



LEGAL DEFENSE TRUST

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LEARNING POINTS



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“BRADY LIST” DISCLOSURE HELD PERMISSIBLE

*Association for Los Angeles Deputy Sheriffs v. Superior Court
Supreme Court of California, S243855, decision August 26, 2019*

By Muna Busailah

The California Supreme Court’s unanimous decision held that LASO’s “sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer’s confidential personnel file”, does **not** violate the Penal Code.

Background

Under Brady, a prosecutor must disclose to the defense evidence that is “favorable to [the] accused” and “material either to guilt or to punishment”. (See *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).) The disclosure to the defendant includes impeachment evidence (See: *Giglio v. US* (1972) 402 US 150.) The constitutional duty to disclose may be required even if the prosecutor is not personally aware of the evidence (See: *Kyles v. Whitley* (1995) 514 US 419). Because this duty goes beyond the prosecutor’s personal knowledge, it carries with it the obligation to inquire whether the Department is in possession of evidence favorable to the defense. “Favorable” means the evidence helps the defense or hurts the prosecution.

While the prosecutor has a *Brady* obligation to disclose evidence that favors the defendant, Penal Code sections 832.7 and 832.8 render peace officer personnel records confidential. A criminal defendant seeking information from an officer’s personnel file must file a *Pitchess* motion demonstrating good cause for the disclosure. If the motion is granted, a court reviews the file *in camera* and provides the defendant any information therein deemed relevant. This same process applies to the prosecution’s efforts to obtain information from a peace officer’s file. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

Some law enforcement agencies have created so-called *Brady* lists, identifying officers whom the agency has identified as having potential impeachment information in their personnel files, (for example, a sustained charge of dishonesty or moral turpitude), which may need to be disclosed to the defense under *Brady*.

Procedural History

In 2016, LASO created a *Brady* list, containing the names of roughly 300 deputies with sustained

administrative findings for violating certain Department policies (false statements, obstruction of an investigation, immoral conduct, unreasonable force and family violence, to name a few) in their files. The Department advised the affected deputies, that it intended to disclose "the names of employees with potential exculpatory or impeachment [*Brady*] material in their personnel file to the District Attorney".

The deputies' union, Association for Los Angeles Deputy Sheriffs (ALADS) obtained trial court injunction preventing LASO from disclosing the identity of deputies on the *Brady* list, absent compliance with the *Pitchess* procedures, except when a deputy is a potential witness in a pending prosecution.

The Court of Appeal then held that no disclosure of identities, *even if* the deputy is a witness in a pending criminal prosecution, is permissible absent a properly filed, heard, and granted *Pitchess* motion. With this ruling, LASO was prohibited from disclosing to the prosecutor, the names of deputies on the *Brady* list, even if the deputies were potential witnesses in a pending criminal matter.

The Supreme Court granted review to decide the following question: "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?"

Decision

The Supreme Court held that the Department may disclose to the prosecutor the names of potential witnesses in a pending criminal case, that have Brady material in their personnel files.

If an officer's personnel file is confidential, how did the Court come to this decision? The Supreme Court examined the *Pitchess* statutes against the prosecution's "Brady obligation" not to infringe on the defendant's right to a fair trial. In doing so, the Court found that the

Department's *Brady* list is confidential to the extent it was derived from confidential records. The Court also found that the Department does not violate the confidentiality of peace officer files by sharing with prosecutors the identity of potential witnesses on the *Brady* list because the "confidentiality" of peace officer records "[i]s not limited to complete anonymity or secrecy." Put differently, the Court suggested, deeming information "confidential" creates insiders (with whom information may be shared) and outsiders (with whom sharing information might be an impermissible disclosure). The Court remarked that the *Pitchess* statutes do not clearly indicate who constitutes an insider or outsider for the purposes of receiving information. Thus, the Court concluded that the Department **may** provide prosecutors with the *Brady* alert (names of officers with *Brady* material in their files who are potential witnesses in a pending criminal case) without violating the confidentiality of peace officer records.

What This Decision Means For You?

If you have material in your personnel file that causes you to be placed on a *Brady* list, and you are a potential witness in a pending criminal case, your Department can release your name to the prosecutor. The prosecutor will then seek to review the information in your personnel file to determine what, if anything, needs to be disclosed to the defense. The Court limited this disclosure to witnesses in a particular case who are included on a *Brady* list, but did not extend its ruling to allow the Department to forward the entire *Brady* list to the prosecution.

While the prosecution bears the ultimate responsibility for ensuring that *Brady* disclosures are made to the defense, the Court did not address whether it would violate the confidentiality of your personnel records for the prosecutor to share a *Brady* alert directly with the defense. Expect a court to rule that is permissible sometime soon.

Muna Busailah has been a partner in the firm for 24 years and representing peace officers in police law and litigation cases, in administrative, state and federal venues for 26 years.