In the Supreme Court of California

Association for Los Angeles Deputy Sheriffs, Petitioner, v. **Superior Court of California for the County of Los Angeles,** Respondent.	No. S243855 Second District Court of Appeal No. B280676 Los Angeles County Superior Court No. BS166063
Los Angeles County Sheriff's Department, et al., Real Parties in Interest.	

Supplemental Briefing by *Amicus Curiae*, the San Francisco Public Defender's Office

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Supplemental Question

The Court asked for supplement briefing on what bearing, if any, SB 1421, signed into law on September 30, 2018, has on the question presented for review here.

Answer

1. SB 1421 expressly leaves the *Brady* process alone; it affects only what may constitute *Brady* material.

That the Legislature intended that public access to police records to operate on a separate track from the *Brady* process is affirmatively reflected in the newly revised Penal Code section 832.7, subsections (g) & (h):

> (g) 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.
>
> (h) 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.

When seeking *Brady* information from confidential personnel records, the parties must comply with the *Pitchess*

procedures. (*People v. Superior Court (Johnson)* (2015) 61 Cal. 4th 696, 714.)

Concededly, even if SB 1421 not affect the *process* for getting *Brady*, if exculpatory, material information becomes publicly accessible, the state may not have a *Brady* duty for that material. (See *Johnson, supra,* 61 Cal.4th at 715.)

Yet, as shown next, far less information is publicly accessible under SB 1421 than a defendant is entitled to under *Brady*. So even if a defendant must try to obtain some information through this new, public route, the *Brady* process must still exist for those materials not publicly accessible.

2. SB 1421 grants to the public a smaller universe of information than *Johnson* Discovery—it does not give access to the full scope of *Brady* materials under *Johnson*.

There will be times when the public has access to some of the same materials a party might obtain under *Brady*. It may overlap. Yet SB 1421 is no substitute for the *Brady* process, because public access is more limited than the scope of *Brady-Johnson*.

A. SB 1421 provides less information to the public than a criminal defendant is entitled to under *Brady*.

SB 1421 provides limited information about police officer misconduct to the public, permitting the agency to engage in extensive redacting and significant disclosure delays.

As just one example, while SB 1421 grants public access to records relating to a police officer's use of force (§832.7(b)(A)(ii)), it provides that a police agency *shall* redact from the record information "to preserve the anonymity of complainants and witnesses" (§832.7(b)(5)(B)). By contrast, disclosure of the complainants and witnesses to a material use-of-force incident would be required under *Brady*—without witnesses and complainants, the information would be useless as evidence in a criminal case—with any privacy concerns addressed by a protective order.

Other scope differences between publicly accessible (1421) and the *Brady-Johnson* procedure abound. Under the new 832.7, the affected agencies can withhold information on vague "public interest grounds" or if it causes the "unwarranted invasion of personal privacy." (§832.7(b)(5)(C)

and (b)(6).) The agency may also delay disclosure while it investigates the use of force, or if there is a criminal case pending against "someone other than the officer who used the force." (§832.7(b)(7)(A)(i-iii).) And, most starkly, disclosure may be delayed where "criminal charges are filed related to the incident in which force was used" until the charges are resolved through trial or plea. (§832.7(b)(7)(B).)

In all of these contexts, *Brady* would require disclosure of the information for trial under a protective order, without the redactions and delays that SB 1421 provides before it affords public access.

B. San Francisco's Bureau Order demonstrates that defendants are entitled to more than SB 1421 affords to the public.

The San Francisco practice further demonstrates how much less information a defendant would get through SB 1421, compared to the information the police department has determined is required under *Brady*.

The San Francisco Police Department Bureau Order (appended to *Johnson* and attached here) remains in effect,

and the City Attorney has indicated that the Police Department has made no changes to its *Brady* procedures in the wake of SB 1421.

The Bureau Order reveals the divergence between the disclosures required under 1421 and *Brady*. The Bureau Order defines what constitutes "*Brady* Material" broadly, including that contained in an officer's personnel file.

For example, unlike SB 1421, *Brady* material under the Bureau Order includes not only *sustained* complaints of misconduct (§832.7(b)(1)(C)) but pending complaints, if the officer is likely to be a witness before the misconduct case is decided. (See Bureau Order II (B)(2).) It also includes information in the officer's file about any arrest, conviction or pending criminal charge for a felony or an offense involving moral turpitude (see Bureau Order II (B)(3)), information not publically released under SB 1421.

Finally, the Bureau Order does not allow for the expansive redactions SB 1421 requires, but for protective orders to maintain appropriate confidentiality, limited use, and nondisclosure to the public. (See Bureau Order IV (C).)

In sum, the Bureau Order embodies the wider scope of *Brady* disclosure, and a process for maintaining confidentiality of the many materials that fall under *Brady*. In comparison, SB 1421 allows for limited, redacted public access to certain, mostly sustained, complaints, and not while a related, criminal case is pending.

Conclusion

The Legislature enacted SB 1421 to provide limited public access to a narrow category of police misconduct records. At the same time, it recognized that procedures for obtaining officer personnel records under *Pitchess* and *Brady* would remain unchanged. SB 1421's only effect on the question here is tangential: it will mean that defendants may now obtain a limited amount of information through a public process. But, at least in San Francisco, the affected agencies must disclose more, and crucial information. The rest of this essential material is required to allow for an effective defense under the state and federal due process clauses. (5th and 14th Amends., US Const.; art. 1 sec. 7, 15, CA Const.) Amicus believes this broader *Brady* discovery is constitutionally necessary for any

workable *Brady* process, a practice the *ALADS* decision threatens to impair.

Dated: February 21, 2019 Respectfully submitted,

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By: Dorothy Bischoff
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Certificate of Word Count

I, Dorothy Bischoff, counsel for amicus curiae the San Francisco Public Defender, certify that the word count of the attached application to file amicus brief and brief of amicus curiae in support of Real Party is 1,028 words as computed by the word-count function of Word, the word processing program used to prepare this brief.

Dated: February 21, 2019

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Proof of Service

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 555 Seventh Street, San Francisco, California 94103; and that on January 22, 2019, I served by mail the Supplemental Briefing by Amicus Curiae, the San Francisco Public Defender's Office in the matter of *Association for Los Angeles Deputy Sheriffs* (S243855) on the following parties at the addresses indicated:

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