California high court cans cop union's attempt to block new law requiring police misconduct records disclosure

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The California Supreme Court on Wednesday declined to clarify whether a new state law requiring California law enforcement agencies to make police misconduct records public applies to misconduct that took place before the new law went into effect on Jan. 1 — whether the law is retroactive.

Since the high court will not weigh the retroactivity issue, it also declined to issue an injunction against the enforcement of the law, as was also requested.

The upshot: California law enforcement agencies will have to begin fulfilling requests made by the public, the media or anyone else who asks for them. If police departments want to challenge the way retroactivity applies to the law, that will have to be decided in lower courts, on an individual basis — a lawsuit over the matter was filed in Los Angeles County on Dec. 31. If lower court decisions on the matter are appealed, the California Supreme Court could eventually be forced to rule on the matter.

The lawsuit was filed by a union representing San Bernardino County Sheriff's Department deputies, and was intended to leapfrog lower courts and get a statewide ruling directly from the state's highest court.

The recently-enacted law, SB 1421, requires police departments to make public internal investigation records regarding officers' use of force, sexual assault and lying on reports.

However, the San Bernardino County Sheriff's Employees' Benefit Association, which represents deputies from the county's sheriff's department, asked the court on Dec. 18 to determine whether Senate Bill 1421 should be applied by the departments retroactively.

Mike Rains, the union's attorney, said in a statement that the court issued a summary denial without explanation.

"The Court's action was simply a decision to decline to exercise its original jurisdiction in this matter," Rains said in the statement. "The Court did not adjudicate the merits of the case, nor did it issue any legal precedent regarding the issues raised."

The court also denied the union's motion to delay the implementation of the transparency bill until the retroactivity issue is adjudicated.

The union's president, Grant Ward, said in a statement that the union is fighting the new law's retroactivity in order to look out for police officers' best interests.

“SEBA is very concerned about any plans to retroactively apply Senate Bill 1421,” Ward said in the statement. “We believe retroactive application violates our members’ rights and we hope the California Supreme Court will consider the serious issues raised by our legal challenge.”

State Senator Nancy Skinner, D-Berkeley, who drafted the legislation said California’s previous restrictions against releasing information about investigations into police officer misconduct did not serve the best interest of the public.

“When incidents such as a police shooting occurs, the public has a right to know that there was a thorough investigation,” Senator Skinner said in a statement released while the bill was making its way through the legislature in 2018. “Without access to such records, communities can’t hold our public safety agencies accountable.”

Now in effect, SB 1421 allows the public to use the California Public Records Act to unseal internal investigation records related to when officers use weapons on people, commit sexual assault or lie in police reports. The records may include evidence, recordings of interviews, autopsy reports, reports to the district attorney to determine whether to file charges and copies of disciplinary records.

While the bill keeps unfounded complaints from reaching the public, records that are disclosable will be unsealed 18 months after the incident.

The union’s case was filed as law enforcement agencies across California prepared for a wave of requests to release officer misconduct investigations.

Los Angeles Police Department Chief Michel Moore wrote in a letter included in the filing, that his department has established an SB 1421 Task Force to prepare for the “massive influx in historical records requests it anticipates.”

Moore wrote in the letter that the influx of requests could be “beyond any reasonable expectation given the sheer volume of personnel complaints and uses of force (UOF) maintained in antiquated or archaic formats”.

With the new law in effect, Rains, the union’s attorney, said he expects lower court could rule in contradictory ways on the retroactivity issue, meaning different interpretations in different jurisdictions, which could mean the lawsuit ends up back before the state supreme court.

“The possibility of multiple lawsuits being filed and litigated in numerous counties throughout the state, and the potential for conflicting decisions at the Superior Court level was the impetus for the action we filed,” Rains said.

Rains filed a similar case attempting to bar retroactive enforcement of SB 1421 in the Los Angeles Superior Court on behalf of the Los Angeles Police Protective League. The superior court granted the union’s request to delay retroactive enforcement of the law on Dec. 31, but the case remains open.

Nikki Moore, an attorney for the California News Publishers Association, said every police department in California will have to determine how to comply with SB 1421.

But Michelle Blakemore, an attorney who works for San Bernardino County, wrote in a letter included as an exhibit in the lawsuit that the county has reviewed SB 1421 and plans to enforce it retroactively.

“In anticipation of SB 1421 taking effect, the Sheriff’s Department has been diligently reviewing the changes to the law and carefully considering how to implement these changes,” Blakemore wrote. “Based on this review, and on the advice of counsel, the Department intends to apply these changes retroactively.”

The union argued in the filing that the county’s plan is based on an incorrect interpretation of the law because SB 1421 does not explicitly order agencies to retroactively enforce the law.

“Respondent incorrectly contends that, notwithstanding the absence of any express retroactivity provision, SB 1421 must be applied and enforced as to personnel records and information reflecting specified peace officer conduct occurring prior to January 1, 2019,” the union wrote in the court filing.

Social media has created a slew of new issues in the courts and forced judges to ponder the legal import of postmodern concepts like Facebook friends and Instagram followers.

Last year, the US Supreme Court ruled in Carolina that social-media platforms are the new “public square,” and access to them is protected by the First Amendment, which guarantees free speech. But that doesn’t necessarily mean there are no limitations on how social media can be used when an ex-convict is on probation. For example, a California state appeals court just found in *AA v. The People* (pdf) that a “narrowly tailored” limit on social media use for a juvenile on probation—in this case for a felony offense—was legal for rehabilitation purposes and to protect a crime victim. (It is common for adults and juveniles serving probation for a felony offense to have many limitations imposed on their conduct and communications as part of the terms of conditional release.)

The decision is interesting not only because it shows just how deeply social-media use has penetrated the culture, but also the extent to which some believe they need to publicize their activities.

The juvenile involved in the case, AA, is 16 years old. He was placed on probation by a Los Angeles County Court after being found guilty of assaulting someone on a basketball court, necessitating two plastic surgeries for the victim, who will be permanently scarred. While his case was under consideration, he posted a picture of his subpoena on Instagram with the caption, “[N]ew Nexflix series coming. I’m a 16-year-old felon.” The juvenile court judge admonished him not to post about his case again.

But AA didn’t listen. At the next hearing, he posted a video of himself dancing in front of the courthouse. When the judge asked him about it, AA said, “[P]eople knew I was in court; so I shot a video because I do have a lot of Instagram followers, and they do tend to, like, care, in a

sense of what I'm doing." He was again ordered to refrain and warned that his posts could be used against him if he continued to ignore the judge's order.

When it came time to lay out conditions for the juvenile's probation, the court told AA to take down any social-media posts having to do with his case and the offense that led to it and prohibited him from posting anything new about the matter. The juvenile didn't object at the hearing, but he did file an appeal arguing that the probation conditions violated his free-speech rights. It wasn't fair, AA argued, that he couldn't even express remorse about his actions without violating probation.

The appeals court couldn't have agreed with AA less, stressing the lowly position of juveniles in the criminal justice system. The opinion summarized the case as follows:

One of the goals of the juvenile law is reformation and rehabilitation of the minor's attitude so that he respects the rights of others. Here, appellant seems to think that his felonious conduct is a springboard for braggadocio on the internet. Appellant has First Amendment freedom of speech rights. But the juvenile court may curtail such rights in an appropriate case by a narrowly tailored condition of probation. This is an appropriate case.

Basically, it's true that AA has the right to speak freely. But his freedom is legally curtailed by probation conditions designed to rehabilitate him and protect the victim. The court noted that his social-media posts could endanger the victim in this case and that there were plenty of other ways AA could communicate, including email, phone, in person, and via written correspondence.

To the extent that AA's case seems to contradict the conclusions about free speech and social media in *Packingham,* it's notable that the Supreme Court case involved a North Carolina law that made it a felony for sex offenders to have any social-media presence at all, indefinitely. In this juvenile case, however, AA was only barred from posting about his offense and only for the duration of his probation.

AA also argued that his trial court attorney was ineffective for failing to object to the social-media prohibition condition when it was initially imposed. This claim was dismissed with barely any discussion. The court said objecting would have been "an exercise in futility" anyway, so counsel couldn't be considered deficient.

FDSA Endorsement Board of Supervisor District 2

At the December 5th 2018 Fresno Deputy Sheriff's Board meeting, your board heard from Fresno County Board of Supervisor candidate Steve Brandau. Brandau is currently a Fresno City Councilman and is in the middle of his second term.

Brandau addressed the FDSA Board and membership for about 30 minutes informing us of his purpose for running for BOS and fielding questions as well. After hearing what Brandau said, the FDSA Board of Directors made a motion to support Steve in his election.

We feel Steve has the principles that are needed in order for Fresno County to continue stabilizing, while bringing ideas for expansion. His personality will mesh well with the sitting board members and focus on making Fresno County great. Steve has a common-sense approach, matched with intelligence which is what works. Steve understands, as a Fresno County resident, the end of the road with law enforcement stops with the Sheriff's Office.

During the interview process he spoke very candid and highly of his commitment to public safety; how important it is to the residents within the communities we serve. These are the values we at the Fresno Deputy Sheriff's Association believe is important for Fresno County. FDSA has no reason to doubt Steve's word when he addressed us.

We believe Steve will stand by his word when it comes to law enforcement and the resources it needs to keep people safe. We seek out the best candidates when it comes to hiring a deputy sheriff. As a Board of Supervisor, Steve will have a strong voice in helping to maintain the high level of law enforcement professional the people of Fresno County expect to arrive at their doorstep and handle their problem.

District Two for our purposes is Old Fig Garden, the Lincoln 21 beat, parts of Clovis and the Fresno State area. I have attached a map to get an idea.

The election is March 5, 2019 – if you live in the district please remember to vote for Steve Brandau for Supervisor.