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PERSPECTIVE

Union loss on *Brady* list disclosure may actually be greater gain

By Daniel S. Roberts

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Recent controversial police shootings have led to heightened public scrutiny of the police in the media, the legislative floor, and courtrooms. In California, this has included a reexamination of the confidentiality of police officers' personnel records. California law has long favored officers' privacy in their personnel files. Peace officer personnel files, records of complaints made against such officers for alleged misconduct, and information derived from those sources, are declared confidential by statute.

In 2018, the California Legislature substantially amended that statutory protection to allow greater public access to the background of public safety officers. Senate Bill 1421 made certain police personnel records subject to inspection under the Public Records Act. Specifically, items related to the report, investigation, or findings of police shootings, police use of force resulting in death or great bodily injury, and sustained findings of sexual assault and dishonesty are no longer confidential.

Even prior to SB 1421, however, the confidentiality of police officer personnel files was subject to two important exceptions necessary to preserve an accused's due process right to a fair trial. The *Pitchess* statutes (Evidence Code Sections 1043-1047 and Penal Code Sections 832.5, 832.7, and 832.8 — named for the California Supreme Court's 1974 decision in *Pitchess v. Superior Court*, which was codified in 1978) have long allowed discovery from an officer's personnel file, subject to statutory restrictions and procedural requirements. The U.S. Constitution, as interpreted in *Brady v. Maryland* and its progeny, places on the government — both the prosecutor and the investigating agency — an affirmative duty to disclose to a criminal defendant evidence that is favorable to the accused and material either to guilt or punishment, even if such information is contained in a personnel file.

In order to comply with their *Brady* obligations, and to allow their prosecutorial counterparts to do the same, some law-enforcement agencies have created so-called "*Brady* lists" of officers in their employ who have potential exculpatory or impeachment information in their personnel files. When an officer on the *Brady* list is identified as a potential material witness, the agency discloses that fact to the prosecutor. The prosecutor may suggest to defense counsel to bring a *Pitchess* motion to obtain discovery of that information.

Despite the California Supreme Court describing this practice as "laudabl[e]," when the Los Angeles County Sheriff's Department recently followed such a path, its deputies' union sued to block disclosure of information from the *Brady* list to prosecutors. The deputies claimed that the *Brady* list was confidential, and could not be disclosed even to the prosecutor without the prosecutor's bringing a Pitchess motion and showing good cause for disclosure.

The case, *Association for Los Angeles Deputy Sheriffs v. Superior Court*, 2019 DJDAR 8165 (Aug. 26, 2019), required the California Supreme Court to navigate "the relationship between prosecutors' constitutional duty to disclose information to criminal defendants and a statutory scheme that restricts prosecutors; access to some of that information." The court acknowledged that because the *Brady* list was derived from information contained in personnel files, at least some of which remains confidential even after the passage of SB 1421, the list itself is confidential.

Nevertheless, the court found that the statutory confidentiality provisions did not prohibit an agency advising the prosecutor that a particular officer was on the *Brady* list. It unanimously reasoned that although personnel information is declared by statute to be "confidential," it is not completely secret from everyone. Rather, the statutory determination protects that information from indiscriminate publication — it creates "insiders" with whom such information may be shared and "outsiders" to whom disclosure of such information is prohibited. The court then determined that, within the context of *Brady* disclosures — for which the entire government team (investigating agency and prosecutor) is responsible — the prosecutor is an "insider" with whom the *Brady* list (or alert) may be shared without breaching its statutory confidentiality. At first glance this may appear to be a further erosion of an officer's confidentiality in his or her personnel files or a further change of the rules governing police interaction with the community they serve and protect, especially following so closely after the passage of SB 1421. After all, the deputies' union (and a half dozen other police officers' associations as amici curiae) fought the issue all the way to the California Supreme Court in order to prevent such disclosure to prosecutors.

In reality, the decision is not a great blow to officers' privacy protections. The Supreme Court's unanimous decision actually harmonizes the confidentiality provisions in the Penal and Evidence Codes with the already-existing constitutional requirements of *Brady*. The ruling actually protects the statutory confidentiality in police personnel files. As the court acknowledged, "*Brady* imposes on prosecutors 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in [a] case, including the police,'" and "[p]rosecutors are deemed constructively aware of *Brady* material known to anyone on the prosecution team and must share that information with the defense." With that understanding, the court reasoned, "interpreting the *Pitchess* statutes to prohibit *Brady* alerts would pose a substantial threat to *Brady* compliance." *Brady* compliance, being a requirement of the U.S. Constitution, would obviously trump the confidentiality provisions of the *Pitchess* statutes.

But for the court's interpretation of those confidentiality provisions to treat prosecutors as "insiders" able to receive the confidential *Brady* lists or alerts, the confidentiality scheme in the *Pitchess* statutes may have been at even greater risk, at least in part. Ironically, the deputies' union's loss in preventing disclosure of the derivative *Brady* list to prosecutors may have been to its greater gain by preventing an even greater breach of the confidentiality provisions in the *Pitchess* statute necessary to satisfy the *Brady* requirements. ■

Dan Roberts *is the managing partner of Cole Huber LLP's Southern California office in Ontario. He focusses his practice on municipal litigation, including police-liability matters.*

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