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JONES & MAYER

Attorneys at Law

3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: Gregory P. Palmer

JUST WHEN YOU THOUGHT THE BRADY/PITCHESS DISCUSSION WAS OVER……..

The Second District Court of Appeal in Los Angeles issued a 2-1 opinion on July 11, 2017 in the case of Association for Los Angeles Deputy Sheriffs ("ALADS") v. Superior Court (Los Angeles County Sheriffs Department) (B280676) which will likely upset the careful balance which had been achieved in handling Brady & Pitchess issues in the past.

Background

In 2015, the California Supreme Court issued an opinion entitled People v. Superior Court (Johnson) 61 Cal.4th 696. In that case, the Supreme Court analyzed a policy negotiated between the San Francisco Police Department ("SFPD") and the San Francisco District Attorney ("SFDA"), whereby if SFPD knew or suspected that a San Francisco police officer had Brady material in their personnel file, the SFPD would inform the SFDA, only in summary form, the nature of the Brady information when that officer was a witness in a criminal case. The Supreme Court described that policy in very positive terms; calling it a "laudable" policy.

The Supreme Court then held that once that disclosure is made to the SFDA all the SFDA had to do to comply with its Brady obligation is to inform defense counsel that the witness/officer may have Brady material in their file. Once informed, it then becomes incumbent of defense counsel to decide whether a Pitchess motion is necessary to obtain the information. Indeed, the Supreme Court held it is defense counsel who is in a better position to determine whether a Pitchess motion is necessary at all, whereas a prosecutor would have to file a Pitchess motion in virtually every case in which Brady material was thought to exist.

The Johnson case resolved, we thought for the last time, the careful interplay between Brady and Pitchess, until now.

In ALADS, likely in response to the Johnson case, the Los Angeles Sheriff's Department ("LASD") convened a Commander's Panel which reviewed every deputies' personnel file for potential Brady material. The Panel identified approximately 300 individual deputies who had administratively founded allegations of misconduct involving moral turpitudinous type behavior which would likely constitute Brady material. The Panel then created a "Brady" list of these deputies, identified by name and serial number only. That list was then intended to be shared with prosecuting agencies who handle LASD cases. The actual records which comprise the Brady material were never going to be disclosed, absent a Pitchess motion.

ALADS filed a writ petition seeking a restraining order prohibiting the LASD from disclosing the Brady list to prosecuting agencies.

The trial court issued a ruling which held that:

1. LASD is entitled to prepare its own internal Brady list, but;
2. LASD may disclose the Brady list to prosecutorial agencies in Los Angeles County when the deputies are involved as witnesses in an actual criminal prosecution.

The court said:

> "Essentially, the trial court held that when a deputy on the list is a potential witness in a pending prosecution, Brady creates a federal constitutional disclosure obligation that overrides the state-created confidentiality restrictions of Pitchess and the Pitchess statutes. When a deputy on the list is not involved as a witness in a particular filed prosecution, however, the Brady disclosure obligation is not triggered, and the LASD cannot violate its statutory confidentiality obligation by disclosing names from the list to outside prosecutors in the absence of a properly filed, heard, and granted Pitchess motion.
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> Based upon its analysis, the trial court concluded that ALADS was likely to succeed on the merits in terms of preventing the wholesale disclosure of the entire Brady list to the district attorney, but was not likely to succeed in terms of preventing disclosure of individual deputies from the list when such deputies were witnesses in filed prosecutions. The trial court also concluded that general disclosure of the list would cause irreparable harm to the reputations of the deputies on the list, while an order enjoining such disclosure would cause no comparable harm to real parties.

ALADS appealed that decision to the Second District Court of Appeal. While the Court of Appeal upheld that portion of the order which allowed LASD to prepare its own Brady list for internal purposes, it found fault with and eventually reversed the trial court's ruling that the list could be shared with prosecutors when the deputy is a witness in a criminal case. The Court held that the mere disclosure of the inclusion of a particular deputies name on the Brady list also necessarily includes the deputies name as linked to a sustained finding of misconduct, which is a confidential portion of a deputies personnel file and may not be disclosed in a criminal or civil proceeding without a Pitchess motion.

Discussion

The majority of the court addressed the apparent conflict between the decision it was making and the Supreme Court's decision in Johnson, supra, as follows:

> As significant as what Johnson decides, however, is what it does *not* decide: Johnson does not decide and, in fact, the Johnson court does not mention, let alone discuss, the legality under Pitchess of the Department's initial disclosure to the district attorney that the two officers had Brady material in their personnel files. Neither the parties nor the court ever raised that issue. In fact, by the time the prosecutor in Johnson filed her Pitchess motion, the Order had been in place for over three years. (Johnson, supra, 61 Cal.4th at pp. 706, 724, appen.)
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> Thus, at the time of the Johnson case, the Order was essentially a fait accompli. It is unknowable, from the Johnson opinion, (the Court stated), why the legality of the order was not raised in that, or an earlier case. Whatever the reason, Johnson simply does not address the central issue of our case: the statutory legality of a law enforcement agency disclosing to an outside prosecutorial agency, absent a filed, heard, and court-granted Pitchess motion, the fact that a peace officer has founded allegations of misconduct in his or her personnel file and, to the extent such disclosure is illegal under state law, whether it is nevertheless constitutionally compelled by Brady and constitutional due process.

This majority of the court also addressed the Supreme Court's positive remarks about the San Francisco Brady Policy. It said:

> It is true that Johnson comments positively about the procedure created by the San Francisco Police Department: "[i]n this case, the police department has laudably established procedures to streamline the Pitchess/Brady process." (Johnson, supra, 61 Cal.4th at p. 721.) But such brief comment, in the context of a procedure whose legality is neither directly raised nor expressly addressed in the opinion, is not the same as formal legal approval. "'It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.'" (Kinsman v. Unocal Corporation (2005) 37 Cal.4th 659, 680, quoting Chevron U.S.A., Inc. v. Workers' Compensation Appeals Board (1999) 19 Cal.4th 1182, 1195; accord People v. Knoller (2007) 41 Cal.4th 139, 154-155.) Put another way,"[a]n appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.'" (Santisas *v.* Goodin (1998) 17 Cal.4th 599, 620, quoting Childers v. Childers (1946) 74 Cal.App.2d 56, 61.)

Based on the above, in a 2-1 opinion, the Court of Appeal reversed the trial court and ordered that it strike from the injunction any language that allowed the disclosure of the Brady list to any individual outside LASD, even a prosecutor, and even when the Deputy

is a witness in a pending criminal case, absent a Pitchess motion.

HOW THIS AFFECTS YOUR AGENCY

At least for now, until and unless the Supreme Court depublishes the case or it accepts a petition for review from LASD, law enforcement agencies in the Second District Court of Appeal jurisdictional boundaries (Los Angeles, Ventura, Santa Barbara and San Luis Obispo) are prohibited from essentially "tattling" on its officers to the district attorney that the individual officer has or may have Brady materials in their personnel file.

We believe there is a good chance the Supreme Court may view the case differently. Justice Grimes, in his dissenting opinion, said it best when he wrote the decision made by the majority in the case will essentially mean a prosecutor now has to do a Pitchess motion in every case to ensure its Brady obligation is satisfied. This was the exact problem the Johnson case avoided.

Justice Grimes went even further and said:

> A Pitchess motion cannot be made unless the prosecutor knows the identity of the officer in question. (Pitchess motions require, among other things, "[i]dentification of . . . the peace or custodial officer whose records are sought . . . ." (Evid. Code, §1043, subd. (b)(1).)) So, the real effect of the majority's holding would seem to be either (1) to prevent entirely any disclosure of the identity of a Brady-list officer by the Department to the prosecutor, or (2) to require the prosecutor to make Pitchess motions for every officer involved in a pending criminal case (though it is hard to see how the requisite "good cause" could be shown), or (3) to require the prosecutor to risk the consequences of possible failure to disclose exculpatory Brady material to the defendant. This is an unacceptable and, in my view, entirely unnecessary conundrum, created by the erroneous conclusion that the disclosure permitted by the trial court violates the Pitchess statutes. No case has so held and, as discussed above, the Copley Press line of cases does nothing, in my view, to advance the majority's position.

As always, if you wish to discuss this matter in greater detail, please feel free to contact us at (714) 446 – 1400 or via email at gpp@jones-mayer.com.

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