

The Ultimate Backup

A Client News Bulletin

RAINS, LUCIA & WILKINSON LLP

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BEWARE THE ALFORD WAIVER: PART 2

Becerrada v. Superior Court (July 25, 2005):

Individual Officers Can Access Materials Released Through a *Pitchess* Motion

In March 2003, *The Ultimate Backup* News Bulletin reported on the California Supreme Court's decision in *Alford v. Superior Court* (2003) 29 Cal. 4th 1033. That case, which was decided on February 27, 2003, severely restricted the right of a prosecutor to access the *Pitchess* discovery obtained by the defense in a criminal proceeding. In that case, the high court ruled that personnel records do not lose their confidential and privileged status vis-a-vis the prosecution simply by release to the defense following a *Pitchess* motion. Thus, the prosecution had no right to examine the personnel file material simply because the defendant received it in discovery. Rather, the prosecution was required to comply with the *Pitchess* procedures and files its motion if it wanted access to the material. In so doing, the district attorney would have to establish the relevancy and materiality of the records to the prosecution case, using a greater showing than simply that the defense had been given the information.

At first blush peace officers and prosecutors felt that the Court's ruling unfairly prejudiced the district attorney's ability to prosecute cases. But, give that the reality of *Brady* disclosure requirements, the decision provided significant protection to the *individual officer*. Why? The court recognized that if the district attorney learned of allegations or findings that would be subject to *Brady* disclosure requirements through a defense *Pitchess* motion, the prosecution would feel compelled to reveal that material in all subsequent prosecutions in

which the officer is a witness. The *Alford* court protected against the harsh reality of being placed on a *Brady* list unjustifiably.

In response to *Alford*, district attorneys throughout California sought to have officers sign a broad *Alford* waiver, that would allow the prosecution blanket access to any materials released as the result of defense *Pitchess* motions. RLW strongly cautioned against such wholesale waivers of confidentiality, met with numerous labor associations and choreographed appropriate responses.

Our advice was that confidentiality waivers should be narrow, and provided only after assessing, on a case-by-case basis, the detriments and benefits to providing the prosecution access to the material. Indeed, we recommended that before officers allowed the prosecution access to information from their confidential personnel files, the officer read and review the material released so that the officer can make an informed decision as to how release of that information might effect not only the current prosecution, but also future prosecutions and the impact of being placed in a *Brady* database. RLW stands by that advice today, and urges caution and careful analysis before releasing personnel file information to the prosecution.

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After *Alford*, the question then became whether the officer was entitled to know what was released to the defense even if the prosecution was not. That answer was affirmatively given in the decision of *Becerrada v. Superior Court*, decided on July 25, 2005 (05 C.D.O.S. 6502).

In *Becerrada*, deputies with the Los Angeles County Sheriff's Department sought to obtain the information released by the department to the criminal defendants following a *Pitchess* motion. The criminal defendant protested, claiming that to do so would backdoor the *Alford* prohibition on the prosecution obtaining access to the information without filing its own motion. The court found that a limited release to the individual officer information contained in his own personnel file would not disturb the balance between the defendant's right to a fair trial and the officer's right to privacy.

In so deciding, the court noted that an individual officer has the statutory right to be present during a *Pitchess* motion as well as during any *in camera* review of his or her personnel files. That right, along with the general right of access to personnel files, gave to each individual officer the practical ability to access the information the court discloses to the defense. The court noted: "The distinction between an officer's ability to review his files with the list of relevant complaints in hand, and to receive a copy of the disclosure report containing information extracted from those same files is a distinction without a difference ... the officer has gained access to the same information."

The court emphasized that its decision did not translate into a "back door" for the prosecution to evade the *Alford* requirements. No officer is required to request the information or to share it with the prosecution. Thus, the officer can both access the information and maintain it as confidential vis-à-vis the prosecution.

The *Becerrada* court noted that its decision did not address "any issues that may arise if an individual officer in fact chooses to share the information obtained from his personnel file with the prosecution, or with

other officers." The scope or impact of such a waiver of the officer's privacy right was not addressed.

Thus, because *Brady* databases exist and can have a far-ranging impact on the officer testimony in future proceedings, RLW still urges caution and careful analysis before disclosing any information to the prosecution. The *Becerrada* decision made that process easier in that it confirmed the officer's right to obtain and review the material disclosed so that he or she can make an informed decision on how to proceed.

It is our hope that this follow-up Bulletin will assist you in fully understanding the impact this new decision as it applies to your agency. We strongly encourage you to contact your legal counsel if you have any questions on the application of this case to you or your association, and/or to discuss what, if any, action would be in the best interest of your individual association and membership.

As always, the attorneys at Rains, Lucia & Wilkinson stand ready to assist you with this and any other issues that impact your collective bargaining rights. For more information, please do not hesitate to contact us.

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