POINTS AND AUTHORITIES

The District Attorney of Alameda County Presents a Weekly Video Survey of Criminal Law Approved for Credit Toward California Criminal Law Specialization: #172 The Alameda County District Attorney's Office is a State Bar of California Approved MCLE Provider.

Week Of	Topic	Guest	
Sept. 3, 2019	Supreme Court weighs in on *Brady* Alerts (*ALADS*); Text Messages as Adoptive Admissions (*McDaniel*)	Edward Vieira-Ducey	Ethics 20 min General 10 min

Association for Los Angeles Deputy Sheriffs v. Superior Court **__ Cal.5th __ [2019 WL 4009133]**

Below are highlights from this decision. The California Supreme Court, in a unanimous decision, concludes that when a peace officer is on a *Brady* list and is a potential witness in a criminal prosecution, the Sheriff's Department may share with prosecutors that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file (*Brady* alert.)

I. The Issue

A prosecutor in a criminal case must disclose to the defense certain evidence that is favorable to the accused. (*Brady v. Maryland* (1963) 373 U.S, 83.) This duty sometimes requires disclosure of evidence that will impeach a law enforcement officer's testimony. Even if an officer is not personally aware that such evidence is exists, such disclosure is still required. The prosecutor has an obligation to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley* (1995) 514 U.S. 419, 437

However, the *Pitchess* statutes restrict a prosecutor's ability to learn of and disclose certain information regarding law enforcement officers. "Most notably, Penal Code section 832.7 renders confidential certain personnel records and records of citizens' complaints, as well as information 'obtained from' those records. (Pen. Code, § 832.7, subd. (a).) Upon a motion showing good cause, a litigant may obtain a court's in camera inspection of the confidential information and, possibly, win the information's disclosure. But the less reason there is to believe that an officer has engaged in misconduct, the harder it is to show good cause." (p.*1.)

"In part to address this issue, some law enforcement agencies have created so-called *Brady* lists. These lists enumerate officers whom the agencies have identified as having potential exculpatory or impeachment information in their personnel files — evidence which may need to be disclosed to the defense under *Brady* and its progeny. Disclosure of the fact that an officer is on a *Brady* list both signals that it may be appropriate to file a motion seeking in camera inspection and helps to establish good cause for that inspection." (p.*1.)

Here is the question decided by the Supreme Court in this case: *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?* The Supreme Court concludes that the *Pitchess* statutes permit such disclosure.

II. The Applicable Law

A. *Brady v. Maryland* (1963) 272 U.S. 83

Under *Brady*, a prosecutor must disclose to the defense evidence that is "favorable to [the] accused" and "material either to guilt or to punishment." (*Brady*, *supra*, 373 U.S. at p. 87.) Evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Evaluating materiality requires consideration of the collective significance of the undisclosed evidence as well as the effect of the nondisclosure on defense investigations and trial strategies. A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. (p.* 6.)

B. *Pitchess*

The California Supreme Court in *People v. Mooc* (2001) 26 Cal.4th 1216, 1219, "recognized that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge." The threshold question under the *Pitchess* statutes is whether the information requested is confidential. (See Pen. Code, § 832.7.) If it is, the information may generally be disclosed only "by discovery pursuant to" Evidence Code sections 1043, 1045, and 1046. (p.*4.)

Under the requirements of the *Pitchess* statutes outlined in Evidence Code section 1043, the party seeking disclosure must file a written motion and give notice to the agency with custody and control of the records. Among other things, the motion must identify the officer or officers at issue; describe "the type of records or information"; and, by affidavit, show "good cause for the discovery or disclosure sought."

The "good cause" requirement has two components. First, the movant must set forth "the materiality" of the information sought "to the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).) In other words, requests for officer information must be relevant to the pending charges. Second, the "good cause" requirement obliges the movant to articulate "a 'reasonable belief' that the agency has the type of information sought. This belief may be based on a rational inference. The function of the "good cause" requirement at this stage of the *Pitchess* process

is to determine whether the information will be reviewed in camera. Thus, the burden is not high.

When a court determines that the movant has made a sufficient showing to justify in camera inspection, the custodian must bring to court the relevant documents. The court must examine the documents out of the presence of all persons except the person authorized to claim the privilege and such others as that person is willing to have present. After conducting the in camera review, a court has discretion regarding which documents, if any, to disclose to the movant. The court must disclose information that is favorable to the defense and material within the meaning of *Brady.* (pp.*5-6.)

III. Analysis

A. The Sheriff's Department *Brady* list is confidential

1. Penal Code section 832.7(a) creates three categories of confidential information pertaining to law enforcement:

The first category is "personnel records of peace officers and custodial officers." Among other things, this category keeps confidential certain records that relate to "[e]mployee ... discipline" (Pen. Code, § 832.8, subd. (a)(4)) or certain "[c]omplaints, or investigations of complaints, ... pertaining to the manner in which [the employee] performed [the employee's] duties" (*id*., § 832.8, subd. (a)(5).)

The second category of confidential information encompasses "records maintained by any state or local agency pursuant to [Penal Code] Section 832.5." (§ 832.7(a).) Section 832.5 "requires '[e]ach department or agency in [California] that employs peace officers [to] establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies ....' "

The third category of confidential information is "information obtained from" the prior two types of records. (§ 832.7(a). Stated differently, information that was acquired from those records. (pp.*6-7.)

2. Senate Bill 1421 made certain records non-confidential

Section 832.7(a) was amended by Senate Bill 1421 to exclude certain information from the confidentiality provision. Any portion of a *Brady* list based on these types of records is not confidential, and section 832.7(a) does not restrict dissemination of such information.

The first category deemed nonconfidential are records "relating to the report, investigation, or findings" of an incident in which an officer (i) discharged a firearm at a person or (ii) used force against a person resulting in death or great bodily injury. (Pen. Code, § 832.7, subd. (b)(1)(A).)

The second category are those records "relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency" that an officer "engaged in sexual assault

involving a member of the public." (Id., § 832.7, subd. (b)(1)(B)(i).)

The third category is "[a]ny record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." (Id., § 832.7, subd. (b)(1)(C); subd. (b)(2)-(4).)

Note: The Supreme Court says it is not suggesting that nonconfidential records must be fully disclosed, at any time under the California Public Records Act. As amended, Penal Code section 832.7 contemplates that it may be appropriate for an agency to redact records (*id*., § 832.7, subd. (b)(5)-(6)) or to delay disclosure of records to avoid interference with certain investigations or enforcement proceedings (*id*. § 832.7, subd. (b)(7).)

3. The record does not support a conclusion that the *Brady* list is nonconfidential

The Supreme Court states that even putting the categories of section 832.7 aside, "there is no serious question" that the deputies on the Sheriff Department's list are peace officers, and that the list was created by reviewing their personnel files. Therefore, the identities of officers on the *Brady* list constitute "information obtained from" "the personnel records of peace officers." (§ 832.7(a).) "The *Brady* list is a catalog of officers with a particular kind of discipline-related information in their personnel file. It was derived from information in those files. "It follows that, barring the applicability of an exception, the *Pitchess* statutes render confidential the identities of officers on the *Brady* list." (*Id.* at p.*9.)

B. The Sheriff's Department May Share Even Confidential Portions of Its *Brady* List with Prosecutors

The Supreme Court concludes that the confidentiality created by the *Pitchess* statutes does not forbid the limited disclosure to the prosecutors in this case. It states that Penal Code section 832.7(a) permits the Sheriff's Department to share *Brady* alerts with prosecutors

The Supreme Court states: "There can be no serious doubt that confidential personnel records may contain *Brady* material. An officer may provide important testimony in a criminal prosecution. Confidential personnel records may cast doubt on that officer's veracity. Such records can constitute material impeachment evidence. These are not close questions." (p.* 11, citation omitted.)

The Court states further: "Because confidential records may contain *Brady* material, construing the *Pitchess* statutes to permit *Brady* alerts best 'harmonize[s]' *Brady* and *Pitchess*. [Citation.] *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.' [Citation.] Prosecutors are deemed constructively aware of *Brady* material known to anyone on the prosecution team and must share that

information with the defense. [Citation.] In this context, construing the *Pitchess* statutes to cut off the flow of information from law enforcement personnel to prosecutors would be anathema to *Brady* compliance." (*Id*. at p.*11.)

The Court notes that although prosecutors may file *Pitchess* motions as appropriate, without *Brady* alerts, "prosecutors may be unaware that a *Pitchess* motion should be filed — and such a motion, if filed, may not succeed. Thus, interpreting the *Pitchess* statutes to prohibit *Brady* alerts would pose a substantial threat to *Brady* compliance. (p.*11.)

The Court also said prohibiting *Brady* alerts "would also put deputies in a precarious position. The Fourteenth Amendment underlying *Brady* imposes obligations on states and their agents — not just, derivatively, on prosecutors. Law enforcement personnel are required to share *Brady* material with the prosecution. [Citation]. The harder it is for prosecutors to access that material, the greater the need for deputies to volunteer it." (p.*11.)

The Supreme Court also disagreed with the Deputies' Association that "'*Brady* relates only to the prosecutor'" and that *Brady* "'does not impose obligations on law enforcement.'" (p.*12.) While the prosecution bears *ultimate* responsibility for ensuring that necessary disclosures are made to the defense, this does not mean law enforcement personnel have no role to play. "This is not to imply that *Brady* alerts are a constitutionally required means of ensuring *Brady* compliance; only that disclosure of Brady material is required, and that *Brady* alerts help to ensure satisfaction of that requirement." *(Ibid*.)

The Court states: "To be clear, we do not suggest that permitting *Brady* alerts completely resolves the tension between *Brady* and the *Pitchess* statutes. Not all departments maintain *Brady* lists. And nothing guarantees that a *Brady* list will reflect all information that might prove 'material' in each particular case. (*Brady*, *supra*, 373 U.S. at p. 87.) But when a department seeks to transmit a *Brady* alert to prosecutors, allowing the department to do so mitigates the risk of a constitutional violation. With *Brady* in mind . . . , the term "confidential" (§ 832.7(a)) must be understood to permit such alerts." (p.*13)

Finally, the Supreme Court concludes: "The question presented in this case concerns whether the [Sheriff's] Department may share confidential *Brady* alerts with prosecutors. We do not address whether it would violate confidentiality for a prosecutor to share an alert with the defense. [Citation.] And because this case concerns only *Brady* alerts, it provides no occasion to revisit whether prosecutors may directly access underlying records, or perhaps a subset of those records. (See Pen. Code, § 832.8, subd. (a)(4) ["discipline"], (5).) To resolve the question presented, it is enough to hold that the Department does not violate section 832.7(a) by 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." (p.*14.)

People v. David Lee McDaniel **__ Cal.App.5th __ 2019 WL 3852662**

This case illustrates the limitations of applying the Adoptive Admissions hearsay exception to text message exchanges

I. Factual and Procedural Background

Between June 2014 and October 2014, six separate establishments were robbed in the cities of Patterson and Westley in Stanislaus County. Law enforcement was able to obtain surveillance videos in all but one of the incidents. The robber's face was obscured in all the videos. Furthermore, no witness identified McDaniel as the robber in any of the robberies at issue. As the Court of Appeal states, "The case against McDaniel was therefore entirely circumstantial." (p.*2.)

The lead investigator testified that that the sheriff's office publicized the robberies, including by sending "local flyers" to other law enforcement agencies as well as press releases to various newspapers. The press releases included details of the robberies and images of the suspect (i.e., still shots obtained from video clips), whereby the suspect's photograph was released to the public. An article published in the local newspaper provided details of the robberies and asked for cooperation from the public in providing information about the robberies to the police and identifying the suspect. (p.*5.)

Eventually a "citizen" contacted the investigator and advised him that McDaniel was a "possible suspect." McDaniel lived in the vicinity of all the Patterson businesses that were robbed. The police were also advised of two other suspects, but those suspects were eventually excluded. (p.*5.)

McDaniel was arrested and interrogated, but denied any involvement in the robberies. An investigator from the District Attorney's Office testified at trial as a "cellular forensic expert." He testified that there was one cell phone tower in Patterson and one in Westley. McDaniel's phone was used somewhere in the area covered by the Patterson cell tower on the days on which the two of the robberies occurred. (p.*6.)

The defendant was convicted of nine counts of robbery relating to the robberies of five of the establishments. The defendant was acquitted of the robbery at the sixth establishment. The trial court found in a bifurcated proceeding that McDaniel's two prior robbery convictions were true.

II. Admission of Text Messages

The prosecutor sought to admit a September 10, 2014 text message exchange between a cell phone associated with McDaniel and a cell phone associated with McDaniel's mother. The Court of Appeal sets out the exchange, noting that abbreviations, spelling, and punctuation are contained in the original:

"[McDaniel]: Stop telling lies!!!

"[McDaniel]: That's why Johnny left yo nasty ass

"[Mother]: U r the 1 who needs to learn how 2 respect. I am ur mother and ur days r number

"[McDaniel]: Why are you so hateful

"[Mother]: *An that is why u will b locked up 4 robberey of the stores in this area* (Italics added.)

"[Mother]: Why do you feel u hv 2 b so nasty an fowl ur sick" (p.*6.)

The opinion states: "The prosecution filed a motion in limine to admit the text exchange between McDaniel and his mother, with a focus on the mother's statement to the effect, 'An that is why u will b locked up 4 robberey of the stores in this area.' Indeed, this statement is the reason why this text exchange was relevant, in the first place, to the disputed issue at trial, i.e., whether McDaniel was the perpetrator of all the charged robberies."

The prosecution, in its motion in limine, argued: "[McDaniel's] failure to respond to his mother['s] last text message where she accused him of committing the robberies in the area is admissible as an adoptive admission by [McDaniel] that he committed these robberies." (p.*6.) McDaniel filed a motion in limine to exclude the text message.

"At trial, a record from McDaniel's cellular carrier documenting the fact of the text exchange, as well as the content of the text messages, was admitted into evidence. The trial court in turn instructed the jury on adoptive admissions pursuant to CALCRIM No. 357. Subsequently, in closing argument, the prosecutor forcefully argued, with reference to the record of the text exchange, the content of the mother's text message, and the jury instruction on adoptive admissions, that McDaniel had failed to respond to his mother's statement and this failure amounted to an 'adoptive admission' on his part that he had in fact robbed stores in the local area."

III. Court's Analysis of the Text Messages

A. General

Evidence Code section 1221 states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the

limited purpose of showing the party's reaction to it. The person's silence, evasion, or equivocation may be considered as a tacit admission of the statement made in his presence. (*People v. Jennings* (2010) 50 Cal.4th 616, 661.)

The Court of Appeal here states that the case of *People v. Wilson* (1965) 238 Cal.App.2d 447, provides a useful summary of "the general rules as to the use of accusatory statements," in this context. *Wilson* states:

" 'Accusatory statements . . . are plain hearsay. They may properly find their way into the record only as admissions, under the familiar exception to the hearsay rule. If the accused responds to the statement with a flat denial, there is no admission and hence nothing that may be received in evidence. If, on the contrary, the truth of the statement is admitted, the statement may properly be introduced. A third situation is presented when the accused stands mute in the face of the accusation or responds with an evasive or equivocal reply. In that situation this court has held that under certain circumstances both the statement and the fact of the accused's failure to deny are admissible on a criminal trial as evidence of the acquiescence of the accused in the truth of the statement or as indicative of a consciousness of guilt.

" 'The theory underlying this rule is that the natural reaction of an innocent man to an untrue accusation is to enter a prompt denial. Where his response is silence, evasion, or equivocation, it is for the trial court to determine in the first instance whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. Where the trial judge determines that such an inference may be drawn, the statement is then admitted, not as substantive evidence in proof of the fact asserted but merely as a basis for showing the reaction of the accused to it.' " (*Wilson*, *supra*, 238 Cal.App.2d at p. 457.)

B. Application to McDaniel's Text Messages

As stated by the Court of Appeal, the prosecution's theory that the mother's statement was admissible to show an adoptive admission by McDaniel was based on the fact that McDaniel did not text his mother back to deny her indirect accusation that he had committed several local robberies. But the Court of Appeal stated: "[G]iven the nature of text messaging, the fact that McDaniel did not text his mother back was not sufficient to show that he had adopted his mother's statement. Text messaging is different from in person and phone conversations in that text exchanges are not always instantaneous and do not necessarily occur in 'real time.' Rather, text messages may not be read immediately upon receipt and the recipient may not timely respond to a text message for any number of reasons, such as distraction, interruption, or the press of business." (p.*12.)

"Furthermore, people exchanging text messages can typically switch, relatively quickly and seamlessly, to other forms of communication, such as a phone call, social-media messaging, or an in-person discussion, depending on the circumstances. In short, in light of the distinctive nature of text messaging, the receipt of a text message does not automatically signify prompt knowledge of its

contents by the recipient, and furthermore, the lack of a text response by the recipient does not preclude the possibility that the recipient responded by other means, such as a phone call." (p.*12.)

The Court of Appeal also noted that the text exchange here "was not instantaneous but rather unfolded over a 20-minute period until it stopped. There was no evidence as to whether and when McDaniel read the text message in which his mother suggested he had robbed multiple local stores. To the extent he read it, it was entirely possible he responded to it by calling his mother or talking to her in person. Considering the distinctive nature of text messaging, the instant record provides no basis for a conclusion, in the first instance, that McDaniel, with knowledge of his mother's statement, in fact failed to deny or respond to it and, in turn, that he thereby adopted it." (p.*13.)

The Court said, "Furthermore, the text exchange at issue captured a heated argument between McDaniel and his mother in which McDaniel had emphatically texted his mother, 'Stop telling lies!!!' Given that McDaniel had angrily demanded that his mother '[s]top telling lies,' the prosecution could not reasonably establish that a putative failure to contradict his mother's subsequent text to the effect that he would 'b locked up 4 robberey of the stores in this area' constituted an admission by him that he had committed the robberies she referenced. Indeed, to the extent his mother's texts were based on newspaper articles or police flyers about the robberies, any failure to respond may well have reflected McDaniel's frustration with his mother, rather than an admission of guilt as to the commission of the robberies." (p.*13.)

The Court concluded there was not an adequate showing that McDaniel had in fact failed to respond to or deny his mother's indirect accusation. Additionally, a response or denial was not necessarily warranted under the circumstances. (p.*13.) Because the prosecution could not show that McDaniel failed to respond to his mother's assertion and therefore adopted it, it was error to admit the text exchange to show an adoptive admission on McDaniel's part that he committed the robberies referenced by his mother. (*Ibid*.)

IV. Assessment of Prejudice

The Court of Appeal noted the circumstantial nature of the prosecution's case against McDaniel heightened the importance of the erroneously admitted evidence. The Court described the text exchange as "explosive," because it "[i]t captured the unfiltered views of McDaniel's *own mother*, who would reasonably be expected to have seen the flyers and articles about the robberies, which included images of the suspects in the respective robberies. The text exchange flagged for the jury that McDaniel's own mother believed he was the person committing the robberies in the local area." (p.*18, italics in original.)

The Court of Appeal said, in addition, "the text exchange was specifically introduced to show McDaniel admitted to robbing several local stores (the jury was instructed on adoptive admissions). Thus, the erroneously-admitted text exchange not only revealed that McDaniel's own mother believed he had robbed the local stores, but also permitted the jury to infer, based on McDaniel's failure to respond to his mother's assertions, *that McDaniel admitted he had robbed the stores*." (p.*18, italics

in original.)

The Court of Appeal opines that the prosecutor's use of the text exchange in closing argument "rendered it singularly damning evidence against McDaniel." (p.*18.) The prosecutor "methodically walked the jury through the instruction," explaining that the requirements of the jury instruction were met and arguing that McDaniel "admitted that he committed the robberies." (*Ibid.*)

The Court found that certain other evidence had been wrongly admitted and was prejudicial, but concluded "the erroneous admission of the text messages alone requires reversal." (p.*19.)

An Update: Review Granted in *People v. Superior Court of San Diego County, Bryan Maurice Jones* (2019) 34 Cal.App.5th 75

In April, we did a P&A on this case. In a postconviction writ of habeas corpus, the defense made a discovery request for the prosecutor's jury selection notes from the trial. During voir dire, after the trial court determined the defense attorney made a prima facie showing of racial bias, the prosecutor offered race-neutral explanations for excusing the jurors, citing in part a numerical score that the prosecution team had devised. The trial court granted the defendant's postconviction request for the prosecutor's jury selection notes. The trial court's decision was ultimately upheld by the Court of Appeal. The Court of Appeal rejected the People's argument that the work product privilege was applicable to the notes. The Court of Appeal additionally stated that even if the work product privilege applied, the prosecutor waived it by referencing the notes in his explanation for his challenges to the prospective jurors

On July 24, the California Supreme Court granted review. Opinions of the Court of Appeal that have been granted review may be cited, but only for their "potentially persuasive value," not as binding precedent. (California Rules of Court, Rule 8.1105(e)(1).)

Suggestions for future shows, ideas on how to improve P&A, and other comments or criticisms should be directed to the P&A author, Mary Pat Dooley, at (510) 272-6249, marypat.dooley@acgov.org. Technical questions should be addressed to Gilbert Leung at (510) 272-6327. Participatory students: MCLE Evaluation sheets are available on location and certificates of attendance are constructively maintained in your possession in the Ala. Co. Dist.Atty computer banks.
If you wished to be added to or removed from the P&A mailing list, contact mishel.jackson@acgov.org