Case No.: S243855

In The Supreme Court of the State of California

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, et al.,

Real Parties in Interest

On Review From the Court of Appeal for the Second Appellate District, Division 8
Civil No.: B280676

After an Appeal from the Superior Court of Los Angeles County
Judge James C. Chalfant
Case Number BS166063

SUPPLEMENTAL BRIEF OF REAL PARTY IN INTEREST COUNTY OF LOS ANGELES RE: IMPACT OF SB 1421 ON QUESTION PRESENTED FOR REVIEW

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

Real Party in Interest County of Los Angeles (hereinafter "County") provides the following supplemental brief:

I. STATEMENT OF QUESTION PRESENTED FOR SUPPLEMENTAL BRIEFING

On January 2, 2019, this Court directed the parties to file 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-entitled case?

As discussed more fully below, while Senate Bill 1421 ("SB 1421") provides a mechanism for public inspection of certain materials and information that would ordinarily be subject to disclosure in a criminal prosecution under *Brady v. Maryland* (1963) 373 U.S. 83, SB 1421 does not fully address the question whether a law enforcement agency may provide "*Brady* alerts" (i.e., disclosures of the names and identifying numbers of officers on an internal *Brady* list, along with the fact the officers may have relevant exonerating or impeaching material in their personnel files) to prosecutors absent a court order on a properly filed *Pitchess* motion.

SB 1421 is a sunshine law that amended some of the statutes that the Court of Appeal relied upon in its ruling, i.e., it made previously confidential peace officer personnel records subject to disclosure under the California Public Records Act ("CPRA") rather than through what is commonly called a "*Pitchess* motion," but SB 1421 limited the new

disclosure scheme to four specific types of instances: (1) discharge of a firearm at a person; (2) use of force resulting in death or great bodily injury; (3) sustained finding of sexual assault involving a member of the public; and (4) sustained finding of dishonesty relating to criminal matters or relating to the misconduct of another peace officer.[1] Because of the non-confidential nature of records relating to those four categories of incidents, it appears it would be permissible to provide a *Brady* alert advising a prosecutor that an officer has such non-confidential records in his or her personnel file without a *Pitchess* motion. However, the scope of disclosures generally required under *Brady*—and therefore the types of misconduct that can result in an officer being added to an agency's *Brady* list—are more expansive than the disclosures that are now permissible under SB 1421. The County contends that the Court of Appeal still erred regardless of SB 1421, and that a decision by this Court is needed.

The legislative history of SB 1421 demonstrates that the bill was intended to address the lack of transparency to the public at large regarding certain types of serious, and often high profile, misconduct by peace officers rather than concern over a criminal defendant's constitutional due process rights to *Brady* information. While the amended Penal Code section 832.7 expressly provides that the section does *not* affect the *Pitchess* discovery process set forth in Evidence Code section 1043, SB 1421 is nevertheless instructive as it demonstrates a trend in the State toward greater transparency and it lends additional support to the notion

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[1] The first two categories, i.e., discharge of a firearm at a person and use of force resulting in death or great bodily injury, do not require "sustained" findings to be disclosed while the latter two do.

that a limited *Brady* alert may be provided to prosecutors absent a court order on a *Pitchess* motion. If members of the general public may now receive complete records of certain types of peace officer disciplinary investigations pursuant to a Public Records Act request, certainly an investigative agency should be permitted to provide a limited *Brady* alert to the other member of the prosecution team (i.e., the prosecutor) so that constitutional obligations can be fulfilled.

Lastly, Petitioner Association for Los Angeles Deputy Sheriffs ("ALADS") and other peace officer associations throughout the state have filed lawsuits and obtained temporary restraining orders blocking the disclosure of records under SB 1421, arguing that the law does not apply "retroactively" to records regarding incidents that occurred before January 1, 2019. In the event the courts interpret the law to not apply to records of pre-2019 incidents that will further limit the already limited impact SB 1421 has on a criminal defendant's ability to obtain *Brady* information.

II. OVERVIEW OF SB 1421

SB 1421 simultaneously limits the confidentiality afforded to peace officer personnel records under Penal Code section 832.7 and expands the reach of the CPRA by expressly making certain categories of peace officer personnel records, and records relating to certain incidents, complaints and investigations involving peace officers, subject to disclosure under the CPRA. SB 1421's revisions to Penal Code section 832.7 provide that the following types of records shall not be confidential and shall be made available for public inspection pursuant to a PRA request:

- Records relating to the report, investigation, or findings of an incident involving the discharge of a firearm at a person by a peace officer or custodial officer. (Penal Code § 832.7, subd.

(b)(1)(A)(i).);

- Records relating to the report, investigation, or findings of an incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury. (Penal Code § 832.7, subd. (b)(1)(A)(ii).);
- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public. (Penal Code § 832.7, subd. (b)(1)(B).); and
- Any record relating to sustained findings 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. (Penal Code § 832.7, subd. (b)(1)(C).)

With respect to the two latter categories of incidents, the term "sustained" is defined as "a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy." (Penal Code § 832.8, subd. (b).)

III. AT A MINIMUM, SB 1421 APPEARS TO ALLOW FOR *BRADY* ALERTS WHEN A PEACE OFFICER HAS RECORDS IN HIS OR HER FILE RELATING TO ONE OF THE FOUR CATEGORIES OF INCIDENTS SUBJECT TO DISCLOSURE

Because records of incidents falling within one of the four categories subject to disclosure "***shall not be confidential*** and shall be made available for public inspection" (Penal Code § 832.7, subd. (b)(1)), it is logical to conclude that, at a minimum, an investigating agency is absolutely permitted to provide a *Brady* alert to a prosecutor advising that an officer has such *non-confidential records* in his or her personnel file and to invite the prosecutor to serve a CPRA request to obtain the non-confidential records in question, all without a *Pitchess* motion. This is the clearest impact of SB 1421 on this case.

IV. SB 1421'S REVISIONS TO PENAL CODE SECTION 832.7 COVER ONLY A SUBSET OF RECORDS OR INFORMATION THAT MUST BE DISCLOSED UNDER *BRADY*

As indicated above, revised Penal Code section 832.7 requires the disclosure of records relating to only four specific categories of incidents: (1) discharges of a firearm at a person; (2) uses of force resulting in death or great bodily injury; (3) sustained findings of sexual assault on a member of the public; and (4) sustained findings of dishonesty concerning the performance of duties in criminal matters, or regarding the investigation of misconduct by other peace officers. However, while records and information regarding incidents falling into these four categories could potentially be subject to disclosure under *Brady* (particularly those relating

to dishonesty and sexual assault), the scope of disclosures constitutionally required under *Brady* is much broader.

Examples of evidence that may constitute *Brady* material includes, but is not limited to, the following:

1. Evidence relevant to showing the character of the witness for dishonesty or untruthfulness. (Evid. Code § 780, subd. (e).)
2. Evidence relevant to showing that a witness has a bias, interest, or other motive in connection with the criminal investigation. (Evid. Code § 780, subd. (f).)
3. Evidence showing that the witness made a statement that is inconsistent with the witness's police report or prior statements. (Evid. Code § 780, subd. (h).)
4. Felony charges and/or convictions involving moral turpitude. (Evid. Code § 788; Penal Code § 1054.1, subd. (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177; *People v. Castro* (1985) 38 Cal.3d 301, 314.)
5. Facts showing criminal conduct involving moral turpitude, whether or not the conduct resulted in the filing of criminal charges or a conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)
6. Pending criminal charges for felony or misdemeanor charges, even if the charges do not amount to moral turpitude. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)
7. The parole or probation status of a witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486.)

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8. Evidence undermining the expertise of a witness testifying as an expert witness. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179-1182.)

9. Evidence that a witness has a racial, religious, or personal bias against the defendant individually or as a member of a group. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)

Even though SB 1421 requires the disclosure of records relating to certain incidents of peace officer dishonesty, disclosure is limited to cases where an officer is dishonest in the reporting, investigation, or prosecution of a crime or in the reporting or investigation of misconduct ***by another peace officer***. (Penal Code § 832.7, subd. (b)(1)(C).) Accordingly, a possible interpretation of the statute is that a sustained finding that a peace officer lied during an administrative investigation into ***his or her own misconduct*** would not be subject to disclosure under SB 1421. However, such a finding would still be subject to disclosure under *Brady*. Similarly, a sustained finding of dishonesty unrelated to a criminal matter or another officer's misconduct, such as a finding that an officer lied in an employment application, falsified time records, or engaged in workers' compensation fraud, would not be subject to disclosure under SB 1421, but would likely still be subject to disclosure under *Brady*.

Additionally, even though SB 1421 requires the disclosure of records involving sustained findings that a peace officer engaged in sexual assault, the disclosure requirement applies only to incidents of sexual assault involving a "member of the public," i.e., "any person not employed by the officer's employing agency." (Penal Code § 832.7, subds. (b)(1)(B)(i) and (iii).) Accordingly, a sustained finding that an officer

committed sexual assault against a co-worker would not be subject to disclosure under SB 1421. However, such information could still be subject to disclosure under *Brady*.

Furthermore, disclosures under SB 1421 are required only for "sustained" findings of dishonesty or sexual assault, where "sustained" is defined to mean a final determination by an agency, commission, board, hearing officer, or arbitrator, following an opportunity for an administrative appeal. (Penal Code § 832.8, subd. (b).) Accordingly, records and information that the agency determined that an officer engaged in such misconduct are not subject to disclosure until any administrative appeal proceedings have concluded, which can frequently be a year or more after the agency's appointing authority has already made the determination that the officer engaged in the misconduct and imposed the discipline. Disclosures of peace officer misconduct pursuant to *Brady* are not so limited.

Notably, SB 1421 does not require disclosure of records reflecting that an officer has criminal charges pending, was convicted of a crime involving moral turpitude, or was found to have engaged in conduct involving moral turpitude such as domestic violence, child or elder abuse, embezzlement, fraud, etc. However, such information is subject to disclosure under *Brady*. (Evid. Code § 788; Penal Code § 1054.1, subd. (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177; *People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297; *People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)

SB 1421 also does not permit disclosure of records or information that an officer was determined to have engaged in racial profiling, or acts of discrimination or harassment. Because such actions would demonstrate

bias, they would be subject to disclosure under *Brady*. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)

In summary, while SB 1421 permits prosecutors or criminal defendants, as members of the public, to file a CPRA request as an alternative means of ascertaining whether a peace officer has certain types of *Brady* information in his or her personnel records, SB 1421 covers only a small subset of information that is typically subject to disclosure under *Brady*. Accordingly, SB 1421 does not negate the necessity of *Brady* alerts from law enforcement agencies to prosecutors in order to protect a criminal defendant's due process right to *Brady* material.

V. SB 1421 WAS INTENDED TO ADDRESS GOVERNMENT TRANSPARENCY REGARDING PEACE OFFICER USES OF FORCE AND CERTAIN, LIMITED CATEGORIES OF PEACE OFFICER MISCONDUCT, NOT A CRIMINAL DEFENDANT'S DUE PROCESS RIGHT TO *BRADY* MATERIAL

SB 1421, on its face, makes it clear it was not intended to address a criminal defendant's due process right to *Brady* material, but was instead focused on improving government transparency in order to enhance the public's faith in law enforcement.

SB 1421, Section 1, sets forth the Legislature's findings and declarations behind the enactment:

> (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 expressly provides that the amendments to Penal Code section 832.7 further the purposes of Article I, Section 3, subdivision (b), paragraph (7) of the California Constitution (requiring local public agencies to comply with the Public Records Act, Government Code section 6250, *et seq.*, and the Ralph M. Brown Act, Government Code section 54950, *et seq.*) in that "[t]he public has a strong, compelling interest in law enforcement transparency because it is essential to having a just and democratic society." (SB 1421, § 4.)

Importantly, Penal Code section 832.7, subdivision (g), provides that the 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." Furthermore, Penal Code section 832.7, subdivision (h), provides that the 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."

The legislative history of SB 1421 further makes clear that the purpose of the enactment was to increase transparency surrounding peace

officer misconduct, and not to address a criminal defendant's access to *Brady* information or whether *Brady* alerts are permissible:

> 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.

(Assembly Committee on Public Safety, SB 1421 (2017-2018 Reg. Sess.), as amended June 19, 2018, p. 8. <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1421#> Emphasis added.)

Based upon the legislative history of SB 1421 as well as the express language of the revisions to Penal Code section 832.7, it is clear that SB 1421 was not intended to address a criminal defendant's constitutional due process right to access *Brady* material.

VI. SB 1421 REPRESENTS A TREND IN STATE LAW TOWARD GREATER TRANSPARENCY CONCERNING PEACE OFFICER MISCONDUCT AND DISCIPLINE

While SB 1421 does not directly address the question presented for review, it is nevertheless instructive in this case as it reflects a continuing trend in state law toward greater transparency, with a goal of shining additional light upon peace-officer misconduct. While SB 1421 is concerned with public access to records relating to certain types of serious misconduct, it follows the enactment of other relatively recent legislation and revised rules of professional conduct intended to reinforce a prosecuting attorney's obligation to turn over potentially exculpatory

information to the defense. (See, e.g., Penal Code § 1424.5 and Bus. & Prof. Code § 6086.7, subd. (a)(5) [authorizing disqualification of prosecutors and requiring a report to the State Bar for deliberate and intentional withholding of relevant, material exculpatory evidence]; Penal Code § 141 [making it a felony for a prosecutor to intentionally and in bad faith withhold exculpatory information]; Rule of Professional Conduct 5-110 [Requiring prosecutors to make timely disclosure to the defense of all evidence that tends to negate the guilt of the accused].)

This march toward greater transparency lends additional support to the notion that a limited *Brady* alert may be provided to prosecutors absent a court order on a *Pitchess* motion. If members of the general public may now receive complete records of certain types of peace officer disciplinary investigations pursuant to a CPRA request, certainly an investigative agency should be permitted to provide *Brady* alerts to prosecutors in fulfillment of the prosecution team's *Brady* obligations.

SB 1421's revisions to Penal Code section 832.7, which added the CPRA disclosure-related provisions, while at the same time adding subdivision (g), which provides that the section "does not supersede or affect the criminal discovery process," bolster the conclusion that disclosures under the CPRA and criminal discovery (which includes *Brady* disclosures) must be considered separately given that they involve different interests. Accordingly, both ALADS' as well as the Court of Appeal's reliance on *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272 ("*Copley Press*") and *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 298, are ultimately misguided because those cases dealt with CPRA requests by members of the press, rather than the disclosure of the name of an officer from one member of the

prosecution team to another in fulfillment of the prosecution team's *Brady* obligations.

VII. RECENT PEACE OFFICER ASSOCIATION CHALLENGES TO SB 1421'S "RETROACTIVITY" HAVE THE POTENTIAL TO FURTHER LIMIT THE IMPACT THE ENACTMENT COULD HAVE ON A CRIMINAL DEFENDANT'S ACCESS TO *BRADY* MATERIAL

Since SB 1421 went into effect, numerous peace officer unions throughout the state, including ALADS, have filed actions in superior court seeking to halt the disclosure of records under the new law. (See, e.g., Petition for Writ of Mandate and Minute Order granting ALADS' request for a Temporary Restraining Order prohibiting disclosure of pre-January 1, 2019 personnel records in *ALADS v. County of Los Angeles, et al.*, Los Angeles Superior Court Case No. 19STCP00166, attached to the concurrently filed Motion for Judicial Notice (hereinafter "County Supplemental MJN") as Exhibits "A" and "B.") ALADS contends that SB 1421 cannot apply "retroactively," and therefore does not permit disclosure of records relating to incidents that occurred prior to January 1, 2019. According to news reports, unions representing peace officers in Contra Costa County, San Bernardino County, Ventura County, Riverside County, Orange County, and the City of Los Angeles, among others, have filed

similar suits.[2]

ALADS initially obtained a temporary restraining order in its case against the County, and an order to show cause hearing on their request for preliminary injunction was heard on February 15, 2019. (Exhibit "B" to County Supplemental MJN.) Following the hearing, on February 19, 2019, the superior court denied the request for preliminary injunction, concluding that SB 1421 permits the disclosure of records regardless of when they were created. The superior court further ruled that the prior temporary restraining order would remain in effect until March 1, 2019, to afford ALADS sufficient time to file a writ and seek a stay with the Court of Appeal. (Exhibit "C" to County Supplemental MJN.)

In the event either the Court of Appeal or this Court reverses the superior court decision and concludes that SB 1421 does not permit the disclosure of records relating to incidents occurring before January 1, 2019, such an interpretation of the law will substantially narrow the already limited impact SB 1421 has on a criminal defendant's ability to obtain *Brady* information. For this additional reason, the Court must render a decision reversing the Court of Appeal.

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[2] See, e.g., Lau, "L.A. judge halts release of records on misconduct and use of force by deputies," *Los Angeles Times* (Jan. 24, 2019) <https://www.latimes.com/local/lanow/la-me-ln-sheriff-discipline-records-20190124-story.html> (as of February 11, 2019); Dillon and Lau, "California police unions are preparing to battle new transparency law in the courtroom," *Los Angeles Times* (Jan. 8, 2019) <https://www.latimes.com/politics/la-pol-ca-police-records-law-challenges-20190109-story.html> (as of February 11, 2019).

VIII. CONCLUSION

SB 1421 provides a new mechanism by which investigating agencies and prosecutors may fulfill their *Brady* obligations as members of the prosecution team. However, while the new law arguably allows for *Brady* alerts when an officer has been involved in one of the four categories of incidents that are now subject to disclosure, the scope of *Brady* disclosure obligations is broader than what SB 1421 provides. Accordingly this Court should hold that law enforcement agencies may provide *Brady* alerts to the prosecution without the need for a *Pitchess* motion, even for incidents falling outside the scope of SB 1421's coverage.

Dated: February 22, 2019

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

By: _____

Geoffrey S. Sheldon
Alex Y. Wong
Attorneys for Real Party in Interest COUNTY OF LOS ANGELES

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **February 22, 2019**, I served the foregoing document(s) described as **SUPPLEMENTAL BRIEF OF REAL PARTY IN INTEREST COUNTY OF LOS ANGELES RE: IMPACT OF SB 1421 ON QUESTION PRESENTED FOR REVIEW** in the manner checked below on all interested parties in this action addressed as follows:

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Los Angeles County District Attorney's Office 211 West Temple Street, Suite 1200 Los Angeles, CA 90012	Alyssa Daniela Bell Federal Public Defender 321 East 2nd Street Los Angeles, CA 90012 ***Counsel for Amicus Curiae Office of the Federal Public Defender of Los Angeles***
Supreme Court of California Clerk of the Supreme Court 350 McAllister Street San Francisco, CA 94102-4797	

☐ **(BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed on **February 22, 2019**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Beverly T. Prater