SENATE THIRD READING
SB 1220 (Umberg)
As Amended July 28, 2020
Majority vote

SUMMARY:

Requires each prosecuting agency to maintain a *Brady* list and any law enforcement agency to, annually and upon request, provide a prosecuting agency a list of names and badge numbers of officers employed in the five years prior to providing the list that meet specified criteria, including having a sustained finding for conduct of moral turpitude or group bias, and establishes a due process procedure for the officer to contest their inclusion on the list.

Major Provisions

1) Requires each prosecuting agency to maintain a *Brady* list, as specified.
2) Requires any law enforcement agencies maintaining personnel records of peace officers and custodial officers to, annually on and after January 1, 2022, provide to each city, county, or state prosecuting agency within its jurisdiction, and upon request at any time to any city county or state prosecuting agency, a list of names and badge numbers of officers employed by the agency in the five years prior to providing the list who meet specified criteria, including officers who:
    a) Have had sustained findings that they engaged in sexual assault involving a member of the public;
    b) Have had sustained findings that they engaged in an act of dishonesty related to the reporting, investigation, or prosecution of a crime or misconduct, including but not limited to a sustained finding of perjury, false statements, filing false reports, destruction, falsifying or concealing of evidence;
    c) Have had sustained findings for conduct of moral turpitude;
    d) Have had sustained findings for group bias;
    e) Have been convicted of a crime of moral turpitude;
    f) Who are facing currently pending criminal charges; or
    g) Who are on probation for a criminal offense.
3) 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.
4) Provides that these requirements do not limit the discovery obligations of law enforcement or prosecutors under any other law.
5) 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 (*Brady*).

6) States that the list may be used by either a prosecutor or criminal defense attorney to establish good cause for in camera review by a court of confidential peace officer records or information, as specified.

7) Requires a prosecuting agency, prior to placing an officer's name on a *Brady* list, to notify the officer and provide the officer an opportunity to present information to the prosecuting agency against the officer's placement on the list. If that prior notice cannot be provided consistently with the prosecutor's discovery obligations, the prosecuting agency shall comply with its discovery obligations, notify the officer as soon as practicable, and provide the officer an opportunity to present information to the prosecuting agency favoring the officer's removal from the list.

8) Specifies that this provision does not create a right to judicial or administrative review of the prosecuting agency's decision to place or retain a peace officer's name on a *Brady* list.

9) States that the decision to place or retain an officer's name on a *Brady* list shall be within the sound discretion of the prosecuting agency.

10) Removes the limitation on relevance at trial and disclosure of information of an officer's misconduct that occurred more than five years before the event or transaction that is the subject of the litigation for which discovery or disclosure is sought, if the information is required to be disclosed pursuant to *Brady*.

COMMENTS:

According to the Author:

"Under Brady v Maryland, the prosecution has a constitutional obligation not only to disclose what is already known to prosecutors, but also to learn of any such information that is known to law enforcement, including matters related to witness credibility, even that of peace officers, and make that information available to the defense.

"Although Brady and subsequent decisions have been [in] place for many decades, some law enforcement agencies are not able to fully observe its requirements through organizational policy or practice because of the lack of clarity and the confusing patchwork of varied policies across prosecutorial jurisdictions. Brady does not provide a bright-line rule on the types of information that must be revealed and departments can have difficulty establishing protocols on compiling Brady materials from records that may be spread throughout a department.

"SB 1220 aims to strike a delicate balance between prosecutors' constitutional obligations and due process protections for peace officers. Firstly, this bill requires law enforcement agencies maintaining personnel records of peace officers to provide prosecuting agencies a list of names and badge numbers of officers employed by the agency in the five years preceding the request who meet specified criteria in accordance with the Brady case and subsequent decisions. Prosecuting agencies will be required to keep this list confidential, except as constitutionally required. Secondly, SB 1220 establishes California's first-ever minimum due process standards for officers by requiring prosecuting agencies, before placing an officer's name on a Brady list, to

notify the officer and provide the officer an opportunity to request the prosecuting agency remove the officer from the list."

Arguments in Support:
According to the *California District Attorneys Association*, the sponsor of this bill "SB 1220, which would mandate *Brady* notification from peace officers to prosecutors to ensure prosecutors are able to meet their constitutional obligations and to provide greater transparency in our criminal justice system.

"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.

"Having consulted with the American Civil Liberties Union and the California Public Defenders Association, we support the July 28, 2020, amendments to the bill. These amendments mandate that prosecuting agencies in California maintain *Brady* lists and require law enforcement agencies to provide *Brady* notification to prosecuting agencies annually and at any other time upon request. In addition, the amendments clarify that nothing in this bill will delay or alter prosecutorial and law enforcement discovery obligations under other laws.

"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."

Arguments in Opposition:
According to the *California Attorneys for Criminal Justice*, "[Senate Bill 1220] runs afoul of the federal Constitution and conflicts with the California Supreme Court and United States Supreme Court decisions on the prosecution's *Brady v. Maryland*, 373 U.S. 83 (1963) (*Brady*).

"We support any efforts to encourage law enforcement to cooperate fully with the prosecuting agencies in criminal cases and, specifically, to provide information that might lead to the discovery of *Brady* material. However, the proposed addition of Penal Code section 1045(g)(1), places limits on the nature of the information to be disclosed and a time limit on that information, neither of which is consistent with *Brady* obligations. The proposed addition of section 1045(g)(4) also requires notice to the officers and provides them an opportunity to request removal from the list.

"First, *Brady* is a federal Constitutional requirement and cannot be limited by state statute. In fact, any attempt to limit *Brady* obligations would not only be unconstitutional but would likely result in unnecessary reversals and retrials. Just last year, the California Supreme Court reiterated, "Under *Brady*, a prosecutor must disclose to the defense evidence that is 'favorable to [the] accused' and 'material either to guilt or to punishment.'" *Association for Los Angeles Deputy Sheriffs v. Superior Court*, (2019) 8 Cal.5th 28, 40 (*ALADS*). This includes information about officers involved in the case, testifying or otherwise, that is favorable to the defense. Our Court went on to say, this is based on the federal Constitution. The United States Supreme Court has made it clear that a failure to abide by the *Brady* obligation can lead to reversal of any conviction where the failure to disclose might undermine '"confidence in the outcome of the trial."' *ALADS, supra*, 8 Cal.5th at p. 40, quoting *Smith v. Cain* (2012) 565 U.S. 73, 75. The prosecutor can fail in this obligation, again under the federal Constitution, even if their office is not aware of information in possession of the law enforcement agencies involved in the case.

"Second, this proposed legislation attempts to limit the constitutional obligations under *Brady* with analogies to the technical protocols involved in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). As the court in ALADS reiterated, *Pitchess* and its subsequent codification (Cal. Evid. Code Sections1043-1047) was not based on constitutional grounds. Therefore, under *Pitchess* alone, the courts can impose restrictions on disclosure of material.

"However, the courts can only limit disclosure under Pitchess insofar as that disclosure is not also required by Brady because Brady is based on the federal Constitution which cannot be limited by California courts. Moreover, the California Legislature also cannot impose restrictions on Brady obligations by statute.

"Therefore, the limitation to disclosing only name and badge number to the prosecution and forcing the prosecutor to pursue more information may be convenient in a short-sighted sense. However, this puts an undue burden on the prosecutor to guess that Brady material may exist and then to file its own motion to compel disclosure of that information. Failure to get that right could lead to reversal of any conviction. That is why Brady lists were developed – they have nothing to do with Pitchess. They are designed to give the prosecutors a fighting chance to identify information that they are required to investigate and turn over to the defense if the information qualifies. Even though the prosecutor must meet the burden in court, police agencies have the duty to inform the prosecution of potential information. Law enforcement and the prosecutor should be on the same side.

"Third, *Brady* does not have a time limitation. The prosecutors are charged with the duty under *Brady* of knowing about all possible *Brady* information notwithstanding its age or other artificial factors. *Pitchess* legislation contains time limitations but that has nothing to do with the Constitutional requirements of *Brady*. SB 1220 purports to limit the reporting officer misconduct to "five years preceding the request." That limitation is both non-sensical and, even if it made sense, would violate *Brady*. It is non-sensical because the date of a request could be anytime, including, in delayed prosecutions, long after an officer left the force, meaning that misconduct at or near the time of the events charged against the defendant would not be disclosed. However, even if the proposed statute required, for example, five years before and five years after the events charged, that would still not meet the Constitutional requirements that would be based on the circumstances of the relevant misconduct.

"Fourth, the police officer has no employment rights regarding disclosure of *Brady* information. *Brady* iterates the Constitutional rights of the person accused. There is no balancing of interests of the employee or the right of the employee to suppress prior complaints sustained or otherwise. Either the misconduct is relevant to the defendant's rights under *Brady* or not. Whether the officer or the department or even the prosecutor feel that it embarrassing to the officer or whether it would be better from an employee/employer standpoint is not relevant."

FISCAL COMMENTS:

According to the Assembly Appropriations Committee:

1) One-time costs (General Fund (GF)) to the California Highway Patrol (CHP) of approximately $6.8 million dollars for additional training, policy updates and review of personnel records. Specifically, CHP estimates, among other costs, initial one-hour training for all personnel would cost $980,944.00; approximately $5.3 million dollars to review personnel records for inclusion on the *Brady* list; and approximately $500,000 for software development.

   Annual costs (GF) to CHP of approximately $1.2 million dollars for ongoing training and review of personnel records in order to provide *Brady* information to state and local jurisdictions.

2) Possible cost pressures (General Fund (GF)/local funds) in the hundreds of thousands of dollars to low millions of dollars for local law enforcement agencies to review personnel files for purposes of providing *Brady* information to local prosecuting agencies. 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 reimbursable state-mandated local program. Case law currently allows law enforcement agencies to provide *Brady* information to district attorneys and many law enforcement agencies are already doing so. If costs to local agencies are low enough given the existing requirements, it is possible none of them file a claim for reimbursement with the Commission on State Mandates.

3) Possible cost pressure (GF/local funds) in the hundreds of thousands of dollars to low millions of dollars to local district attorney offices to provide officers with notice and opportunity to object to their inclusion on the *Brady* list. As noted above, many law enforcement agencies already provide *Brady* lists to district attorneys and consistent with the requirements of Government Code section 3305. 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 reimbursable state-mandated local program.

VOTES:

SENATE FLOOR: 34-0-6
YES: Allen, Atkins, Bates, Beall, Borgeas, Caballero, Chang, Dahle, Dodd, Durazo, Galgiani, Glazer, Lena Gonzalez, Grove, Hertzberg, Hill, Hueso, Hurtado, Jackson, Jones, Leyva, McGuire, Moorlach, Nielsen, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk
ABS, ABST OR NV: Archuleta, Bradford, Melendez, Mitchell, Monning, Morrell

ASM PUBLIC SAFETY: 6-0-2
YES: Jones-Sawyer, Lackey, Bauer-Kahan, Diep, Santiago, Mark Stone
ABS, ABST OR NV: Kamlager, Quirk

ASM APPROPRIATIONS: 17-0-1
YES: Gonzalez, Bigelow, Bauer-Kahan, Bloom, Calderon, Carrillo, Chau, Megan Dahle, Diep, Eggman, Fong, Gabriel, Eduardo Garcia, Petrie-Norris, Quirk, Robert Rivas, Voepel
ABS, ABST OR NV: Bonta

UPDATED:

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