SUPREME COURT
FILED

FEB 15 2019

Jorge Navarrete Clerk

Deputy

Supreme Court No. S243855

IN THE

SUPREME COURT OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS
Petitioner,
v.
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
Respondent,

LOS ANGELES SHERIFF'S DEPARTMENT,
SHERIFF JIM MCDONNELL and COUNTY OF LOS ANGELES
Real Parties In Interest

PETITION FOR WRIT OF MANDATE
TO THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
THE HONORABLE JAMES C. CHALFANT, PRESIDING
SUPERIOR COURT CASE NO.: BS166063
COURT OF APPEAL, 2nd APPELLATE DISTRICT: NO. B280676

AMICI CURIAE SUPPLEMENTAL BRIEF OF RIVERSIDE SHERIFFS' ASSOCIATION, LOS ANGELES POLICE PROTECTIVE LEAGUE, SOUTHERN CALIFORNIA ALLIANCE OF LAW ENFORCEMENT AND LOS ANGELES SCHOOL POLICE ASSOCIATION IN SUPPORT OF ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS

STONE BUSAILAH, LLP
Michael P. Stone, Esq. (SBN 91142)
Muna Busailah, Esq. (SBN 166328)
Robert Rabe, Esq. (SBN 72312)
1055 East Colorado Blvd., Suite 320
Pasadena, California 91106
Phone: (626) 683-5600, Fax: (626) 683-5656

Attorneys for Amici Curiae

Service on the Attorney General of California is required by California Rules of Court, Rule 8.29(c).

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

I. THE QUESTION PRESENTED 4

II. ARGUMENT 6

1. Legislative Solutions To The Brady Issue 6
2. May A Law Enforcement Agency Violate The Pitchess Procedures 9

TABLE OF AUTHORITIES

Cases:

Abatti v. Superior Court (2003) 112 Cal.App.4th 39 9

Eulloqui v. Superior Court (2010) 185 Cal.App.4th 1055 9

People v. Blackmon (Colo.App. 2000) 20 p.3d 1215, 1220 7

People v. Gutierrez (2003) 112 Cal.App.4th 1463, 1475-1476 4

People v. Superior Court (Johnson) (2015) 61 Cal.4th 696 5

Pitchess v. Superior Court (1974) 11 Cal.3d 531 5

United States v. Aichele, 941 F.2d 761 (9th Cir. 1991) 7

Statutes and Authorities:

Evidence Code § 1043 8

Evidence Code § 1044 8

Evidence Code §1045 8

Government Code, § 3305.5 5,10

Me. Rev. Stat. Title 30-A, § 503 (2014) 8

Penal Code § 832 5

I. The Question Presented

This Court has directed the parties, and permitted *Amici Curiae*, to address 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?"

The brief previously filed by *Amici* in this matter, citing then pending SB 1421, explained how legislative solutions, not judicial resolutions, should determine these public policy issues, and suggested that this Court should allow the Legislature, not a local law enforcement agency, to create the procedures by which all California public agencies will comply with their *Brady* obligations.

In short, the amendments to *Penal Code* § 832.7 in SB 1421 allow members of the public to obtain certain "confidential" peace officer personnel records that were previously available only through the *Pitchess* procedure (*Evidence Code*, §§ 1043-1045). Now, when a request is made under the California Public Records Act (CPRA), a public agency is required to disclose records and information in an officer's personnel file that pertains to certain categories of incidents and misconduct: officer-involved shootings, certain uses of force, sustained findings of sexual assault, and sustained findings of dishonesty.

Now, no longer will a criminal defendant need to obtain such information and potential evidence through a properly filed *Pitchess* motion (which necessarily would include a showing of "materiality"; see *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475-1476). Instead, a criminal defendant, like any other member of the public, will be able to obtain such records and information through the CPRA procedure.

When this Court granted the Department's petition for review, it presented the following question: "When a law enforcement agency creates an internal *Brady* list (see *Government Code*, § 3305.5), 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 his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion? (See *Brady v. Maryland* (1963) 373 U.S. 83; *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; *Penal Code*, §§ 832.7-832.8; *Evidence Code*, §§ 1043-1045.)"

//

//

//

With regard to the material in an officer's personnel file relating to officer involved shootings, and what the California Legislature has deemed "serious" uses of force, and "serious" misconduct[1], the passage of SB 1421 has made this case somewhat meaningless.

II. Argument

1. Legislative Solutions To The *Brady* Issue

In *Brady* and its progeny, the Supreme Court did not establish any specific procedure that the states were constitutionally required to follow. Rather, the Court implicitly left it to the states to determine how best to ensure material evidence, favorable to the accused, is not suppressed by the government. This lack of a "constitutional rule"[2] allows the states flexibility in responding to defense requests for *Brady* evidence that may be contained in an officer's personnel file.

As noted in the brief previously filed by *Amici* in this matter, a variety of *Brady* approaches have emerged in the states in regard to police personnel

---

[1]SB 1421 contains a legislative finding that, "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." (Emphasis added.)

[2] The clearest example of where the Supreme Court has established a constitutional rule is in *Miranda v. Arizona*, 384 U.S. 436 (1966).

files. These approaches could generally be described as "public record" regimes, prosecution "access and disclosure" regimes, and "no [prosecution] access" regimes. The different regimes are loosely based on the emphasis the legislature in each jurisdiction has placed on the confidentiality of police personnel records. Previously, California would have been classified as a "no access" regime. Now, California is a combined "public record" regime (for uses of force and misconduct that the Legislature has deemed "serious"), and continues to be a "no access" regime, subject to the *Pitchess* procedure, for other material contained in police personnel files.

In "public record" regimes, records of police misconduct are publicly accessible. The "public record" group of states includes Florida, Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana and South Carolina, now must also include California. In regard to *Brady*, such public access actually eliminates any need for the prosecutor to discover and disclose such information to defendants because, under the reasonably diligent defendant doctrine, defendants may access such information on their own. (See *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) [When a defendant is able to obtain "the supposed *Brady* material on his own, there is no suppression by the government."].) Since a criminal defendant in California may now obtain *Brady* material found in a personnel file without a "court order on a properly

filed *Pitchess* motion" (at least for such material in a personnel file that the Legislature has deemed "serious"), the passage of SB 1421 has removed the need for an agency to compile a *Brady* list containing that material (other than to possibly assist in CPRA requests).

In "no access" regimes, prosecutors are barred by state laws from viewing police personnel files. In these jurisdictions, in order to comply with *Brady*, there is usually a procedure set up for defense access, as we have in California. For example, in Colorado, police personnel files are confidential, and prosecutors cannot access them without a subpoena and *in camera* review. To trigger such review, the moving party must present more "than bare allegations that the requested documents would relate to the officer's credibility" and must "show how they would be relevant to his defense of the charges against him." (*People v. Blackmon,* 20 P.3d 1215, 1220 (Colo.App. 2000).)

//

//

//

//

//

//

The "no access" group, in addition to California (for incidents and misconduct not deemed by the Legislature to be "serious" in nature) includes, or has included, New Hampshire, Colorado, Vermont, Maine and New York.[3]

2. <u>May A Law Enforcement Agency Violate The *Pitchess* Procedures</u>?

Although we can now, because of SB 1421, expect fewer *Pitchess* motions, this Court must still determine whether a law enforcement agency may violate the *Pitchess* procedures when it has created a so-called *Brady* list (containing information about an officer that the Legislature has deemed not to be "serious", or otherwise).

It is important to note, that when the Court granted review in this case, it did not request briefing on whether, in light of *Brady* and its progeny, the California *Pitchess* statutory scheme (*Penal Code*, §§ 832.7-832.8; *Evidence Code*, §§ 1043-1045), should be deemed to be unconstitutional under the Fourteenth Amendment. However, those arguing in favor of allowing a law enforcement agency to violate the *Pitchess* procedures, do so by basing their

---

[3]Some of these states, like California, have in recent years passed less restrictive legislation. In New Hampshire, the legislature amended its personnel file statute to read "exculpatory evidence in a police personnel file ... shall be disclosed to the defendant", and stated an *in camera* review is only required "if a determination cannot be made as to whether evidence is exculpatory." (N.H.Rev.Stat.Ann. § 105:13-b (2014).) In Maine, the legislature amended its personnel file statute to create a *Brady* exception that reads, "[the statute] does not preclude the disclosure of confidential personnel records" to prosecutors for purposes "related to the determination of and compliance with the constitutional obligations ... to provide discovery to a defendant in a criminal matter." (Me.Rev.Stat. Tit. 30-A, § 503 (2014).)

argument on such a proposition.

In their brief, *Amici* presented a detailed argument on why this Court must not rule that the California *Pitchess* statutory scheme is unconstitutional under the Fourteenth Amendment. That analysis demonstrates how, as numerous cases have discussed, "the '*Pitchess* process' operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information."[4] (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 55.)

The Legislature, when it passed SB 1421 and amended *Penal Code* § 832.7, could have chosen to make it possible to obtain all sustained peace officer misconduct under the CPRA. Instead, the Legislature chose to place an emphasis on certain types of incidents and misconduct, and make public (upon request) only the personnel records of peace officers for "serious" police officer misconduct and "serious" uses of force. For other (non-serious) misconduct and uses of force, the Legislature has decided that the confidentiality of police personnel records must remain as is, and the *Pitchess* statutory scheme for discovery of such information should continue without modification.

---

[4] There is no conflict between *Pitchess* and *Brady* because evidence that meets the higher *Brady* materiality standard will necessarily meet the lower *Pitchess* discovery standard. (See *Eulloqui v. Superior Court* (2010) 185 Cal.App.4th 1055, 1065 ("[A]ny citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under Pitchess.")

Unless the entire *Pitchess* process and procedure is deemed to be unconstitutional, since the Legislature has so recently and soundly decided such public policy issues on its own[5], there is no need for this Court to create an alternative "judicial *Brady* procedure", that effectively changes the *Pitchess* procedure, by permitting individual law enforcement agencies to act outside that structure and disclose confidential police personnel information merely because it has been placed in an *ad hoc, Department* created "*Brady*" list[6].

DATED: February 11, 2019

Respectfully Submitted,

STONE BUSAILAH, LLP

/s/ Michael P. Stone

MICHAEL P. STONE, and
MUNA BUSAILAH, *and*
ROBERT RABE
Attorneys for Amici Curiae
Riverside Sheriffs' Association,
Los Angeles Police Protective League,
Southern California Alliance of Law Enforcement and Los Angeles School Police Association

---

[5]The Legislature would necessarily have been aware of this case, yet chose not to modify the Pitchess scheme, (for non-serious misconduct and uses of force), by allowing a public agency to disclose *Pitchess/Brady* material via a Brady list, without first having an *in camera* review, conditioned upon a showing of materiality.

[6]Any so-called *Brady* list created by an individual law enforcement agency, should not be confused with such a list created and controlled by a prosecution agency. (See *Government Code*, § 3305.5.)

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed ***AMICI CURIAE*** **SUPPLEMENTAL BRIEF OF RIVERSIDE SHERIFFS' ASSOCIATION, LOS ANGELES POLICE PROTECTIVE LEAGUE, SOUTHERN CALIFORNIA ALLIANCE OF LAW ENFORCEMENT AND LOS ANGELES SCHOOL POLICE ASSOCIATION** is produced using 13-point Roman type including footnotes and contains approximately1,713 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

Respectfully submitted,

STONE BUSAILAH, LLP

/s/ Michael P. Stone

MICHAEL P. STONE
MUNA BUSAILAH
ROBERT RABE
Attorneys for Amici Curiae

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is Stone Busailah, LLP, 1055 E. Colorado Boulevard, Suite 320, Pasadena, California 91106.

On **February 13, 2019,** I served the foregoing document described as ***AMICI CURIAE*** **SUPPLEMENTAL BRIEF OF RIVERSIDE SHERIFFS' ASSOCIATION, LOS ANGELES POLICE PROTECTIVE LEAGUE, SOUTHERN CALIFORNIA ALLIANCE OF LAW ENFORCEMENT AND LOS ANGELES SCHOOL POLICE ASSOCIATION, with this corresponding CERTIFICATE OF COMPLIANCE AND PROOF OF SERVICE,** in the manner indicated below, to the interested parties named on the Service List (see next page):

☑ **(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.

☑ **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Stone Busailah's electronic mail system from d.danial@police-defense.com to the email address(es) set forth above and/or filed electronically with the TrueFiling Electronic Filing Service. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

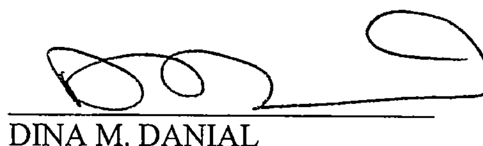
☐ **(BY FACSIMILE)** I caused such documents to be transmitted from facsimile number (626) 683-5656 to the facsimile machines of the above-listed addressee(s).

☐ **(BY PERSONAL SERVICE)** I delivered the foregoing document by hand delivery to the addressee(s).

☐ **(BY OVERNIGHT MAIL)** I enclosed the documents in an envelope or packaged provided by an overnight delivery carrier and addressed to the persons at the addresses above. I placed the envelope or package for collection and overnight delivery at any office or a regularly utilized drop box of the overnight carrier.

☑ (STATE) I declare that I am employed in the office of a member of the bar of this Court at which direction the service was made.

Executed on **February 13, 2019,** at Pasadena, California.



DINA M. DANIAL

SERVICE LIST

Elizabeth J. Gibbons
The Gibbons Firm, PC
811 Wilshire Boulevard, 17th Floor
Los Angeles, CA 90017
Counsel For Petitioner Association For Los Angeles Deputy Sheriffs
(Via Electronic Filing Service and U.S. Mail)*

Douglas G. Benedon
Judith E. Posner
Benedon & Serlin, LLP
22708 Mariano Street
Woodland Hills, CA 91367
Counsel For Petitioner Association For Los Angeles Deputy Sheriffs
(Via Electronic Filing Service and U.S. Mail)*

Frederick Bennett
Superior Court of Los Angeles County
111 North Hill Street, Room 546
Los Angeles, CA 90012
Counsel for Respondent
Superior Court of Los Angeles County
(Via Electronic Filing Service and U.S. Mail)*

Geoffrey Scott Sheldon
James Edward Oldendorph, Jr
Alexander Yao-En Wong
Liebert Cassidy Whitmore
6033 West Century Boulevard
Fifth Floor
Los Angeles, CA 90045
Counsel for Real Parties in Interest Los Angeles County Sheriff's Department, et al.
(Via Electronic Filing Service and U.S. Mail)*

Los Angeles Superior Court
Clerk of the Superior Court
Department 85, No. BS166063
111 North Hill Street
Los Angeles, CA 90012
(Via U.S. Mail)*

Court of Appeal, State of California
Clerk of the Court of Appeal
Second Appellate District
Division 8, No. B280676
300 S. Spring Street
2nd Floor North Tower
Los Angeles, CA 90013
(Via Electronic Filing Service and U.S. Mail)*

Supreme Court of California
Clerk of the Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
(Via Electronic Filing Service and U.S. Mail)*

Los Angeles County
District Attorney's Office
211 West Temple Street. Suite 1200
Los Angeles, CA 90012
(Via U.S. Mail)*

Xavier Becerra
Attorney General of California
300 South Spring Street
Los Angeles, CA 90013-1230
(Via U.S. Mail)*

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
(Via Electronic Filing Service and U.S. Mail)*

*In accordance with the *Supreme Court Rules Regarding Electronic Filing*, Rule 5(a), this is a true and correct paper copy, in the form(s) specified in Rule 8.40(b), *California Rules of Court*, is transmitted via U.S. Mail to all indicated parties on or before May 8, 2018.