for ***Pitchess*** information from media organizations, rather than disclosures to prosecutors with ***Brady*** obligations. (Conc. & dis. opn. at pp. 7–8.) But the majority believed these distinctions were irrelevant as the "***Pitchess*** statutes and their requirements do not make distinctions among who is seeking the information, or the type of proceedings in which or for which they are sought[.]" (at p. *11.)

d. Because "the identity of a peace officer that is derived from his or her personnel file, to the extent it connects that officer to administrative disciplinary proceedings or complaints of misconduct also contained within the protected personnel file, may not be disclosed absent compliance with the ***Pitchess*** procedures," it violates the ***Pitchess*** statutes to disclose to anyone, "even a prosecutor's office" there is potential ***Brady*** information in the officer's file. (at p.*10, *11.)

e. The majority recognized that prosecutors have an affirmative obligation under ***Brady* v. *Maryland*** (1963) 373 U.S. 83, 87 to disclose all evidence within its possession that is exculpatory to a criminal defendant, which includes impeachment evidence. Moreover, the majority recognized this duty to disclose "extends not only to evidence in its immediate possession, but also to evidence in the possession of other members of the prosecution team, including law enforcement." (at p. *1.)

f. Nevertheless, the court held that if the duty under ***Brady*** compelled law enforcement agencies to disclose evidence of misconduct in personnel files to prosecutorial agencies (either before or after a criminal prosecution was initiated in which the deputy was a witness), then it effectively would have to find that the ***Pitchess*** statutes' prohibition on disclosure was "unconstitutional in the particular context of a filed prosecution wherein a ***Brady*** list deputy is a witness." (at p. *2.)

Moreover, the court assumed that "if ***Brady*** compels the [Sheriff's Department] to violate state law in this fashion, by disclosing the identity of a ***Brady*** list deputy in the absence of a fully litigated and ***granted Pitchess*** motion where a deputy is also a witness in a filed prosecution, then it compels every state and local law enforcement agency in California to do the same under the same or similar circumstances." (at p. *2.)

g. After characterizing the issue as one involving the constitutionality of ***Pitchess***, the majority relied on language in ***City of Los Angeles* v. *Superior Court*** (2002) 29 Cal.4th 1 and

People* v. *Mooc (2001) 26 Cal.4th 1216 to conclude "the statutory ***Pitchess*** procedures do not violate either ***Brady*** or constitutional due process, but rather, supplement both." (at p. *13.)

The majority also relied on the case of ***People* v. *Gutierrez*** (2003) 112 Cal.App.4th 1463, which rejected the argument that the ***Pitchess*** statutes "interfered with the prosecutor's affirmative obligation to ascertain and disclose exculpatory evidence and . . . placed upon a defendant the burden of establishing good cause for an otherwise obligatory ***Brady*** disclosure." (at p. *13.) The majority agreed with ***Gutierrez*** that the ***Pitchess*** statutes did not interfere with the prosecutor's ***Brady*** obligation since if a defendant *cannot* meet the good cause required for ***Pitchess*** discovery, the information sought cannot be ***Brady*** material and if the defense *can* meet the showing required, any ***Brady*** information in the file will be disclosed. (at p. *14 citing to ***Gutierrez*** at p. 1474.) The majority agreed with the ***Gutierrez*** court that since the "prosecution has no general access to or constructive possession of law enforcement personnel files," the prosecution has no obligation to search those files. (at p. *14 citing to ***Gutierrez*** at pp. 1474–1475.) Finally, the majority agreed with ***Gutierrez*** that requiring "a preliminary demonstration of materiality" akin to the good cause showing under ***Pitchess*** is a constitutionally "valid prerequisite to disclosure of evidence contained in conditionally privileged state agency files." (at p. *14 citing to ***Gutierrez***, which in turn cited to ***Pennsylvania* v. *Ritchie*** (1987) 480 U.S. 39 at pp. 43-44, 56-58.)
Later in the opinion, the majority noted that the California Supreme Court in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 also cited to the ***Gutierrez*** decisions for the proposition that "the ***Pitchess*** scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in ***Brady***. Instead, the two schemes operate in tandem." (at p. *16 citing to ***Johnson*** at pp. 719-720.)

h. The majority also observed that even assuming the trial court's constitutional rationale justified ignoring the requirements of the ***Pitchess*** statutes, the injunction was still overbroad because as "worded, the injunction allows disclosure outside of the ***Pitchess*** procedures whenever a ***Brady*** list deputy is a 'potential' witness in a pending criminal prosecution." (at p. *15.) This meant that names of "potential" witnesses in a criminal case could be released even though the role played by the witness would not be significant enough to the case that impeachment information in their personnel files would be material. Thus, a name could be released in violation of the ***Pitchess*** statutes without any actual "***Brady***" justification for overriding the ***Pitchess*** protections. (at p. *15.)

Editor's note:** The majority's interpretation of why the injunction is overbroad is based on the premise that the constitutional rationale for creating the ***Brady list must be applicable in all individual circumstances. But the rationale allowing for the ***Brady*** list reflects the practical limitations on obtaining ***Brady*** information in an officer's file by having to file a ***Pitchess*** motion on every officer in every case. In other words, if an alternative to the system is unworkable because of resource limitations, then the constitutional rationale supports creation of the list (to carry out the constitutional mandate) regardless of whether, in a particular case, the disclosure might not ultimately be justified – especially considering the de minimus nature of any breaching of the ***Pitchess*** protections by disclosure of the list. Here, by way of analogy, is why the majority's conclusion *may* be flawed: Assume the normal rule is that birch trees are protected from destruction unless a tree is diseased. To protect against the destruction of all birch trees by a fast-moving disease, entire groves where some of the trees are diseased must be burned. Destroying only those trees in a grove that are diseased is too labor intensive and time-consuming to prevent the spread of the disease. Under the majority's analysis, if one or more of the trees in the grove was not diseased, the grove could not be burned because the rationale for destroying the trees (i.e., that a tree is diseased) does not apply to some individual trees within the grove that remain healthy. (Okay, not a perfectly parallel analogy but one that hopefully illustrates why just because the ***Brady*** obligation in the individual case would not necessarily authorize final disclosure, the disclosure of the ***Brady*** list in general is permissible.)

6. The majority was not swayed by language from the California Supreme Court decision in ***People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696 stating that the San Francisco Police Department "has ***laudably*** established procedures to streamline the ***Pitchess/Brady*** process" (at p. *17, emphasis added by IPG) even though the ***Johnson*** court was describing a system for disclosing ***Brady*** information in personnel files that was virtually identical to the system proposed by the Sheriff's department. (at p. *15). The majority believed this statement to be dicta as ***Johnson*** was not asked to decide the legality under ***Pitchess*** of the [San Francisco Police] Department's initial disclosure to the district attorney that the two officers had Brady material in their personnel files." (at p. *17.)

7. Nor was the majority swayed by the fact that a recent Attorney General Opinion (98 Ops.Cal.Atty.Gen. 54 (2015)) approved the legality of a proposed policy whereby the California Highway Patrol (CHP) would examine personnel files, compile a list of officers who had sustained administrative findings of misconduct involving moral turpitude or actual criminal convictions involving moral turpitude, create a secure database identifying the officers, but not the misconduct, and give access to prosecutors to search for the names of officers who might testify in their upcoming trials so the prosecutors could then file a ***Pitchess*** motion based on

officer's name appearing on the list. (at p. *18.) The majority acknowledged that the Attorney General rejected the CHP's argument that it could not disclose the files without violating ***Pitchess***; and that the Attorney General had interpreted ***Johnson*** as "plainly and necessarily approv[ing]" the policy proposed. (at p. *18 citing to 98 Ops.Cal.Atty.Gen. at p. 64.)

Nevertheless, the majority declined to place any stock in the opinion on the grounds that Attorney General opinions are "advisory only, and are not binding on the courts" and "that, where, as here, an advisory opinion does not discuss relevant precedent or undertake serious legal analysis in the context of the immediate case, it may be disregarded as not persuasive." (at p. *18.)

8. **Maintenance of an Internal *Brady* List is Okay**

The majority believed that maintaining a ***Brady*** list for internal use by the police department did not violate the "***Pitchess*** statutes insofar as the [department] reviews already existing personnel records, and simply compiles or creates a summary or categorization of information already contained in those files for internal use only." (at p. *12.) The majority noted nothing in the ***Pitchess*** statutes even discusses, let alone prohibits, "the internal collection of data, based upon past events found to have occurred after an investigation and administrative hearing by the employing law enforcement agency." (at p. *12.)

9. **POBRA is not Violated by Transfers or Job Restrictions Based on Findings Adversely Affecting the Credibility of Deputies**

The majority rejected the argument that the trial court's order violated Government Code section 3305.5(a), which is part of POBRA and prohibits any "punitive action" against or any denial of promotion of any public safety officer solely because that officer has been placed on a "***Brady*** list," or because that officer's name might otherwise be subject to disclosure under ***Brady***. (at pp. *19-20.)

The majority observed that the only action proposed by the Sheriff's Department that section 3305.5 could potentially bar would be a transfer. However, "[a] transfer must be punitive in nature before it violates POBRA." (at p. *20 citing to Gov. Code, § 3303.) And "any transfer or other change in duties based upon a deputy's placement on the LASD Brady list would be to address, or compensate for, the deputy's reduced credibility due to potential disclosure of the deputy's past founded allegations of misconduct. Such a transfer is not 'for purposes of punishment.'" (at p. *20.)

10. **The Aspect of the Trial Court Order Addressing the Sheriff's Department Authority with Respect to a *Brady* list Involving *Non-Sworn Employees* is Invalid**

The majority did not address the substantive question of whether the Sheriff's Department could release a list of names of non-sworn employees. Rather, they held that, to the extent the trial court's order would allow for such a disclosure, it was invalid because the non-sworn employees of the LASD were not parties to, and were therefore not represented in, the litigation. The majority stated: "The issue of a ***Brady*** list for non-sworn LASD employees is not raised by ALADS' petition and complaint, and, as far as we can see, was never raised by the parties either in their pleadings, motions, or other documents filed in the trial court, or during oral argument before the trial court. It appears to be completely beyond the scope of the issues fairly raised by the litigation up to this point, and thus beyond the scope of the trial court's injunctive authority in the context of the immediate case." (at p. *21.)

The Concurring and Dissenting Opinion

The concurring and dissenting opinion of Justice Grimes concluded the "trial court properly harmonized the ***Brady*** and ***Pitchess*** authorities in refusing to enjoin the Department from disclosing to the district attorney the identity of any deputy on the Department's ***Brady*** list who is a potential witness in a pending criminal prosecution." (at p. *21.)

Justice Grimes believed that "[n]o motion is required to transfer, between members of the prosecution team, the identities of officers involved in a pending prosecution who may have ***Brady*** materials in their personnel records. There is no ***Pitchess*** violation in a procedure that is consonant with ***Brady*** obligations and that does not involve a prosecutor's perusal of any information in an officer's personnel file." (at p. *21.)

Justice Grimes also did not believe the injunction compelled "the Department to do anything. It simply allows the Department to implement its decision that its ***Brady*** obligations are best fulfilled by giving the names of peace officers with ***Brady*** material in their files to prosecutors when charges are pending." (at p. *22.) "The injunction, and a decision by this court to affirm it, would not require any other law enforcement agency to institute similar practices. It would merely confirm that such a practice is consonant with ***Brady*** and does not violate ***Pitchess***." (at p. *22.)

Justice Grimes did not venture an opinion on whether there would be any violation of the

Pitchess statutes if disclosure of the list was made without a pending prosecution. (at p. *21 and fn. 5.)

Questions an Inquisitive Prosecutor Might Have After Reading the *ALADS* Decision

Q-1: Is the *ALADS* decision likely to be taken up for review?

The Los Angeles Sheriff has decided to seek review of the ***ALADS*** decision in the California Supreme Court. Considering the immediate and widespread impact of the decision on the practices of numerous prosecutor's offices throughout the state, the conflict between the dicta in the ***Johnson*** decision as well as the Attorney General's opinion and the holding in ***ALADS***, it would be surprising if the California Supreme Court did not grant the Sheriff's petition for review.

Q-2: Are law enforcement agencies now prevented from giving prosecutors *Brady* tips on officers?

It is an open question whether law enforcement agencies can continue to provide ***Brady*** tips to prosecutor's offices in light of the ***ALADS*** decision. ***ALADS*** puts agencies between the proverbial rock and a hard place. Certainly, an argument can be made that the holding in ***ALADS*** that it is a violation of the ***Pitchess*** statutes to inform a prosecutor's office that an officer has potential ***Brady*** material in their personnel file effectively prohibits any law enforcement agency in the state from expressly disclosing to the prosecutor's office the fact there has been a sustained administrative finding that an officer has engaged in misconduct involving moral turpitude.

Moreover, while we know from the majority opinion in ***ALADS*** that Attorney General's opinions are not binding and apparently can be easily dismissed, there is an Attorney General opinion (albeit one long pre-dating ***Johnson*** and the most recent Attorney General opinion on what ***Pitchess*** allows) that concluded "the disclosure of peace officer personnel records in violation of Penal Code section 832.7 may constitute a crime under the provisions of Government Code section 1222 if the conditions of the latter statute are met." (82 Ops. Cal. Atty. Gen. 246.)

***Editor's note:** Government Code section 1222 provides: "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor."

If ***ALADS*** is correct, an awful lot of police chiefs may end up behind bars for alleged violations of section 1222. Although at least they should be immune from civil suit since a wrongful dissemination of peace officer personnel records does not give rise to a private cause of action for damages. (***Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 614; ***Rosales v. City of Los Angeles*** (2000) 82 Cal.App.4th 419, 427-428; ***City of Hemet* v. *Superior Court*** (1995) 37 Cal.App.4th 1411, 1430; 532; ***Bradshaw* v. *City of Los Angeles*** (1990) 221 Cal.App.3d 908, 918-919.) And "an officer whose records are wrongfully disclosed may not state causes of action for invasion of privacy, negligence, negligence per se, violation of a federal right to privacy or infliction of emotional distress." (***Fagan* v. *Superior Court*** (2003) 111 Cal.App.4th 607, 614; **accord *Rosales* v. *City of Los Angeles*** (2000) 82 Cal.App.4th 419, 429-432.)

On the other hand, there is a *potential* for a court to find that *failure to disclose* favorable material information (even in an officer's personnel file) subjects a department or investigating officer to civil liability. Moreover, an argument can be made that in light of the language in California Supreme Court decision of ***Johnson*** approving the San Francisco Police Department's policy of providing ***Brady*** tips and the Attorney General opinion approving a comparable policy, a law enforcement agency can continue with the practice of providing ***Brady*** tips until the California Supreme Court weighs in on the issue. Finally, alternate procedures can potentially be put into place that can accomplish some of the same goals as the policy proposed by the Los Angeles Sheriff's Department, but which are sufficiently distinguishable from the policy proposed by the Sheriff that it cannot be said the ***ALADS*** decision would inhibit implementation of the policy.

For example, a departmental policy of simply recommending that a prosecutor's office file a ***Pitchess*** motion on certain identified officers without providing *any* information about what is potentially contained in the file may be challenged as a violation of the ***Pitchess*** procedures (and criticized as a disingenuous means of getting around the ***ALADS*** decision), but such a policy was <u>not</u> at issue in the ***ALADS*** case and thus can be distinguished from the policy in ***ALADS*** until another appellate decision says otherwise. Similarly, a policy of simply

providing the names of officers who do not have any sustained administrative findings in their files involving misconduct of moral turpitude does not "link[] the officers to disciplinary investigations in their personnel files." (***ALADS*** at p. *1 citing to ***Copley Press, Inc.* v. *Superior Court*** (2006) 39 Cal.4th 1272, 1297–1299.)

Q-3: If the decision in *ALADS* is correct, does that mean any list or *Brady* tips previously provided must be returned to the law enforcement agencies?

Once prosecutors have been provided information about an officer that constitutes favorable material evidence for the defendant in a criminal case, prosecutors cannot divest themselves of it. Even if prosecutors return the physical documents (e.g., the list or other documents from the officer's personnel file) that were initially released to the prosecutorial agency, prosecutors will be deemed to be in possession of the information for ***Brady*** purposes. This just makes sense. While the actual records themselves may not be in the possession of the prosecutor's office or may be subject to a protective order, the *exculpatory content* of those records remains in the actual possession of the prosecutor's office. From a standpoint of prosecutorial federal due process (***Brady***) disclosure obligations, there can be no distinction between physical possession of written materials containing favorable, material evidence and knowledge of the favorable material evidence. Knowledge of intangible information *is* possession of intangible information. For example, if a witness provides information exculpating a defendant in an oral statement to the prosecutor, the prosecutor's duty to disclose that statement to the defense is the same whether or not the statement is written down in a report. (**See *United States* v. *Rodriguez*** (2nd Cir. 2007) 496 F.3d 221, 222 ["When the Government is in possession of material information that impeaches its witness or exculpates the defendant, it does not avoid the obligation under ***Brady/ Giglio*** to disclose the information by not writing it down"]; ***Smith* v. *Secretary of New Mexico Dept. of Corrections*** (10th Cir. 1995) 50 F.3d 801, 825, 828 [indicating the prosecution actually or constructively possesses information *learned orally but not memorialized in writing* and finding that, because the district attorney's office had actual knowledge that there was a separate investigation by authorities in a separate county, it was reasonable to impute knowledge possessed by the separate county to prosecution]; ***United States* v. *Lacey*** (8th Cir.2000) 219 F.3d 779, 783 [***Brady*** requires the government to disclose "only evidence that is in the government's possession or that of which the *government is aware.*"]; ***United States* v. *Meregildo*** (S.D.N.Y. 2013) 920 F.Supp.2d 434, 440, [to protect "a defendant's right to due process, the Government must disclose

favorable material-evidence when it is in the Government's *knowledge or possession*"].) (Emphasis added by Rubin.)

Q-4: Does *ALADS* prevent law enforcement agencies from providing information to prosecutorial agencies regarding criminal investigations, arrests, or convictions of officers?

Information contained in the criminal history database reflecting that an officer has been arrested, charged, or convicted of a crime is not protected by the ***Pitchess*** statutes. Law enforcement agencies should still be able to provide this information even if they choose to follow ***ALADs*** when it comes to internal IA findings. If they do not, prosecutor's offices will likely have to start running rapsheets on police officers in every case because prosecutors are generally deemed to be in possession of criminal databases to which they have reasonable access and thus have a duty to disclose that information to the defense under their ***Brady*** obligation or statutory discovery obligations. (**See *People* v. *Little*** (1997) 59 Cal.App.4th 426, 432-433 [prosecution deemed to be in "possession" of State Department of Justice rapsheets (i.e., CII or CLETS rapsheets) of witnesses because rapsheet was reasonably accessible to the prosecution]; ***J.E.* v. *Superior Court*** (2014) 223 Cal.App.4th 1329, 1335 [citing to ***Little*** and other cases to illustrate that the prosecutor has a duty to disclose impeachment evidence contained in "materials that are not directly connected to the case" but which are "reasonably accessible" to the prosecution but not the defense]; ***United States* v. *Perdomo*** (3rd Cir. 1991) 929 F.2d 967, 971 [prosecution in possession of local criminal history database]; ***United States* v. *Auten*** (5th Cir. 1980) 632 F.2d 478, 481 [prosecution in possession of and federal FBI and NCIC records]; ***People* v. *Lopez*** (unpublished) 2016 WL 1244729, *9-*11 [CalGang database was in the possession of the prosecution because the prosecution had reasonable access to it in the same way as the prosecution had reasonable access to other criminal history databases]; ***People* v. *Coleman*** (unpublished) 2016 WL 902638, at *9 [while "a defendant cannot compel the prosecution to run rap sheets on police officer witnesses pursuant to ***Brady***, we note the prosecution bears the risk of reversal if the adopted procedures are inadequate and ***Brady*** material is not disclosed"].)

True, regardless of whether the information in the criminal history is protected by the ***Pitchess*** statutes, the information necessary *to run* the criminal history may be protected by the ***Pitchess*** statutes (**see *Garden Grove Police Department* v. *Superior Court (Reimann)*** (2001) 89 Cal.App.4th 430) and thus prosecutors may not be deemed to have the

reasonable access to criminal history files of peace officers necessary for those files to be held to be in the possession of the prosecution team (in contrast to the rapsheets of civilian witnesses). But that is a different question than whether the information in the criminal history databases of peace officers are protected by the ***Pitchess*** statutes.*

*__Editor's note (part I of II):__ In ***Garden Grove***, the defendant asked the district attorney to run criminal records checks on the officers involved in the defendant's arrest and to "provide information of crimes or acts of moral turpitude or misdemeanor or felonious behavior or convictions." The defendant also sought "specific acts of misconduct" and "other acts done under 'color of authority'" to "impeach the credibility" of the officers. (**Id**. at p. 433.) When the district attorney declined, the defendant filed a motion requesting the information. Both the police department and the district attorney filed motions in oppositions. (**Id**. at p. 432.) The trial judge ordered the district attorney to run criminal records checks on the officers. And because the district attorney needed the officers' birth dates to run the criminal records checks, the judge ordered the police department to disclose the birth dates to the district attorney. The judge left the determination whether the evidence was ultimately discoverable for later. (**Id**. at p.432.) The police department then filed a writ of mandate seeking to vacate the order requiring it to disclose the officers' birth dates to the district attorney. (**Id**. at p. 432.) The appellate court granted the writ, finding the trial court abused its discretion when it ordered the police department to disclose the birth dates of the police officers to the District Attorney "for the purpose of running criminal records checks." (**Id**. at p. 431.) ***Garden Grove*** may be read as generally condemning the running of police officer criminal records absent compliance with the ***Pitchess*** procedures (which would indicate that such records are third party records). But it is also (more) plausibly read as standing only for the proposition that seeking access to information *about peace officer dates of birth* requires compliance with the ***Pitchess*** procedures. (**See *Fletcher* v. *Superior Court*** (2002) 100 Cal.App.4th 386, 401-402 [stating ***Garden Grove*** "informs us ***only*** that the birth date of a police officer is covered by Penal Code section 832.8 and can be discovered only by means of a ***Pitchess*** motion" emphasis added.) Moreover, even assuming ***Garden Grove*** protects an officer's date of birth, the notion that absent that information, the criminal histories of officers are not reasonably accessible to the prosecution is dubious. In many instances, the prosecution *can* check an officer's criminal records without having the officer's date of birth if the officer's name is unique, or by narrowing down the list of potential candidates with the same name based on race, ethnicity, approximate age, and criminal record. [Continued next page]

__Editor's note__ **(part II of II):** It may take longer to conduct a search for the records, but such searches are routinely conducted for witnesses whose date of birth is unknown. Moreover, if the lack of a date of birth for a police officer witness places an officer's rapsheet outside the constructive possession of the prosecution, then the lack of a date of birth about *any* witness would place that witness's rapsheet outside the constructive possession of the prosecution. And the latter proposition is pretty questionable. (**Cf**., ***People* v. *Martinez*** (2002) 103 Cal.App.4th 1071, 1080 [discounting prosecution's argument that failure to disclose prosecution witness' criminal history was excusable on ground the prosecution did not have the witness' date of birth and the witness had a common name].)

Editor's note: Rap sheets themselves are not discoverable. (***People* v. *Roberts*** (1992) 2 Cal.4th 271, 308; ***People* v. *Santos*** (1994) 30 Cal.App.4th 169, 175.) However, "much, if not all of the information contained in the rap sheets is discoverable. [Citations.]" (Cal. Crim. Law Procedure & Practice (2014) § 11.8, p. 250 (CEB); ***People* v. *Coleman*** (unpublished) 2016 WL 902638, at *8.)

Q-5: Does *ALADS* prevent law enforcement agencies from providing information to prosecutorial agencies that indicate officers have engaged in misconduct from sources other than officer personnel files?

The ***ALADS*** decision should not prevent an agency from passing on information regarding potential officer misconduct of moral turpitude if that information derives from a source other than the personnel file of the officer. For example, if a case involving an allegation of police misconduct gets reported on the press, the agency could pass on the article even though ***ALADS*** would prevent them from passing on what happened with the follow-up IA investigation.

Q-6: Are there any reasons for law enforcement agencies to continue to provide *Brady* tips, notwithstanding the decision in *ALADS*?

There are several reasons why a law enforcement agency may want to continue to provide ***Brady*** tips notwithstanding the holding in ***ALADS***.

First, *not* providing ***Brady*** tips also presents the possibility that the department will be successfully sued in a section 1983 civil suit for violating a defendant's constitutional right to due process. Although there does not appear to be any published case that has directly confronted the issue of whether an officer or agency is liable for failure to disclose exculpatory information contained in an officer's personnel file, here is the argument for why a law enforcement agency has some risk in not providing that information to the prosecution. There are numerous cases holding the police have a ***Brady*** obligation to disclose exculpatory information *to the prosecutor* or, at least, that the police are subject to civil liability for failing to do so even if the violation is not technically a "***Brady***" violation. (**See *Carrillo* v. *County of Los Angeles*** (9th Cir. 2015) 798 F.3d 1210, 1219 [finding as far back as 1984 "it was clearly established that police officers were bound to disclose material, exculpatory evidence"]; ***Bermudez* v. *City of New York*** (2d Cir. 2015) 790 F.3d 368, 376, fn. 4 ["Police officers can be held liable for ***Brady*** due process violations under § 1983 if they withhold exculpatory

evidence from prosecutors"]; ***Beaman* v. *Freesmeyer*** (7th Cir. 2015) 776 F.3d 500, 509 ["the idea that police officers must turn over materially exculpatory evidence has been on the books since 1963"]; ***Owens* v. *Baltimore City State's Attorneys Office*** (4th Cir. 2014) 767 F.3d 379, 402 ["a police officer violates clearly established constitutional law when he suppresses material exculpatory evidence in bad faith"]; ***D'Ambrosio* v. *Marino*** (6th Cir. 2014) 747 F.3d 378, 389 ["the role that a police officer plays in carrying out the prosecution's ***Brady*** obligations is distinct from that of a prosecutor.... ***Brady*** obliges a police officer to disclose material exculpatory evidence only to the prosecutor rather than directly to the defense."]; ***Gantt* v. *City of Los Angeles*** (9th Cir. 2013) 717 F.3d 702, 709 ["We have held in no uncertain terms that ***Brady***'s requirement to disclose material exculpatory and impeachment evidence to the defense applies equally to prosecutors and police officers"]; ***Drumgold* v. *Callahan*** (1st Cir.2013) 707 F.3d 28, 38 ["law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant"]; ***Smith* v. *Almada*** (9th Cir. 2011) 640 F.3d 931, 939 ["***Brady*** requires ***both*** prosecutors and police investigators to disclose exculpatory evidence to criminal defendants" emphasis added]; ***Elkins* v. *Summit County, Ohio*** (6th Cir. 2010) 615 F.3d 671, 676-677; ***Moldowan* v. *City of Warren*** (6th Cir. 2009) 578 F.3d 351, 381-383 [listing cases]; ***White* v. *McKinley*** (8th Cir. 2008) 519 F.3d 806, 814["***Brady***'s protections also extend to actions of other law enforcement officers such as investigating officers" but bad faith must be shown to support a civil suit]; ***Yarris* v. *County of Delaware*** (3rd. Cir. 2006) 465 F.3d 129, 141 ["the ***Brady*** duty to disclose exculpatory evidence to the defendant applies ***only*** to a prosecutor" albeit finding officers may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor, emphasis added]; ***Gibson* v. *Superintendent of N.J. Dep't of Law & Public Safety-Div. of State Police*** (3d Cir.2005) 411 F.3d 427, 442-443 [same]; ***Newsome* v. *McCabe*** (7th Cir.2001) 260 F.3d 824, 825 ["It is possible for police no less than prosecutors to violate the due process clause by withholding exculpatory information"]; ***Brady* v. *Dill*** (1st Cir. 1999) 187 F.3d 104, 114 ["a police officer sometimes may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information"]; ***Walker* v. *City of New York*** (2d Cir. 1992) 974 F.2d 293, 299 [listing cases]; ***Mayes* v. *City of Hammond*** (N.D. Ind. 2006) 42 F.Supp.2d 587, 625 ["When a police officer prevents the prosecutor from complying with his duty to produce exculpatory or impeaching evidence, by failing to disclose such evidence to the prosecutor, then the officer violates his obligations under ***Brady***" and is subject to liability a violation of the Due Process clause]; **but see *Jean* v. *Collins*** (4th Cir. 2000) 221 F.3d 656, 660 (Wilkinson, C.J., concurring), ["to speak of the

duty binding police officers as a ***Brady*** duty is simply incorrect. The Supreme Court has always defined the ***Brady*** duty as one that rests with the prosecution."].)

Even criminalists or other public employees (or their supervisors) who fail to disclose material exculpatory or impeaching information have a due process obligation to disclose the information. (**See *Brown* v. *Miller*** (5th Cir.2008) 519 F.3d 231, 238 [allowing § 1983 claim against state crime lab technician for suppressing exculpatory blood results]; ***Pierce* v. *Gilchrist*** (10th Cir. 2004) 359 F.3d 1279, 1298-1299 [police department forensic chemist was not entitled to qualified immunity on claim under § 1983 for constitutional tort of malicious prosecution based on her alleged withholding of exculpatory evidence and fabrication of inculpatory evidence]; ***Gregory* v. *City of Louisville*** (6th Cir. 2006) 444 F.3d 725, 744 [holding that an examiner in the state police crime laboratory who deliberately withheld exculpatory evidence violated a criminal defendants' constitutional rights]; ***Jones* v. *Han*** (D. Mass. 2014) 993 F.Supp.2d 57, 65 [supervisors who failed to disclose material exculpatory and impeaching information about one of their employees who testified in a defendant's case subject to civil liability for such failure to disclose]; ***Bibbins* v. *City of Baton Rouge*** (M.D.La. 2007) 489 F.Supp.2d 562, 573 [denying summary judgment on a ***Brady*** claim against a state-employed fingerprint analyst].)

There are some differences that can arise in assessing the respective discovery duties of prosecutors and law enforcement under due process. "[W]here a plaintiff seeks damages from a police officer arising from a ***Brady*** violation, the analysis is different and, in certain ways, more complicated." (***Mellen* v. *City of Los Angeles*** (C.D. Cal., Dec. 22, 2016) 2016 WL 7638207, at *17.) For example, circuit courts have split regarding whether a police officer's failure to disclose exculpatory evidence establishes a § 1983 claim in the absence of bad faith although the majority hold some form of bad faith is required. (*Compare* ***Helmig* v. *Fowler*** (8th Cir. 2016) 828 F.3d 755, 760 [a showing of bad faith is necessary] ***Owens* v. *Baltimore City State's Attorneys Office*** (4th Cir.2014) 767 F.3d 379, 402 ["To make out a claim that the Officers violated his constitutional rights by suppressing exculpatory evidence, Owens must allege, and ultimately prove, that (1) the evidence at issue was favorable to him; (2) the Officers suppressed the evidence in bad faith; and (3) prejudice ensued."]; ***Porter* v. *White*** (11th Cir.2007) 483 F.3d 1294, 1308 ["hold[ing] that the no-fault standard of care ***Brady*** imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process"); ***Villasana* v. *Wilhoit*** (8th Cir.2004) 368 F.3d 976, 980 ["[T]he recovery of § 1983 damages

requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial."] *with* ***Steidl* v. *Fermon*** (7th Cir. 2007) 494 F.3d 623, 631-632 [bad faith is not require] *with* ***Tennison* v. *City and County of San Francisco*** (9th Cir. 2009) 570 F.3d 1078, 1089-1090 [while proof of bad faith is not necessary, an officer's good faith in failing to disclose is not a defense if the officer acted with "deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors" and merely placing exculpatory evidence into a homicide file without informing the prosecutor of the existence of the evidence is insufficient to meet the police obligation even if prosecutors have access to the file].) Differences in how the ***Brady*** duty may be interpreted in the context of prosecutorial obligations versus police obligations can also arise based on the fact police may not have as much knowledge about the significance of potential information as a prosecutor– "a police investigator (through no fault of his or her own) may not correctly appreciate the scope of the materials that must be turned over to the defense under ***Brady***. This is especially true as to impeachment evidence, "given the random way in which such information may, or may not, help a particular defendant." (***Mellen v. City of Los Angeles*** (C.D. Cal., Dec. 22, 2016) 2016 WL 7638207, at *18.)

But regardless of the exact parameters of law enforcement's duty to disclose, in light of the above cases, no one can seriously question whether, for ***Brady*** purposes, there is some risk to law enforcement of civil liability for failure to turn over favorable material information impeaching a prosecution civilian witness. It seems to logically follow that if failure to disclose such information on a testifying civilian witness can give rise to liability, how can failure to turn over similar information in an officer's personnel file bearing on a testifying officer's ***own credibility or the credibility of a fellow investigator*** on the prosecution team be excused? (**See e.g.,** this memo at pp. 23-24.)

Second, continuing to provide ***Brady*** tips serves to avoid the harm that might arise if the Ninth Circuit or the High Court eventually rules that, notwithstanding the ***Pitchess*** scheme, the prosecution is in possession of officer personnel files even absent a ***Brady*** tip. It is true, as the majority in ***ALADS*** indicated, that California courts have not been receptive to the idea that *prosecutors* violate ***Brady*** by failing to search through peace officer personnel files for impeaching information that is ***unknown*** to anyone in the prosecutor's office because such records are considered third party records. (**See *People* v. *Superior Court (Johnson)*** (2015) 61 Cal.4th 696, 713, 715 [declining to decide whether the prosecutor's obligation to provide ***Brady*** material "extends only to what the police know about the specific case and

does not go so far as to include confidential personnel records the police department maintains in its administrative capacity" because it concluded "instead that the prosecution has no ***Brady*** obligation to do what the defense can do just as well for itself"; but noting the ***Pitchess*** procedure is "in essence a special instance of third party discovery"]; ***Alford* v. *Superior Court*** (2003) 29 Cal.4th 1033, 1046 [holding absent compliance with the ***Pitchess*** procedures "peace officer personnel records retain their confidentiality vis-à-vis the prosecution; ***Becerrada* v. *Superior Court*** (2005) 131 Cal.App.4th 409, 415 [same, albeit also noting an officer remains free to voluntarily provide the prosecution with material contained in the officer's own personnel file]; ***People* v. *Gutierrez*** (2004) 112 Cal.App.4th 1463, 1475 [same, albeit also noting prosecutor cannot conduct its own ***Brady*** review absent compliance with sections 1043 and 1045]; **accord *Rezek* v. *Superior Court*** (2012) 206 Cal.App.4th 633, 642;; ***People* v. *Abatti*** (2003) 112 Cal.App.4th 39, 56; ***Garden Grove Police Dept* v. *Superior Court*** (4th Dist. 2001) 89 Cal.App.4th 430, 431-432 & fns. 1 & 2, 434; ***People* v. *Superior Court (Gremminger)*** (1997) 58 Cal.App.4th 397, 404-405; ***People* v. *Gonzalez*** (unreported) 2006 WL 3259202, *4-*5 [holding trial court's order that prosecution has to check with IA unit for ***Brady*** information in officer personnel files erroneous because the IA unit of the investigating agency is not on the "prosecution team" – ***Pitchess*** motion is the only vehicle available to obtain the information].)

But it is far from certain the Ninth Circuit or the High Court will come to the same conclusion as California courts when confronted with the issue. (**See *Catzim* v. *Ollison*** [C.D. Cal. unreported] 2009 WL 2821424, *8 ["the United States Supreme Court has no clearly established precedent that a police department or agency acts as a part of a prosecution team when the police compile and keep regular personnel files"].) And several out-of-state courts consider police personnel files within the possession of the prosecution team for ***Brady*** purposes notwithstanding their confidential nature.

In New Hampshire, for example, the state Supreme Court has held that the duty under the state Constitution and ***Brady*** to disclose exculpatory evidence "extends to information known only to law enforcement agencies, such as information located in police officers' confidential personnel files." (***Gantert* v. *City of Rochester*** (2016) 168 N.H. 640, 645 [135 A.3d 112, 116].) To address this obligation, in 2004, the New Hampshire Attorney General issued a memo to all county attorneys and law enforcement agencies aimed at developing a procedure to identity and deal with exculpatory "information contained in confidential police personnel files and internal investigations files." (***Id***. at pp. 645-646.) "Because police personnel files are

generally confidential by statute, see RSA 105:13–b (2013), the Attorney General recognized in the Memo that prosecutors must rely upon police departments to identify ***Laurie*** issues." (***Id***. at p. 646.)

Editor's note: Exculpatory information contained in New Hampshire police personnel files is referred to as "***Laurie***" evidence because back in 1995, the New Hampshire Supreme Court issued a case called ***State v. Laurie*** (1995) 139 N.H. 325, 327, 333 [653 A.2d 549] which granted a defendant a new trial due to the prosecution's failure to disclose information found in a police officer's employment files and records.

The memo advised that law enforcement agencies should notify the county attorney, in writing, "whenever a determination is made that an officer has engaged in conduct that constitutes ***Laurie*** material." (**Ibid**.) Based on this information, county attorneys were then "to compile a confidential, comprehensive list of officers within each county who are subject to possible ***Laurie*** disclosure—the so-called '***Laurie*** List.'" (**Ibid**.) As a result, law enforcement agencies "began developing ***Laurie*** Lists' to share information regarding officer conduct between police and prosecutors." (***Id***. at p. 645; **see also *United States* v. *Lawson*** (7th Cir. 2016) 810 F.3d 1032, 1043-1044 [agreeing with concession that disciplinary record in detective's personnel file was suppressed within the meaning of ***Brady*** but finding it was not material]; ***Matter of Lui*** (Wash. 2017) 397 P.3d 90, 114 [***Brady*** "duty to learn of and disclose any impeachment evidence known to the prosecution that is material to guilt or punishment "extends to information held by others acting on the government's behalf, not just those facts within the prosecutor's file." ***State* v. *Davila***, 184 Wash.2d 55, 71, 357 P.3d 636 (2015). This includes the disclosure of personnel records."]; ***Robinson* v. *State*** (Maryland 1999) 730 A.2d 181, 192-193 ["In this State, each major police department has an IAD division. Consequently, because that division is a part of the police, its records are in the possession of the police. And if the police is an arm of the prosecution, it follows that the records are also constructively in the possession of the prosecution; records in the possession of the police are not rendered not in possession simply because they are made confidential and are not, on that account, shared with, or readily available to, the prosecution"]; ***Snowden* v. *State*** (Del. 1996) 672 A.2d 1017, 1023 [noting decisions from other jurisdictions are "almost unanimous in holding that in response to a specific motion, or upon subpoena duces tecum, the prosecution is required to review [police officer] personnel files for ***Brady*** material"]; Pipes, California Criminal Discovery (4th Edition) §§ 10:29-10:29.4, pp. 996-1013 [laying out some of the arguments in support of the idea the prosecution is in possession of information in peace officer personnel files]; **see also *Milke* v. *Ryan*** (9th Cir. 2013) 711 F.3d 998, 1017-1018

[finding prosecution team *was* in constructive possession of the fact that a detective who testified for the prosecution had previously been found to have lied or to have violated a defendant's constitutional rights in eight other unrelated court cases even though there was no evidence that Maricopa County had any ability to keep track of an officer's alleged courtroom "misconduct"].)

Third, it is even *more important* to have a mechanism for alerting prosecutors to the potential existence of ***Brady*** material in an officer's personnel file that might be treated as ***known*** to the prosecution based on the information in the personnel file having previously been provided to a prosecutor in an office in a different case. Neither the United States nor California Supreme Court has directly confronted the issue of whether every prosecutor in a district attorney's office is on the prosecution team. In ***People* v. *Clark*** (2011) 52 Cal.4th 856, the issue cropped up when a prosecutor did not turn over information about a witness that had recently been prosecuted by the office. The prosecutor had initially checked on the criminal history of the witness and found nothing that would impeach the witness. However, unbeknownst to the trial prosecutor, the witness had been convicted of welfare fraud shortly before she testified. The information was known to one or more prosecutors in the district attorney's welfare fraud unit, but the trial prosecutor did not become aware of the conviction until the guilt phase of trial had been completed. The trial prosecutor stated he did not have access to documents maintained by the division of the district attorney's office that handled welfare fraud and the trial court found there was no duty on the trial prosecutor to gather information from a different division. (**Id**. at pp. 980-981.) Unfortunately (at least for prosecutors interested in having the issue addressed), the California Supreme Court decided there had been no violation because the information was not material and declined to decide whether the welfare fraud unit was "part of the prosecution team for ***Brady*** purposes[.]" (**Id**. at p. 982.) Thus, it remains an open question in California whether a prosecutor will be deemed to be in possession of exculpatory information known to another prosecutor in the office when the prosecutor in possession of the exculpatory information has no involvement in the prosecution of the defendant and is unaware there is any on-going prosecution of the defendant or that the information possessed has any exculpatory value to that prosecution. There are many good reasons for believing that, when directly confronted with the issue, either the California Supreme Court or the United States Supreme Court will ***not*** find information known to one prosecutor in the office is known to every prosecutor in the office. But there are **also** good reasons for believing either court ***will*** find information known to one prosecutor in

the office is known to every prosecutor in the office.

Editor's note: Prosecutors interested in deciding for themselves the relative merits of the arguments for and against finding that all prosecutors in an office are part of the prosecution team for ***Brady*** purposes (as well as whether all officers in an investigating agency are part of the prosecution team) are directed to The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline [2017-IPG-31] at pp. 72-81 – available on the CDAA website by clicking on the tab entitled "Prosecutor's Resources" and then clicking on the "Inquisitive Prosecutor Guides" link.

There is an even greater risk of reversal for failure to disclosure ***Brady*** material in an officer's file if the information known to one prosecutor in an office is held to be known to every prosecutor in an office. Absent a ***Brady*** tip system, how can the prosecution ensure that all prosecutors in the office have access to that "constructively possessed" information short of either asking every prosecutor what information they have ever obtained over the course of their career that might be in an officer's personnel file (completely unrealistic) or filing a ***Pitchess*** motion in every case (highly impractical and wasteful)?

Fourth, regardless of whether the High Court agrees with ***Johnson*** that there is no ***Brady*** obligation to review peace officer personnel files either because they are not within the possession of the prosecution (i.e., under the theory the information is not reasonably accessible to the prosecution) or because they are equally available to the defense and the prosecution, a case may still be reversed on grounds of ineffective assistance of counsel if the attorney fails to file a ***Brady-Pitchess*** motion and there exists information in the personnel file that constitutes ***Brady*** material. Consider how common it is for the defendant to claim that an attorney rendered ineffective assistance on grounds the attorney failed to file a ***Pitchess*** motion. In ***In re Avena*** (1996) 12 Cal.4th 694, the California Supreme Court rejected an argument that a defense attorney's failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel, but only ***because*** the defense had failed to show there was any information in the officer's file that would have changed the verdict (i.e., the failure to file the motion was not prejudicial. (**Id**. at p. 730.) Similarly, in ***People* v. *Nguyen*** (2007) 151 Cal.App.4th 1473, the court denied a defendant's motion seeking ***Pitchess*** information to help support an ineffective assistance claim against trial counsel for failure to file a ***Pitchess*** motion. (**Id**. at p. 1477.)

In numerous other ***unpublished*** cases, similar claims were made and rejected, in part or in whole, on the same grounds. (**See e.g.**, ***People* v. *Molina*** 2014 WL 6632945, *9; ***People* v. *Turner*** 2014 WL 2967916, *9; ***People* v. *Venegas*** 2013 WL 6451795, *5; ***People* v. *Jones***

2011 WL 592286, *4; ***People* v. *Cardenas*** 2011 WL 1991665, *14-*15; ***People* v. *Dunn*** 2010 WL 4160708, *9; ***People* v. *Allen*** 2010 WL 1914113, *5; ***People* v. *Rodriguez*** 2009 WL 3925582, *9; ***People* v. *Smith*** 2009 WL 2769178, *1-*2; ***People* v. *Madayag*** 2007 WL 1229428, *7; ***People* v. *Rocha*** 2006 WL 1381851, *2; ***People* v. *Bell*** 2001 WL 1469070, *4; **see also *People* v. *Diakite*** 2014 WL 6679100, *14; ***People* v. *Darrough*** 2013 WL 4044764, *1.) None of the cases suggested that, if a ***Pitchess*** motion could have been made and there had there been a showing that ***Brady*** information existed in the ***Pitchess*** file, the claim of ineffective assistance would be unsuccessful. (**Cf., *People* v. *Lugo*** 2003 WL 21437636, *2 [where defense would not be dependent on showing officers lied, failure to file ***Pitchess*** motion not ineffective assistance].) And, at least one *unpublished* case ***granted*** a petition for a writ of habeas corpus on grounds that failure to file a ***Pitchess*** motion constituted ineffective assistance of counsel where the officers' credibility was crucial to the case, one of the officers had admitted he had recently been untruthful in his reporting of circumstances that had occurred in an unrelated criminal case and the other had made a typographical error creating a false impression in a probable cause declaration, the judge had encouraged the defense to file such a motion, and the attorney mistakenly believed he did not have to file a motion to obtain the information about the officers. (**See *People* v. *Heredia*** 2009 WL 1133058, *1, *8-*11 [albeit remanding case for defense to file ***Pitchess*** motion to see if, in fact, there was any prejudice from the failure to file the motion].) Ensuring the prosecution knows to file a ***Pitchess*** motion by way of a ***Brady*** tip helps alleviate the possibility that material information contained in the file will be disclosed.

Fifth, by forcing either the defense or the prosecution to file ***Pitchess*** motions (or risk non-disclosure of favorable material evidence) in every case, there is a huge suck on law enforcement resources. Every ***Pitchess*** motion requires a city attorney or county counsel response and the appearance of a custodian of records. Law enforcement agencies may not want to assign additional personnel to handle these duties. Especially when 97% of these motions may be on officers who have nothing in their files.

Q-7: Are there any reasons for law enforcement agencies to refuse to release *Brady* tips in light of the holding in *ALADS*?

Aside from the reasons given in this memo at pp. 13-15 for not releasing ***Brady*** tips (i.e., that is a violation of the ***Pitchess*** statutes and possibly a crime to do so), an argument can be made

that all ***ALADS*** does is validate the policy of many law enforcement agencies not to disclose ***Brady*** tips and to turn back the clock a decade to a time when no agency had formal ***Brady*** lists.

It has been over 50 years since ***Brady*** was decided and almost 40 years since the ***Pitchess*** statutes were created. During all or most of that time, very few prosecutors' offices systematically collected potential ***Brady*** information from law enforcement agencies about their officers. Yet how many cases have been overturned in California because ***Brady*** information in an officer's personnel file or criminal history was not disclosed? Based on looking at published and unpublished cases, it appears the answer is zero.

Isn't the whole idea of ***Brady*** lists an overreaction to illusionary concerns? A solution in search of a problem? The fact is there are a miniscule number of cases in which: (i) there is a sustained finding bearing on an officer's credibility; (ii) there are no concurrent criminal charges filed (which would likely be disclosed); (iii) the officer was not fired for the misconduct (also likely to come to light); (iv) the information was *actually* favorable material evidence in a particular case; and (v) the defense did not file a ***Pitchess*** motion.

Granted, the absence of any horror stories can be attributed in part to the fact that there exist informal channels for prosecutors to be alerted to the existence of officers with severe credibility issues, information in the files over 5-years old can be destroyed, and there are a limited number of officers with potential ***Brady*** material in their files. But regardless of the reasons for the negligible number of cases, a prosecutor's office may reasonably view the risks entailed in not capturing peace officer ***Brady*** misconduct information, especially considering the countervailing risk in failing to adhere to the holding in *ALADS*, as too insignificant to justify the efforts entailed in attempting to capture the information.

Q-8: If law enforcement stops providing *Brady* tips, what should prosecutor's office that rely on such *Brady* tips do?

Assuming a law enforcement agency no longer agrees to provide ***Brady*** tips (notwithstanding any encouragement to maintain the practice), how should prosecutor's offices respond? *With the understanding that this joint IPG/P&A memo does not purport to represent the official policy of either the Alameda County or Santa Clara County District Attorney's Office, and emphasizing the importance of adhering to your office policy*, here are some suggestions offered by Jeff to consider:

1. Do not stop providing ***Brady*** tips to the defense or filing prosecutorial ***Brady/Pitchess*** motions based on information obtained *before* the law enforcement agency ceased giving such tips.

2. Alert the defense that the District Attorney's office is no longer in the same position to represent that there is no ***Brady*** material in an officer's personnel file; and encourage the defense to file a ***Pitchess*** motion if they believe the credibility of an officer will be a material issue in their case.

3. Encourage the law enforcement agency to continue providing information that is *not* protected by the ***Pitchess*** scheme, such as any information that would be contained in the local and state criminal history databases. Consider running officer rapsheets if there is no other mechanism to retrieve this information. (Let the defense know they still will be receiving *this* information.)

4. Be patient before committing to a practice of filing ***Pitchess*** motions in every case. This is a huge and *mostly* unproductive use of prosecutorial resources. Keep in mind that within a couple of months, the California Supreme Court will *likely* eliminate the ***ALADS*** decision as binding or precedential, and perhaps even persuasive, authority. (**See** California Rule of Court, Rule 8.1115(e)(1)). It is probably not worth instituting a new and onerous policy of requiringprosecutors to file ***Pitchess*** motions in every case (especially in front of judges who are disinclined to find the requisite good cause absent a ***Brady*** tip)* just to capture the miniscule number of incidents of officers (who were not previously on the ***Brady*** list) who suffer sustained findings of conduct involving moral turpitude in the brief window of time between now and when the California Supreme Court decides to either grant or deny the Sheriff's petition for review.

Editor's note: While it is true, as pointed out in the concurring and dissenting opinion of ***ALADS***, that it may be hard for prosecutors to show the requisite good cause to obtain an in camera review absent a ***Brady*** tip (**see *ALADS*** at p. *25), it is not necessarily impossible to do so. Prosecutors interested in some ways that the good cause showing may be made absent a ***Brady*** tip are directed to The Basic *Brady*, Statutory, and Ethical Discovery Obligations Outline [2017-IPG-31] at pp. 278-279 - available on the CDAA website by clicking on the tab entitled "Prosecutor's Resources" and then clicking on the "Inquisitive Prosecutor Guides" link. Sample "Me, too" prosecutorial ***Pitchess*** motions (filed in conjunction with defense ***Pitchess*** motions or after information is disclosed to the defense) are also available.

5. Consideration could be given to tinkering with the ***Brady*** tip system in a sufficient manner to distinguish it from the ***Brady*** tip system condemned in ***ALADS***.)

6. Re-assess the policy once we learn what the California Supreme Court is going to do on the Sheriff's petition for review.