ACLU
AMERICAN CIVIL LIBERTIES UNION of SOUTHERN CALIFORNIA
FOUNDATION
STAND FOR JUSTICE

March 22, 2017

Via E-Mail
Members of the Los Angeles Sheriffs Department
Civilian Oversight Commission

Mr. Brian K. Williams
Executive Director
Los Angeles Sheriffs Department
Civilian Oversight Commission
222 S. Hill Street
Los Angeles, CA 90012

Re: Resolution in Support of Sheriff Jim McDonnell's Providing Sheriff Deputies' Misconduct List to District Attorney's Office, March 23, 2017

Honorable Members of the Commission and Mr. Williams:

The ACLU of Southern California (ACLU) strongly supports the supports the Resolution in Support of Sheriff Jim McDonnell's Providing Sheriff Deputies' Misconduct List to District Attorney's Office Improving Accountability within the Civil Service Hearing Process introduced by Supervisor Mark Ridley-Thomas. For years, the ACLU has been concerned about the Sheriff's Department and the District Attorney's Office failure to provide potentially exculpatory information to defendants in violation of both state law and federal due process obligations as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent cases. In 2012, the ACLU sued both the District Attorney and the Sheriff's Department challenging the DA's office Brady policy, and the Sheriff's Department policy of maintaining inmate complaints against LASD custody personnel in inmate's files, rather than in the custody officer's personnel file. The LASD practice ensured that information about those complaints would not be turned over to defense counsel in so-called *Pitchess* motions because there was no feasible way to search for inmate complaints against specific officers. *See Douglas v. Cooley*, BS 138170, (LA Superior Court 2012).[1] The Sheriff's Department changed its practice in response to our lawsuit and now files inmate complaints against deputies in the deputies' personnel folders, and the DA has amended its *Brady* policy.

Just last month, the ACLU, along with California Attorneys for Criminal Justice, the California

[1] The ACLU is also a strong proponent of increasing public access to information about officer misconduct. It vigorously supported SB 1286 (Leno 2016), which would have eliminated the state law confidentiality provisions governing adjudicated findings of excessive force, filing false reports, perjury, and a number of other offenses.

Public Defenders Association and Digity and Power Now filed an amicus brief in *ALADS v. McDonnell* in the Court of Appeal in support of the Superior Court's conclusion that it was permissible for Sheriff McDonnell to provide to the DA the names of deputies who had adjudicated findings of dishonesty, excessive force and related misconduct in their personnel file, if the officers were potential witnesses in pending criminal cases. As the ACLU explained in that amicus brief, the prosecution has a constitutional obligation to turn over exculpatory and impeachment evidence to the defense, including impeachment evidence about law enforcement officers who may testify in a criminal case, if that information is "material." That obligation applies to the prosecution regardless whether the defense asks for it (*United States v. Agurs*, 427 U.S. 97, 107 (1976)), or whether the prosecution is aware that the material is in the files of law enforcement. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty of learn of any favorable evidence known to others acting on the government's behalf in the case, *including the police*.") (emphasis added). But, under California law, the DA is not permitted to search the personnel files of law enforcement officers, even if they are likely to be witnesses in a criminal case. *See People v. Superior Court* (Johnson), 61 Cal.4th 696, 714 (2015). And, as the DA's own recently enacted Brady policy concedes, prosecutors may become aware of this potentially exculpatory only by happenstance unless the law enforcement agency proactively notifies the DA of potential impeachment information in the officer's personnel file. *See* Los Angeles County District Attorney Special Directive 17-03, § 14.06 (February 2017), ("DDAs are occasionally put on notice that a peace officer witness's personnel file may contain potential impeachment information when, for example, they learn that the peace officer has been placed on leave pending an administrative investigation, or, pursuant to a legally valid written policy, a law enforcement agency notifies the LADA that a peace officer employee's personnel file contains potential impeachment information.") available at http://da.lacounty.gov/sites/default/files/Revised%20Brady%20Policy.pdf.

Thus, unless Sheriff McDonnell provides the list to the DA, which obligates the DA to notify the defense that a law enforcement witness has potential impeachment material in his or her personnel folder, the DA frequently will be unable to satisfy its constitutional obligation to notify the defense that there may exculpatory information in the officer's personnel file.

There is a second important reason why all law enforcement agencies should provide a Misconduct List to the DA. Under California law, the court is prohibited from providing to the defense the conclusion of the investigating agency in a *Pitchess* motion. Cal. Evid Code § 1045(b)(2) (barring disclosure by the court of "the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code."). In general, all the defense gets

from a *Pitchess* motion is the name and contact information of the person who made the complaint against the officer and any witnesses, even if the agency that investigates the complaint concludes that the officer engaged in excessive force, filed a false report, or lied to obtain a warrant. *See Alvarez v. Superior Court*, 117 Cal.App.4th 1107, 1112 (2004); Evid. Code § 1045(b)(2). But, a finding that an officer has engaged in misconduct can be crucial impeachment evidence, (*Milke v. Ryan*, 711 F.3d 998, 1009 (9th Cir. 2013 ) (Kozinski, C.J.). In certain cases the evidence will be "material," and if it is not disclosed to the defense due process will require the conviction be reversed. *Id.* at 1018. If the DA has a list of deputies with findings of misconduct, it must notify the defense that there may be potentially exculpatory information in the file. Special Directive 17-03, § 14.06. Informing the defense that there is an adjudicated finding of misconduct of some sort in the officer's file helps ensure that the defense can seek, and the court will disclose, this relevant – and in many cases constitutionally essential – exculpatory material *Johnson*, 61 Cal.4th at 719-20 ("[A]ll information that the trial court finds to be exculpatory and material under *Brady* must be disclosed, notwithstanding [the Pitchess statutory] limitations."). If the defense does not know that there is an adjudicated finding in the personnel folder, it is far less likely to persuade the court to disclose the finding, because state law forbids the disclosure of that finding. Evid. Code § 1045(b)(2)

In short, Sheriff McDonnell is doing the right thing by attempting to provide a Brady list to the DA to ensure fair trials for criminal defendants. Indeed, doing anything less may violate the due process obligations of *Brady v. Maryland* because it results in the prosecution's not informing the defense of crucial impeachment evidence in the files of law enforcement officers.

Sincerely,

Peter J. Eliasberg
Chief Counsel

Peter Bibring
Senior Staff Attorney
Director of Police Practices Project

cc: The Honorable Jackie Lacey

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