ISSUE: When a law enforcement agency creates an internal *Brady* list, and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution: (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in that officer’s confidential personnel file?

A criminal prosecutor must disclose to the defense exculpatory and impeachment information. *Brady v. Maryland* (1963) 373 U.S. 83 ("Brady"); *Giglio v. United States* (1972) 405 U.S. 150, 154-155. Under *Pitchess*, “a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer’s personnel file that is relevant to the defendant’s ability to defend against a criminal charge.” *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1219. In looking to *Pitchess*, the Court in *Association for Los Angeles Deputy Sheriffs (ALADS) v. Superior Court*, S243855, found that (1) an internal “*Brady* list is confidential to the extent it was derived from confidential records,” and (2) “the Department does not violate that confidentiality by sharing with prosecutors the identity of potential witnesses on the *Brady* list.” *ALADS, supra*, S243855 at p. 13.

**Confidentiality of Underlying Records**

Under Senate Bill 1421, three categories of personnel records are determined to be nonconfidential, thereby permitting voluntary disclosure: (1) Records related to a report, investigation, or finding of an incident in which an officer discharged a firearm at a person or used force resulting in death or great bodily injury; (2) Records related to a sustained finding
that an officer engaged in sexual assault involving a member of the public; and (3) Records related to a sustained finding that an officer made false statements, false reports, concealed evidence, or committed perjury. California Senate Bill 1421; See ALADS, supra, S243855 at pp. 17-18. “If the records are not confidential, then the information obtained from those records is also not confidential.” Id. at p. 21. However, even confidential records may be disclosed pursuant to Pitchess.

**Pitchess Permits Brady Alerts toProsecutors in Pending Cases**

Next, the ALADS Court considered the term “confidentiality” and discussed that confidentiality from the general public is different than confidentiality from the prosecution. “The text of the Pitchess statutes does not clearly indicate that prosecutors are outsiders, forbidden from receiving confidential Brady alerts.” Id. at p. 24. Prosecutors have a duty under Brady to disclose impeachment evidence. Thus, in reconciling Brady and Pitchess, the Court concluded that agencies may voluntarily provide prosecutors with Brady alerts where the officer is a witness in a pending criminal case. “The Department may share this limited information, for the limited purpose of ensuring Brady compliance, with the limited class of persons (i.e., prosecutors) with a particularized need to know.” Id. at p. 32.

**BOTTOM LINE:** Law enforcement agencies may voluntarily disclose to prosecutors a Brady list or alert based upon nonconfidential officer personnel information. Further, law enforcement agencies may voluntarily disclose to prosecutors a Brady list or alert based upon confidential personnel records, where the listed peace officers are witnesses in pending criminal cases. Ultimately, a law enforcement agency’s use of a Brady list or alert system is voluntary and is not mandated by the Court. The Court did not address whether it violates confidentiality requirements for a prosecutor to share a Brady alert with the defense.