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PERSPECTIVE

Ruling preserves constitutionality of Pitchess laws, for now

By Naeun Rim

In a unanimous decision that provided much-needed clarity to prosecutors and law enforcement agencies across the state, the California Supreme Court held in *ALADS v. Superior Court*, 2019 DJDAR 8165 (Aug. 26, 2019), that a law enforcement agency does not violate California officer confidentiality statutes — also known as *Pitchess* statutes — by alerting prosecutors to the fact that an officer's personnel file may contain *Brady* material. Using a common sense approach to the meaning of "confidentiality," the court concluded that while *Brady* lists contain "confidential" officer personnel information, law enforcement agencies do not violate that confidentiality by informing the prosecution that a potential witness is on a *Brady* list. That is because, where there is a pending criminal case, the prosecutor is considered an "insider" with whom a police agency may share limited confidential information to fulfill the government's constitutional *Brady* requirements.

The *ALADS* decision substantially alleviates the constitutional crisis created by the Court of Appeal, which held two years ago that it was illegal under state law for police agencies to provide *Brady* alerts in the absence of a successful *Pitchess* motion. The now-reversed decision was contrary to well-established law that prosecutors must affirmatively turn over material evidence favorable to the defense, including impeachment evidence regarding officers on the prosecution team, *even if the defense does not ask for it*. The Court of Appeal's majority opinion forced prosecutors and law enforcement agencies to risk committing *Brady* violations on a daily basis by requiring police agencies to hide from prosecutors *known Brady information* they had gathered from officer personnel files. The California Supreme Court was right to reverse that decision, and it did so in a thorough and well-reasoned opinion.

But while the court managed yet again to sidestep a zero-sum showdown between *Brady* and the *Pitchess* statutes, the tension between the two remains unresolved. *See ALADS*, 2019 DJDAR at 8173 ("To be clear, we do not suggest that permitting *Brady* alerts completely resolves the tension between *Brady* and the *Pitchess* statutes."). Even under the *ALADS* decision, the *Pitchess* statutes give police agencies absolute control over what confidential information in an officer's personnel file a prosecutor may access. This unfettered discretion conflicts with *Brady*'s mandate that prosecutors be the ones to *affirmatively seek out* information impacting a testifying officer's credibility — information that is often located in officer personnel files, which the *Pitchess* statutes prohibit prosecutors from reviewing. By nature, the two doctrines are incompatible, and future clashes are inevitable.

Using a common sense approach to the meaning of 'confidentiality,' the court concluded that while Brady lists contain 'confidential' officer personnel information, law enforcement agencies do not violate that confidentiality by informing the prosecution that a potential witness is on a Brady list.

The *ALADS* court itself foreshadowed questions that are likely to bring the conflict back to the forefront. What happens, for example, with police agencies that do not have a policy of compiling *Brady* lists or a practice of looking at the personnel files of officers who are testifying in a criminal case? Or with officers who have information in their personnel files that meet the requirements of *Brady* but are not placed on a *Brady* list? The *ALADS* decision soundly reaffirmed the well-established principle that law enforcement agencies, as part of the prosecution team, are also subject to *Brady* requirements and must share *Brady* evidence with prosecutors — but who will ensure that they comply? If prosecutors cannot review officer personnel files, they must necessarily rely on law enforcement agencies to conduct the review in the first instance and trust them to truthfully report the existence of all *Brady* evidence.

Yet allowing law enforcement agencies to be the sole arbiters of what constitutes *Brady* evidence in an officer's personnel file still raises serious constitutional concerns. The prosecution's duty to comply with *Brady* is supposed to be "nondelegable" — meaning that it is the prosecutor who bears the ultimate responsibility of ensuring that the entire prosecution team complies with *Brady*. *See In re Brown*, 17 Cal. 4th 873, 881 (1998). How, then, can the *Pitchess* statutes exist in "harmony" with *Brady* when those statutes provide no way for a prosecutor to independently assess whether a law enforcement agency has properly reviewed an officer's personnel file for *Brady* evidence? The restriction on prosecution access to potential *Brady* evidence is the part of the *Pitchess* statutes that is the most difficult to reconcile with the constitution. The *ALADS* decision, while an excellent step in the right direction, did not undo that conundrum.

Moreover, although *ALADS* answered the question of whether police agencies may provide prosecutors with *Brady* alerts, the court expressly declined to address whether it would "violate confidentiality for a prosecutor to share [a *Brady*] alert with the defense." *See ALADS*, 2019 DJDAR at 8174. Given that *Brady* is a constitutional disclosure obligation to the defense, a determination that *prosecutors* can have access to *Brady* alerts solves only half the equation. Which begs the question: If the *ALADS* holding relies on the idea that prosecutors can be considered "insiders" with whom law enforcement can share "confidential" information in limited circumstances, can defendants be considered "insiders" as well for the limited purpose of receiving a *Brady* alert?

Arguably, the court hinted that the answer is "yes" by coyly citing to its decision in *People v. Superior Court (Johnson)*, 61 Cal. 4th 696 (2015), just after musing about the issue. In *Johnson*, the court confirmed that *Pitchess* confidentiality statutes prohibit prosecutors from directly reviewing the personnel files of officers even if they are on a *Brady* list. The court was able to avoid finding this aspect of the *Pitchess* statutes in conflict with the affirmative nature of *Brady*, however, by finding a creative workaround — it held that prosecutors could still meet their affirmative *Brady* obligations by sharing *Brady* alerts they received from the police with counsel for the defense, who could then file *Pitchess* motions.

That compromise only worked, however, because the parties in *Johnson* assumed that sharing *Brady* alerts was permissible between both (1) law enforcement and prosecutors *and* (2) prosecutors and defense counsel. While *ALADS* has confirmed that the first is correct, it is silent on the second. It is always possible that, when faced with the issue, the court would decline to include defendants and defense counsel in the group of "insiders" who can receive confidential *Brady* alerts. But if the court concludes that it is illegal for prosecutors to provide *Brady* alerts to the defense, *Johnson* falls apart — and the court would yet again be forced to confront whether a statutory scheme that prevents prosecutors from sharing known *Brady* information with defendants can truly be constitutional.

For now, however, prosecutors and officers can breathe a sigh of relief that the controlling case on *Brady* alerts no longer forces them to have to choose between breaking California law or violating the United States constitution. The California Supreme Court did what it had to do in *ALADS* to restore the right to a fair trial in California without having to strike down a statutory scheme designed to protect officer privacy interests. While the *ALADS* decision does not end the war between *Brady* and *Pitchess*, it does a fine job of calling a truce — even if only temporarily. ■

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