



# LEGAL DEFENSE TRUST

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## LEARNING POINTS

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### “BRADY LIST” ARGUMENT IN SUPREME COURT

By Muna Busailah, Esq.

The California Supreme Court heard oral argument in this case on June 5, 2019. The case concerns whether the LASD’s disclosure of a “Brady list” or providing a “Brady alert” to the LA District Attorney’s office would violate *Pitchess*.

Put simply, by statute, the information contained in a peace officer’s personnel file is confidential. Currently, in a criminal case, the only way to obtain any information from an officer’s personnel file is by complying with the *Pitchess* statutes. This requires a criminal defendant to file a motion with the court and demonstrate “good cause” for the material sought. If that showing is made, the trial court reviews the file in “chambers” (privately) before making the decision as to whether information from the personnel file should be disclosed.

#### How did we get here?

In 2016, LASD Sheriff McDonnell created a Commander’s Panel to review deputy personnel files. This review led to the identification of approximately 300 deputies who had sustained allegations of misconduct in their personnel files. The sustained

allegations included conduct that constituted moral turpitude, false statements, tampering with evidence, falsifying records, obstruction/influencing witnesses, unreasonable force and family violence. LASD advised the affected deputies that it intended to send a “Brady list” of the deputies’ names and serial numbers to the DA’s office and other prosecutorial agencies in an effort to comply with its *Brady* obligations.

ALADS filed a petition in superior court to stop the *Brady* list from being disclosed to the DA’s office. The trial court found the disclosure of the “Brady list” violated *Pitchess* in that the confidential information contained in the list was being turned over without a *Pitchess* motion. But, the trial court also determined that since a filed criminal case triggers *Brady*, and the LASD, as part of the “prosecution team”, has a “Brady obligation” to disclose exculpatory evidence in its possession, it ruled the LASD was allowed to notify the prosecution of the identity of potential witnesses who have sustained misconduct relevant to his/her credibility in

their personnel file, without the prosecution first having to bring a *Pitchess* motion.<sup>1 2</sup>

After the trial court ruling, ALADS filed a request for an injunction and an appeal of the decision with the Court of Appeal. The Court of Appeal granted ALADS' request to stop the disclosure of information found in the personnel files of witnesses, finding such a "*Brady* alert" disclosure was not required by *Brady* and violated *Pitchess*. The Department then petitioned the California Supreme Court to review the case.

**SOUTHERN CALIFORNIA ALLIANCE OF LAW ENFORCEMENT (SCALE), RIVERSIDE SHERIFFS' ASSOCIATION (RSA), LOS ANGELES POLICE PROTECTIVE LEAGUE (LAPPL), and the LA SCHOOL POLICE ASSOCIATION (LASPOA)** authorized the office of Stone Busailah, LLP, to file an amicus brief in the Supreme Court, which happened to be the only one in support of ALADS' position that disclosure of a "*Brady* list" of names of peace officers who *may* have impeaching material in their personnel files, or even an individual "*Brady* alert" is not required under the Constitution, and therefore constitutes a violation of the statutory confidentiality of peace officer personnel records, and should not be authorized by the Court.

The issue before the Supreme Court was whether the LASD, in an effort to comply with *Brady*, may 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 his or her confidential personnel file", without first complying with the *Pitchess* procedure.

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<sup>1</sup> What is a *Brady* obligation? The United States Supreme Court has held that federal constitutional due process creates an obligation on the part of the prosecution to disclose all evidence within its possession that is favorable to the defendant and material on the issue of guilt or punishment.

In oral argument before the Supreme Court, the County argued that the case pits the privacy rights of law enforcement officers against the constitutional duty of prosecutors to provide the defense evidence that might cast doubt on a defendant's guilt or diminish the credibility of prosecution witnesses. Because the "prosecution" is imputed to know what is in the files of the investigating agency, it should be permissible for that agency to inform the prosecution of the name of any employee who may have possible *Brady* (exculpatory) material in their personnel file. This notification, or *Brady* alert, would allow either the prosecutor or the defense attorney, (once informed about the "alert"), to file a *Pitchess* motion to obtain the material in the officer's file.

ALADS argued that the *Pitchess* statutes and *Brady* requirements have existed in tandem for decades, and the Court has no reason to change the status quo and permit the agency to unilaterally, without a motion, provide a "*Brady* list" of names, or even a *Brady* alert, to the prosecutor. ALADS argued that the list invaded the privacy rights of the affected peace officers in maintaining the confidentiality of their personnel files and, in light of *Pitchess*, which allows the defense to obtain such information upon a showing of good cause, there is no reason to do so under *Brady*.

The Chief Justice noted during the hearing that the legislature had recently modified the *Pitchess* statutes to allow certain "major" sustained misconduct to be disclosed through the CPRA procedure (SB

<sup>2</sup> Who is part of the "prosecution team"? You are. The prosecution's disclosure obligation under *Brady* extends to evidence collected or known by other members of the prosecution team, which includes law enforcement officers involved in the investigation of the case.

1421<sup>3</sup>), and questioned whether it would be wise for the Court to now create a judicial exception to the current balance between *Brady* and *Pitchess*, since perhaps the legislature would be best suited to draw these fine lines. This was one of the arguments Stone Busailah, LLP, presented to the Supreme Court in this case – simply put, if a change in the law is appropriate, then let the legislature make that change – the *Pitchess* statutes are constitutional and have worked in balance with *Brady* for 40 years.

Based on the comments of the Justices and the questions that were asked of counsel, it seems as if the Court is divided on the issue. However, it is our prediction that the Justices will, in some manner, allow an agency to provide notification in some way, perhaps via a *Brady* alert, of potential *Brady* material to the prosecution. Once this occurs, even if done in conjunction with a court “protective order”, any officer whose personnel records are ultimately disclosed will end up on another so-called “*Brady* list”, whether within the law enforcement agency or elsewhere. And, unlike a *Brady* list compiled by the prosecution, where the officers on that list have some protection under POBRA from agency retaliation, there would be no such protection afforded to the involved officer when placed on these other lists.

The law firm of Stone Busailah, LLP, sends out a “thank you” to **SCALE, RSA, LAPPL** and **LASPOA** for stepping up in support of the fight to preserve your rights.

Stay Safe!

***Muna Busailah*** has been a partner in the firm for 26 years and represents peace officers in police law and litigation cases, in administrative, state and federal venues.

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<sup>3</sup> California’s strict laws protecting officer personnel files - which underpinned the appellate court’s ruling for ALADS - were dramatically altered by new transparency laws that opened up records of confirmed cases of lying and sexual misconduct by officers, as well as shootings and serious uses of force.

However, the new law may not apply to a broader range of misconduct that could also put an officer on a *Brady* list, including domestic abuse, sexual harassment, racial discrimination or even bribery/graft.