IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, *Petitioner*	**No. S243855**
vs.	
SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent.*	SUPREME COURT FILED JAN 16 2019 Jorge Navarrete Clerk
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, ***et al.,*** *Real Parties in Interest.*	Deputy

Second Appellate District, Division Eight, No. B280676
Los Angeles County Superior Court, No. BS166063
Honorable James C. Chalfant, Judge

SUPPLEMENTAL AMICUS CURIAE BRIEF OF CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST

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TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

On January 2, 2019, the Supreme Court directed the parties, and invited amici curiae, to file by January 23, 2019, supplemental briefs addressing the following question:

> What bearing, if any, does SB 1421, signed into law on September 30, 2018, have on this court's examination of the question presented for review in the above-titled case?

In response, amicus curiae California District Attorneys Association (CDAA) respectfully files this supplemental brief in support of real parties in interest. [1]

I.

SENATE BILL 1421 DOES NOT RENDER THE CASE MOOT

Senate Bill No. 1421 (SB 1421) was signed by the Governor on September 30, 2018, and went into effect on January 1, 2019. (Stats. 2018, c. 988.) It amends Penal Code sections 832.7 and 832.8 to allow public inspection of certain peace officer personnel records. The types of misconduct that are now public record overlap the types of misconduct that trigger law enforcement agencies' alerts to prosecutors pursuant to the external *Brady*[2] policies that are the subject of the current case. But the new legislation does not cover all types of misconduct that result in *Brady* alerts under the policy. Moreover, the policy retains an important role in

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[1] CDAA submitted its application to file amicus brief, with brief attached, on May 4 2018. The Supreme Court granted the application on June 22, 2018.

[2] *Brady v. Maryland* (1963) 373 U.S. 83.

facilitating compliance with *Brady* by alerting prosecutors when new incidents of misconduct have been added to officers' personnel records.

A. SB 1421 DOES NOT COVER ALL CATEGORIES OF MISCONDUCT DISCLOSABLE UNDER *BRADY*

SB 1421 provides that certain peace officer personnel records are not confidential and are subject to public inspection pursuant to the California Public Records Act (CPRA). Consequently, it appears that either the prosecutor or the defense could simply make a CPRA request to the employing agency and obtain at least some records relevant to officers' credibility (if such records exist) without the necessity of anyone making a *Pitchess* motion.[3] But this does not make the *Brady* alert system under review unnecessary.

SB 1421 allows public disclosure of certain categories of personnel records, namely, those relating to the following:

1. Discharge of firearm at a person by a peace officer or custodial officer. (Pen. Code, § 832.7, subd. (b)(1)(A)(i).) These records could be relevant in some cases in which an officer is a witness to show, for example, excessive use of force. (These records do not necessarily involve misconduct at all, and may involve the discharge of a firearm that was entirely justified under the circumstances.)

2. Use of force by a peace officer or custodial officer resulting in death or great bodily injury. (Pen. Code, § 832.7, subd. (b)(1)(A)(ii).) If the use of force was excessive, these records could be relevant in cases involving an officer's use of force. This category overlaps with the Los Angeles policy at issue in this case, which provides for the sheriff to provide the prosecutor with the name of an officer who has a sustained finding of "unreasonable force." But SB 1421 does not provide for

[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, codified in Evidence Code sections 1043-1047.

disclosure of an incident of excessive force that did not result in death or great bodily injury.

3. An incident in which a sustained finding was made by a law enforcement agency or oversight agency that an officer engaged in sexual assault involving a member of the public. (Pen. Code, § 832.7, subd. (b)(1)(B).) Much of the conduct described in this section would constitute moral turpitude and would be relevant to credibility. (*People v. Wheeler* (1992) 4 Cal.4th 284, 288, superseded on another point as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1460.) But personnel records regarding some sexual misconduct involving moral turpitude relevant to credibility would not be disclosable public records, such as child molest without use of force (Pen. Code, § 832.7, subd. (b)(1)(B)(ii); *People v. Massey* (1987) 192 Cal.App.3d 819, 823), or rape or sexual battery against another member of the officer's department. (Pen. Code, § 832.7, subd. (b)(1)(B)(iii).)

4. An incident in which a sustained finding was made by a law enforcement agency or oversight agency of dishonesty relating to (1) the reporting, investigation, or prosecution of a crime, or (2) the reporting or investigation of misconduct by another officer. (Pen. Code, § 832.7, subd. (b)(1)(C).) But this category does not include all types of dishonesty. It does not include theft or dishonesty incidents unrelated to the officer's handling of a criminal case, such as an officer disciplined for shoplifting, tax evasion, falsification of time cards, or embezzlement from the police activities league. It does not include an officer's dishonesty at an internal investigation in which the officer himself or herself is the subject of the investigation (as opposed to an internal investigation of another officer). It does not include other moral turpitude conduct such as domestic violence, furnishing drugs, or leaving the scene of an accident. It also does not include a finding of dishonesty by a prosecutor's office or a court rather than the employing agency.

The Los Angeles County policy involved in this case includes another category for disclosure that is not covered by SB 1421: "discriminatory harassment." Bias against a racial, religious or ethnic group may be relevant to an officer's credibility in a case involving a member of that group. (Evid. Code, § 780, subd. (f); *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-508.) Evidence of such a bias may be disclosable under *Brady* in those cases. But it would not be disclosed under SB 1421.

So while SB 1421 requires public disclosure of many types of misconduct that overlap with those included in the Los Angeles *Brady* policy "tip" system, it does not cover them all. In order to obtain information regarding these additional categories of misconduct, the prosecutor or defense would need to make a *Pitchess* motion. As we argued previously (CDAA Amicus Brief, pp. 23-26), it is impractical to make a *Pitchess* motion as to every officer in every case, and without a tip, it will sometimes be impossible to make a showing of good cause for in camera review. For that reason, SB 1421 does not eliminate the importance of the policy on review by the court.

B. POLICE AGENCY DISCLOSURES TO PROSECUTORS FACILITATE COMPLIANCE WITH *BRADY*

Even as to misconduct disclosable under SB 1421, a *Brady* alert system may facilitate compliance with *Brady.* As noted in our amicus brief, in some jurisdictions the police agency advises the district attorney of the names of officers whose personnel files contain information that may be disclosable under *Brady*, in advance of the officer being subpoenaed as a witness in a specific case. (CDAA Amicus Brief, pp. 14-15.) In *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 721, the court unanimously found such a policy to be "laudably established." As an appendix to its opinion, the court included the implementation order from

the San Francisco Police Department. Such a system was the precise model that real party in interest Los Angeles County Sheriff's Department tried to implement here. In fact, the Sheriff in announcing the policy specifically referred to this Court's *Johnson* opinion, and the subsequent Attorney General Opinion finding such a procedure "legally valid." (98 Ops.Cal.Atty.Gen. 54 (2015) at *2 - *4.)

Such a policy facilitates compliance with *Brady*, even after SB 1421. Assuming that prosecutors are able to make CPRA requests of law enforcement agencies under SB 1421, this would not provide disclosure of any new incidents of misconduct that are added to the personnel file later. To ensure that complete records have been requested, the prosecutor would need to make repeated CPRA requests each time the officer is subpoenaed as a witness in an additional case, or even if the trial in the original case is continued. Such cumbersome repeat requests would be unnecessary if the agency were to continue advising the prosecutor when new potential *Brady* information is added to an officer's file.

II.

SB 1421 PURPORTS TO NOT IMPACT THE CRIMINAL DISCOVERY PROCESS

The language of SB 1421 suggests that it will have no effect upon criminal discovery. Penal Code section 832.7, subdivision (g) provides:

> This section does not affect the discovery or disclosure of information contained in a peace or custodial officer's personnel file pursuant to Section 1043 of the Evidence Code.

Subdivision (h) provides:

> This section does not supersede or affect the criminal discovery process outlined in Chapter 10 (commencing with Section 1054) of Title 6 of Part 2, or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in Pitchess v. Superior Court (1974) 11 Cal.3d 531.

This language supports the position that the prosecution is still obligated to provide the defense with exculpatory and impeachment evidence, even if the defense can access some of the information itself through a CPRA request.

The question posed by the court in its order for supplemental briefing is what bearing, if any, SB 1421 has on the question presented for review. Taken at face value, the language in subdivision (h), that the statute does not affect the criminal discovery process, would suggest the answer that SB 1421 has no bearing on the question presented for review.[4]

While this legislation does not affect what is disclosed through the criminal discovery process or through a *Pitchess* motion, it appears that a criminal defendant or prosecutor could supplement those procedures through a CPRA request. This is likely to occur since each process may provide different information and each imposes different burdens on the requester. A CPRA request is easy to make but, as noted above, would result in disclosure of only certain categories of impeachment evidence. Additional incidents may be disclosed through a *Pitchess* motion, but it requires the requesting party to show good cause for in camera inspection (Evid. Code, § 1043, subd. (b)(3)), requires a judicial finding of relevance

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[4] However, as argued in the next section of this brief, the enactment of SB 1421 evidences a legislative recognition of a public policy of increased transparency for personnel records of peace officer misconduct.

(Evid. Code, § 1045, subd. (a)), and must be accompanied by a protective order if disclosure is made. (Evid. Code, § 1045, subd. (e).)[5]

The legislative history states that the legislative purpose was not to provide information to criminal defendants. The report of the Assembly Committee on Public Safety states:

> This bill specifically states that its provisions do not affect or supersede the criminal discovery process, or the admissibility of peace officer personnel records. The purpose of the bill is to give the **general public, not a criminal defendant**, access to otherwise confidential police personnel records relating to serious police misconduct in an effort to increase transparency.

(Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1421 (2017-2018 Reg. Sess.) as amended June 19, 2018, p. 8 (bold added)

[5] Even as to incidents disclosed pursuant to the CPRA, the information provided will not necessarily be complete. SB 1421 allows redaction "[t]o preserve the anonymity of complainants and witnesses" (Pen. Code, § 832.7, subd. (b)(5)(B)) or where the public interest is served by not disclosing personal identifying information. (Pen. Code, § 832.7, subd. (b)(6).) Under the CPRA, the agency would need to provide the same information to criminal defendants as it would to any other member of the public because once an agency releases information as a public record, it waives exemptions as to any other member of the public who requests it. (Gov. Code, § 6254.5.) In contrast, *Pitchess* motions typically result in disclosure of the name, address and phone number of complainants and witnesses. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) Accordingly, CPRA disclosures may be followed by a *Pitchess* motion to obtain this additional information as to disclosed incidents, in addition to information regarding undisclosed incidents.

<http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1421>.)[6]

While the legislative purpose may not have been to give access to criminal defendants, general CPRA principles would allow such access. The CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." (Gov. Code, § 6257.5.) Case law holds that a party or a law firm that is anticipating litigation, or has filed a lawsuit, is not precluded from obtaining public records that might be relevant to the lawsuit through the CPRA. (*Fairley v. Superior Court* (1996) 66 Cal.App.4th 1414; *County of Los Angeles v. Superior Court (Axelrad)* (2000) 82 Cal.App.4th 819.) Even if a law enforcement agency were to deny access to a criminal defendant, that would not preclude a CPRA request by a relative of the defendant, an employee of defense counsel, or some other person who could then share this public record with the defendant.

III.

SB 1421 REFLECTS A PUBLIC POLICY OF INCREASED ACCESS TO PEACE OFFICER PERSONNEL INFORMATION

In considering the current case, the court should consider recent shifts in public policy regarding peace officer personnel records and discovery by prosecutors.

Formerly, with limited exceptions, the *Pitchess* process was the exclusive means of obtaining disclosure of peace officer personnel records. (Pen. Code, § 832.7, subd. (a), as amended by Stats. 2003, c. 102 (Assem.

[6] Judicial notice of this report may be appropriate. (Evid. Code, §§ 452, subd. (c), 459; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-32.)

Bill. No. 1106), § 1; *People v. Superior Court (Johnson), supra,* 61 Cal.4th 696, 710, 712-713.) In enacting SB 1421, the Legislature significantly departed from that policy by allowing public access to significant categories of peace officer personnel records. The legislation makes the following findings:

> (a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority — the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.
>
> (b) The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

(SB 1421, § 1.)

The disclosure of peace officer names to prosecutors that is before the court in the current case is consistent with the public policies of

increasing the public's faith in law enforcement through disclosure of police misconduct, as addressed in SB 1421.

The public policy of increased public examination of police conduct is also reflected in another recent bill, Assembly Bill No. 748 (AB 748), effective July 1, 2019. (Stats. 2018, c. 960.) This legislation amends the California Public Records Act to make public video or audio recording of a "critical incident," i.e., discharge of a firearm at a person by a peace officer or custodial officer, or use of force by a peace officer or custodial officer resulting in death or great bodily injury. According to the bill's author, "Transparency between law enforcement and the communities they protect is critical to establishing and maintaining good relationships." (Assem. Floor Analysis, Concurrence in Senate amendments on Assem. Bill No. 748 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 5, <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB748>.)[7]

Based in part upon some highly-publicized police shootings, and in response to claims that police and prosecutors have withheld evidence, members of the public and the Legislature that represents them are demanding increased scrutiny of both police officers and prosecutors. SB 1421 and AB 748 reflect this policy. Other recent legislative enactments reflect this philosophy as well. (Pen. Code, § 1424.5 (Stats. 2015, c. 467 (Assem. Bill No. 1328), § 2, amended by Stats. 2016, c. 59 (Sen. Bill No. 1474), § 7 [disqualification of prosecutors for deliberate and intentional withholding of relevant, material exculpatory evidence]; Bus. & Prof. Code, § 6086.7, subd. (a)(5) (Stats. 2015, c. 467 (Assem. Bill No. 1328), § 1 [report to State Bar for withholding of exculpatory evidence]; Pen. Code

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[7] An appellate court may take judicial notice of legislative history materials such as floor reports. (Evid. Code, §§ 452, subd. (c), 459; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, *supra*, 133 Cal.App.4th 26, 31-32.)

§ 141 (Stats. 2016, c. 879 (Assem. Bill No. 1909), § 2 [felony for a prosecutor to intentionally and in bad faith withhold exculpatory information].)

CDAA believes that the vast majority of police shootings are legally justified. We also believe that incidents of evidence withheld by police or prosecutors are relatively rare, and are generally inadvertent rather than intentional. But we recognize that the public has a legitimate interest in both the actions of the police they employ to protect them, and in the fairness of the criminal process. And of course, prosecutors have a vital interest in ensuring that the defense receives all of the evidence it is entitled to by law.

SB 1421 and the other legislation discussed above reflects a public policy toward greater transparency of police misconduct and appropriate public insistence that law enforcement and prosecutors act ethically. Upholding the disclosures that police have been making to prosecutors throughout the state for a number of years pursuant to external *Brady* policies would be consistent with that policy. Prohibiting such disclosures would be a step backward in the accountability of police officers and in ensuring the integrity of the criminal justice system.

CONCLUSION

While SB 1421 provides another mechanism to obtain impeachment evidence regarding peace officers, it does not cover all potential *Brady* information contained in peace officer personnel files. *Brady* tip policies that are the subject of the present case remain essential to ensure that defendants receive all the information mandated by due process.

DATE: January 15, 2019

Respectfully submitted,

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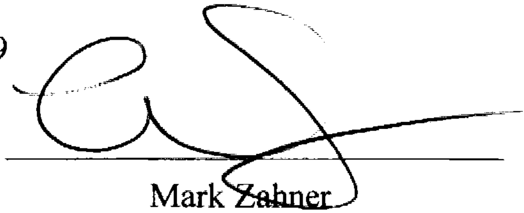
[8] Writing on behalf of CDAA and not the San Francisco District Attorney's Office.

CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204 and 8.520(c), I certify that this amicus curiae brief was prepared using a computer, that it is proportionally spaced, that the type is 13 point, and that the word count is 3,105 words as determined by the word count feature of the word processing system.

DATED: January 15, 2019



Mark Zahner

DECLARATION OF SERVICE

I, Laura Bell, declare:

I am 18 years of age or older and not a party to this matter. On January 15, 2019, I served the within

SUPPLEMENTAL FILE AMICUS CURIAE BRIEF OF CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST

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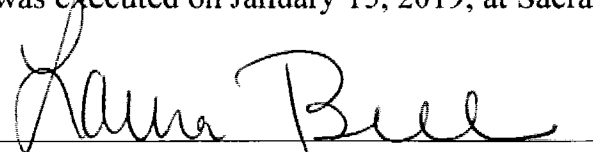
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 15, 2019, at Sacramento, CA.



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