
THIRD READING

Bill No: SB 1220
Author: Umberg (D)
Amended: 6/18/20
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-0, 5/27/20
AYES: Skinner, Moorlach, Jackson, Wiener
NO VOTE RECORDED: Bradford, Mitchell, Morrell

SENATE APPROPRIATIONS COMMITTEE: 4-1, 6/18/20
AYES: Portantino, Hill, Leyva, Wieckowski
NOES: Jones
NO VOTE RECORDED: Bates, Bradford

SUBJECT: Peace and custodial officers

SOURCE: California District Attorneys Association

DIGEST: This bill requires law enforcement agencies to provide prosecutors a list of officer names and badge numbers who have had sustained findings of specified misconduct, certain criminal offenses, or are facing criminal prosecution; and requires that the prosecutors notify the officer that they are being placed on the list, as specified.

ANALYSIS:

Existing law:

- 1) Provides that in any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought. (Evid. Code § 1043, subd. (a).)

- 2) Provides that a motion for discovery or disclosure of personnel records shall include all of the following:
 - a) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.
 - b) A description of the type of records or information sought.
 - c) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records. (Evid. Code § 1043, subd. (b).)
- 3) States that courts shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law. (Evid. Code § 1045.)
- 4) States that, except as specified, the personnel records of peace officers and custodial officers and records maintained by any state or local agency, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except through specified litigation discovery processes. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code § 832.7, subd. (a).)
- 5) Provides that the following peace officer or custodial records maintained by their agencies shall not be confidential and shall be made available for public inspection pursuant to the Public Records Act: (Pen. Code § 832.7, subd. (b).)
 - a) A record relating to the report, investigation, or findings of any of the following:
 - i) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
 - ii) 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.

- b) 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.
- c) Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency 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, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

This bill:

- 1) Requires any law enforcement agencies to, upon request, provide prosecutors a list of names and badge numbers of officers employed by the agency in the 5 years preceding the request who meet specified criteria, including, that the officer has:
 - a) Sustained findings that they engaged in sexual assault involving a member of the public.
 - b) Sustained findings that they engaged in an act of dishonesty related to the reporting, investigation, or prosecution of a crime; including but not limited to a sustained finding of perjury, false statements, filing false reports, destruction, falsifying or concealing of evidence.
 - c) Sustained findings for conduct of moral turpitude.
 - d) Sustained findings for group bias.
 - e) A conviction of a crime of moral turpitude.
 - f) Is currently facing criminal charges.
 - g) That the officer is on probation for a criminal offense.
- 2) Requires the prosecuting agency to keep this list confidential, except as constitutionally required through the criminal discovery process under *Brady v. Maryland* (1963) 373 U.S. 83.
- 3) Requires a prosecuting agency, prior to placing an officer's name on a Brady list, to notify the officer as soon as practicable and provide the officer an opportunity to present information to the prosecuting agency about the placement of the officer's name on the Brady list, except as specified.
- 4) Specifies that a "crime of moral turpitude means" conduct or crimes found to be conduct or crimes of moral turpitude in published appellate court decisions.

Comments

Brady v. Maryland, (1963) 373 US 83 was a United States Supreme Court case that established the rule that prosecutors must turn over all evidence that may exonerate a defendant to the defense. The case has become a basic and fundamental tenet of criminal law and due process. Additionally, nationally prosecutors are held to the ethical standards set forth in *Brady*. The role of the prosecutor should not be to win his or her case, the role of the prosecutor should be to achieve justice. Part of achieving justice is making sure that the defendant has all of the state's evidence that could be used to exculpate them from a finding of guilt.

The *Brady* decision has been applied to information regarding law enforcement officers and records related to their credibility and employment history. The landmark case in California applying the rule to law enforcement records is *Pitchess v. Superior Court*, (1974) 11 Cal.3d 531. In *Pitchess* the defendant was accused of four counts of assaulting four Los Angeles County Sheriff's deputies. However, after the alleged assault the defendant ended up in intensive care and the officers suffered no serious injuries.

Attorneys for the defendant sought records from the sheriff's office regarding complaints by the public about the specific officers who were alleged victims of the defendant, and their propensity to use excessive force on the job. The court issued a subpoena for the records, and the sheriff's office refused to comply. The Court of Appeal ruled that the subpoena should be upheld, but the agency only had to release records of sustained misconduct and the conduct must be substantiated by the agency. The California Supreme Court then unanimously agreed with the lower court. The *Pitchess* procedure has been codified into California law as California Evidence Code sections 1043 and 1047.

In August of 2019 the California Supreme Court unanimously held that law enforcement agencies could share with prosecutors the names of officers on a *Brady* list, in very limited cases, without seeing a court order after the filing of a motion under the *Pitchess* code sections. *Association for Los Angeles Deputy Sheriffs v. Superior Court*, (2019) Case No. S243855. The ruling held that a law enforcement agency does not violate *Pitchess* "by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file." The ruling also explained an example of what constitutes a "*Brady* List" in California. In this case the law enforcement agency conducted a review of approximately 7,899 deputy sheriffs. They sent letters to roughly 300 of those

deputies informing them that a review of their personnel records had identified potential exculpatory or impeachment information in their personnel file. Examples of “performance deficiencies” in this case included, but were not limited to: immoral conduct; bribes, rewards, loans, gifts, and favors; misappropriation of property; tampering with evidence; false statements; failure to make statements and/or making false statements during departmental internal investigations; obstruction of an investigation; influencing a witness; false information in records; violating a policy of equality – discriminatory harassment; unreasonable force; and family violence.

The letter further advised deputies that in order to comply with constitutional obligations the agency had to provide the names of the employees with potential exculpatory or impeachment material in their personnel file to prosecutors. Officers were given the right to object to their inclusion on the *Brady* to correct such things as clerical errors, or incorrect inclusion.

The Association for Los Angeles County Deputy Sheriffs (ALADS) opposed the proposed policy and filed a lawsuit to prohibit the Los Angeles Sheriff from disclosing the names of the deputies on the list to anyone outside of the agency without compliance with the *Pitchess* process. The trial court issued a preliminary injunction on the release of the names to prosecutors with the exception of officers that were witnesses in pending criminal prosecutions. The Court of Appeal approved of the injunction, and held that even the exception imposed by the trial court was inappropriate and prosecutors should have to comply with the full *Pitchess* process.

The California Supreme Court reversed the decision by the Court of Appeal and held that the language of the *Pitchess* statutes authorized the law enforcement agency to share *Brady* information with prosecutors for particular cases. In balancing the *Brady* and *Pitchess* cases, the Supreme Court felt that the law must be construed to allow the agency to share with prosecutors an alert that an officer was on a *Brady* list. This would not violate officer confidentiality. The court examined the Legislature’s actions in passing SB 1421 (Skinner, Chapter 988, Statutes of 2018).

The court found that even though the Legislature made sustained findings of sexual assault, sustained findings of dishonesty, and specified allegations of use of force not confidential and subject to disclosure under the Public Records Act there are other types of police officer personnel records that could cause an officer’s name to be included on a *Brady* list. The Supreme Court concluded that viewing the *Pitchess* statutes against the larger background of the prosecution’s constitutional

obligations under *Brady*, the law enforcement agency may provide prosecutors with *Brady* alerts, not full *Brady* lists, without violating confidentiality.

Given the ruling by the California Supreme Court in *Assn. for LA Deputy Sheriffs v. Superior Court* which stated that only specified *Brady* alerts could be disclosed to prosecutors, not full lists, this bill seeks to amend the confidentiality and disclosure provisions of the *Pitchess* sections in the Evidence Code and the confidentiality section of the Penal Code to permit disclosure of officer names and badge numbers on a *Brady* list.

Just as the Legislature codified the Supreme Court's Ruling in *Pitchess v. Superior Court*, this bill seeks to codify the Supreme Court's ruling in the *ALADS* case. By codifying the decision, the Legislature will encourage compliance and cut down on litigation in and around non-compliance.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Senate Appropriations Committee:

- *Law enforcement agencies:* Unknown, potentially-significant costs in the millions of dollar, in the aggregate, for state and local law enforcement agencies to determine which officers' placement would be required on a *Brady* list and to update the list prior to each request from a prosecuting agency. Actual costs to each law enforcement agency would depend on if it currently maintains and updates a list of officers (such as the Department of Justice, which reports minimal compliance costs) or if it would need to create the list anew. Additionally, the requirement would be triggered only when a prosecuting agency requests a list. Consequently, some law enforcement agencies might not create a list, and incur the associated costs, if a prosecuting agency never makes a request. The California Highway Patrol estimates implementation costs of approximately \$6.8 million (with 27.0 temporary PY) and ongoing annual costs of \$1.1 million (with 5.0 permanent PY). The Department of Corrections and Rehabilitation reports implementation costs of roughly \$850,000 (with 7.0 PY) and ongoing annual costs of approximately \$700,000 (with 6.0 PY). (Special fund*, General Fund)

Local costs to comply with this measure would be subject to reimbursement by the state to the extent that the Commission on State Mandates determines that this bill imposes a state-mandated local program. Staff notes, however, if compliance costs to agencies are relatively low, it is unlikely that a test claim would be filed. There are over 500 local law enforcement agencies across the state. If it cost each agency \$1,000 to assemble and maintain a list, law

enforcement costs associated with SB 1220 would surpass \$500,000 in the aggregate. (General Fund, local funds)

- *Prosecuting agencies:* Unknown, potentially-significant costs for prosecuting agencies to give officers an opportunity to provide information against placement on, or removal from, a *Brady* list and to consider the information proffered. Costs would depend on what type of process a prosecuting agency establishes, how many officers would have to be notified, and how many officers exercise their opportunity for exclusion/removal. There are 58 county district attorney offices along with a number of city attorneys and city prosecutors and the Department of Justice that could maintain *Brady* lists and, therefore, would be subject to this requirement. Local compliance costs would be subject to reimbursement by the state to the extent that the Commission on State Mandates determines that this bill imposes a state-mandated local program, but, as noted above, it is unlikely that a test claim would be filed to the extent that costs are relatively low. (General Fund, local funds)

Costs to notify officers prior to their placement on a *Brady* list is unknown but will be ongoing as new officer would be subject to inclusion on the list. It is unclear if the notification provision applies to officers who have been placed on a *Brady* list already. If notification would be required, there likely would be higher one-time costs to notify those officers simultaneously.

*Motor Vehicle Account, State Transportation Fund

SUPPORT: (Verified 6/18/20)

California District Attorneys Association (source)

Alameda County District Attorney

Amador County District Attorney

Colusa County District Attorney

El Dorado County District Attorney

Escalante County District Attorney

Fresno County District Attorney

Humboldt County District Attorney

Lake County District Attorney

Los Angeles County District Attorney

Madera County District Attorney

Monterey County District Attorney

San Diego County District Attorney

San Francisco District Attorney

San Mateo County District Attorney

Santa Barbara County District Attorney
Santa Clara County District Attorney
Shasta County District Attorney
Siskiyou County District Attorney
Sonoma County District Attorney
Stanislaus County District Attorney
Sutter County District Attorney
Trinity County District Attorney
Ventura County District Attorney
Yolo County District Attorney
Yuba County District Attorney

OPPOSITION: (Verified 6/18/20)

American Civil Liberties Union of California
Association for Los Angeles Deputy Sheriffs
California Attorneys for Criminal Justice
California Public Defenders Association
California Statewide Law Enforcement Association
Los Angeles Police Protective League
Riverside Sheriffs' Association
San Francisco Police Officers Association
San Francisco Public Defenders

ARGUMENT IN SUPPORT: According to the California District Attorneys Association:

“The United States Constitution requires prosecutors to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) Exculpatory evidence includes information the defense may use to impeach the credibility of peace officer witnesses, such as prior misconduct by the officer. This exculpatory information is commonly referred to as ‘*Brady* material.’ Of course, a prosecutor cannot disclose *Brady* material of which the prosecutor is unaware. While the overwhelming majority of peace officers’ personnel files do not have *Brady* material, a percentage does. SB 1220 will help prosecutors to discover, and disclose, exculpatory evidence such as sustained disciplinary findings of group bias or dishonesty.

“In recent years, the California Supreme Court has lauded and upheld the voluntary law enforcement practice of notifying prosecutors when an officer’s file may contain *Brady* material. (*Association for Los Angeles Deputy Sheriffs v. Superior*

Court (2019) 8 Cal.5th 28, 53-55; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 713-714.) However, the court made clear that law enforcement agencies are not required to provide such information. Because no law compels it, some of California's largest agencies do not provide *Brady* notifications to prosecutors. Without this information, the defense is unable to confront law enforcement witnesses with prior misdeeds that may impact the witnesses' credibility.

“SB 1220 would solve this problem by requiring law enforcement agencies to notify prosecutors when a peace officer has potential *Brady* material in his or her personnel file. Under this common sense and balanced legislation, agencies would provide prosecutors the officer's name and badge number. Because certain types of peace officer misconduct records are already subject to disclosure under the Public Records Act (2018 SB 1421, Skinner), counsel could obtain those records merely by requesting them. Otherwise, a judge would review the records and determine whether they should be disclosed to counsel. In addition, officers would have a right to notice when a prosecutor's office places their names on a list of officers with potential *Brady* information in their personnel files. The officers would have the right to request removal if their names were included on the list without justification.

“By mandating *Brady* notification from law enforcement agencies to prosecutors, SB 1220 will ensure prosecutors are able to meet their Constitutional disclosure obligations and will improve the criminal justice system.”

ARGUMENT IN OPPOSITION: According to the Los Angeles Police Protective League:

“The Los Angeles Police Protective League has reviewed your Senate Bill 1220 and regretfully must take an ‘oppose’ position on the bill. We feel that the measure oversteps the findings of the California Supreme Court regarding appropriate disclosure of information related to deputies to a prosecuting agency by an employing agency.

“Senator Umberg, to be *Brady* listed as a peace officer, is to be blacklisted for your entire career. This list carries significant consequences and repercussions; however, we accept that its use is appropriate for identifying officers who have demonstrated that they lack the credibility and honesty necessary to maintain a just justice system. Fundamentally, prosecutors DO NOT show regard for the impact of their decision(s) to place an officer on a *Brady* list has on that officer's career. Officers that have not demonstrated a lack of integrity, truthfulness, or candor are

added to Brady lists far too often because of prosecutorial laziness, prosecutorial abuses of power, or retaliatory actions taken by police management.

“The current Brady system is broken!

- There is an abundance of examples of officers being placed on Brady lists for complaints that were appropriately investigated but never sustained.
- There are too many examples of officers who have been exonerated from the issue they were accused of. However, there was never a corresponding removal of those officers off of a Brady list.
- There are numerous examples of officers being placed on Brady lists for *inconsequential* reasons that occurred multiple decades prior to the date that officer was placed on a Brady list, notwithstanding the officer’s decades of decorated, excellent service.
- There are even examples of officers being placed on Brady lists because of prosecutorial errors for which law enforcement labor unions have had mixed results obtaining justice and relief for our officers.
- There is no structured due process for officers who have been placed on a Brady list to present evidence in an appeal to clear their name. Furthermore, to the extent that appeal processes are provided, they are rigged, meaning that the decision makers are hardly neutral and fair.
- There are no protections for officers that require Brady list entries to be substantiated by credible evidence and nothing in current law that prohibits the arbitrary entry of an officer’s name on a Brady list.

“Senate Bill 1220 requires law enforcement agencies to release personnel records, upon request, to prosecutorial offices in the state. This is both unprecedented and a violation of the right to privacy that our members expect as public employees. We recognize and respect the requirements set forth in both statutory law and case law concerning *Brady v. Maryland*. We have no intention of obstructing a prosecutor’s access to information that they are required to disclose by law. However, your bill requires the disclosure of much more information than is required under *Brady v. Maryland* and its progeny to be revealed. *This provision of your bill will add a significant increase of legal liability, thereby increasing pressure on district attorneys to comb through these personnel files with a fine-toothed-comb for any material that could be considered Brady-relevant by any stretch of the imagination. The result will be the placement of officers on Brady lists en-masse, without due process considerations of whether the findings in these officers’ personnel files are Brady relevant.*

“*Pitchess* motions authorize litigants to question and access confidential background information on peace officers who are participants in a criminal trial. These motions are supervised by a judicial officer to prevent prosecutors and defense attorneys from gaining carte blanche access to records that are immaterial to the trial at hand. SB 1220 undermines the reasonable protections afforded in the *Pitchess* motion process.

“Senate Bill 1220 explicitly strips law enforcement officers of any meaningful judicial or administrative review. We ask that you strike this section of your bill, given the distrust and tension associated with how Brady processes currently operate across the state.

“The Brady List is a blacklist for officers whose integrity, reliability and credibility have been compromised. Utmost care must be taken to ensure that well-intentioned officers are not placed on this list. This means there must be a demonstration that the decision to put an officer on this list was not arbitrary or retaliatory, but based on sound evidence and decided by a neutral arbiter.”

Prepared by: Gabe Caswell / PUB. S. /
6/23/20 17:13:57

**** END ****