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## **L.A. SHERIFF BARRED FROM DISCLOSING *BRADY* LIST NAMES TO PROSECUTORS<sup>1</sup>**

*Association for Los Angeles Deputy Sheriffs v. Superior Court*

*(Los Angeles County Sheriff's Department)*

B280676, filed July 11, 2017

On March 24, 2017, our law firm filed an *amicus curiae* brief in the above-referenced case in support of the Association for Los Angeles Deputy Sheriffs (ALADS), on behalf of the Riverside Sheriffs' Association (RSA), the Los Angeles Police Protective League (LAPPL) and the Southern California Alliance of Law Enforcement (SCALE). The primary concern of all these organizations was whether a law enforcement agency, in this case the Los Angeles Sheriff's Department (LASD), could disclose *Brady* list deputies to the district attorney, or other prosecution agency, when those deputies are potential witnesses in a pending criminal prosecution, even in the absence of a properly

filed, heard, and granted *Pitchess* motion. We took the position that such disclosure is prohibited, because it would violate *Pitchess* and the *Pitchess* statutes, and was not required by constitutional due process, as construed in *Brady*. The Court of Appeal, in a majority decision agreed, and struck the trial court's order that would have permitted such disclosure.

In *Brady v. Maryland (Brady)*, the United States Supreme Court held that constitutional due process creates an affirmative obligation on the part of the prosecution, whether or not requested by the defense, to disclose all evidence within its possession that is exculpatory to a criminal defendant. Exculpatory evidence under *Brady*

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<sup>1</sup>Updated October 2017.

includes impeachment evidence. The prosecution's disclosure obligation under *Brady* 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.

In this case, the LASD created a so-called "*Brady*" list of deputies, whose personnel files contain sustained allegations of misconduct, allegedly involving moral turpitude or other bad acts relevant to impeachment. The LASD proposed to disclose that list to the district attorney, as well as to other prosecution agencies that handle LASD investigations, so that prosecutors in individual cases could file *Pitchess* motions to discover the underlying misconduct or advise the defense of the disclosure, so the defense could file its own *Pitchess* motion. ALADS opposed disclosure of the *Brady* list and filed an action seeking an injunction to prohibit disclosure of the list, or any individual on the list, to anyone outside the LASD, including prosecutors, absent complete compliance with the *Pitchess* statutes.

The California Supreme Court, in *Pitchess v. Superior Court (Pitchess)*, held that under certain circumstances, and upon an adequate showing, a criminal defendant may discover information from a peace officer's otherwise confidential personnel file that is relevant to his or her defense. The California Legislature

codified what became known as *Pitchess* motions in *Penal Code* §§ 832.7 and 832.8, and *Evidence Code* § 1043 through 1045 (the *Pitchess* statutes). The *Pitchess* statutes require a criminal defendant to file a written motion that establishes good cause for the discovery sought. 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.

The trial court in this case issued a preliminary injunction which prohibited general disclosure of the *Brady* list to the district attorney. The injunction, however, expressly allowed disclosure of the identity of individual deputies on the list to prosecutors, in the absence of compliance with the *Pitchess* statutes, so long as any disclosed deputy is also a potential witness in a pending criminal prosecution. The trial court acknowledged that such a disclosure would violate the *Pitchess* statutes, but held a filed criminal case triggers *Brady*, and the LASD, as part of the prosecution team, then had a "*Brady* obligation" to disclose exculpatory evidence in its possession.

The Court of Appeal determined the trial court's decision was the same as finding that the *Pitchess* statutes' disclosure prohibition is "unconstitutional" in the particular context of a filed prosecution, where a *Brady* list deputy is a

potential witness. The Court concluded that there is simply no lawful way to judicially approve a violation of state law unless compelled to do so by a higher authority - in this case, that would be the United States Constitution, as construed in *Brady*. If, as the trial court concluded, *Brady* compels the LASD to violate state law, 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.”**

Fortunately, the Court of Appeal decided otherwise. Noting that the California Supreme Court and, at least, one Court of Appeal have examined the constitutionality of *Pitchess* and the *Pitchess* statutes in light of *Brady*, and found no constitutional infirmity, the Court ruled that these relevant cases support the position taken by ALADS, and granted the relief sought - striking the language in the trial court’s injunction that would have permitted such disclosure.

If the Court of Appeal had ruled otherwise, “every local law enforcement agency in the state” would then be required to “notify the prosecutor whenever one of their peace officers has a founded allegation of misconduct involving moral turpitude in his or her personnel file, so long as that officer is also a potential witness in

a pending criminal case.” A recent article in the Los Angeles Times, noted that “police agencies in at least a dozen counties in California regularly do precisely” that - i.e., give “prosecutors the names of problem officers”. In the ALADS case, the Court noted the California Highway Patrol has a system similar to that proposed by the LASD. The Court also mentioned that a recent Supreme Court decision, *People v. Superior Court (Johnson)*, commented positively about a similar procedure created by the San Francisco Police Department - stating the Department “laudably established procedures to streamline the *Pitchess/Brady* process.” Since the LASD relied largely on that decision to support its argument in this case, it can be expected the Department will file a petition for review in the Supreme Court, asking that court to overturn this decision. It will be interesting to see how the Supreme Court will react to such a request.

#### **UPDATE:**

As expected, on October 11, 2017, the California Supreme Court granted review in this case. When granting the petition for review, the California Supreme Court directed the parties to brief the following 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 his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion?

It is necessary to note the language the Court chose to use in its direction to the parties - "may the agency disclose to the prosecution" - not "is the agency required to disclose to the prosecution", as if the decision by the agency to disclose such information might be optional. The Court also used the phrase - "[w]hen a law enforcement agency creates an internal *Brady* list" - to preface the issue, as if the Court's decision would not apply to any agency that decides, for whatever reason, not to compile such a list (using its internal personnel records). Finally, the Court did not request the parties to discuss if, in light of *Brady*, the *Pitchess* statutes are unconstitutional.

It will be interesting to see if the Court has decided to "duck" the issues that made this case so important to the ACLU and criminal defense organizations, and if the parties will actually restrict themselves, and limit their arguments to the one issue in the Court's direction. For now, we believe the Los Angeles County Sheriff, and the groups that supported his decision to create the list in the first place, will

continue to insist the *Brady* decision required him to act as he did, and disclosure of such material is mandated by the U.S. Constitution in every pending criminal prosecution where a peace officer is a potential witness.

Stay safe!

**Michael P. Stone** is the founder and principal partner of Stone Busailah, LLP. His career in police and the law spans 50 years. He has been defending law enforcement for 36 years in federal and state, criminal, civil, administrative and appellate litigation.

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