IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, *Petitioner* vs. **SUPERIOR COURT OF LOS ANGELES COUNTY,** *Respondent.*	**No. S243855**
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, *et al.,* *Real Parties in Interest*	

Second Appellate District, Division Eight, No. B280676
Los Angeles County Superior Court, No. BS166063
Honorable James C. Chalfant, Judge

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST

MARK ZAHNER, SBN 137732
Chief Executive Officer
California District Attorneys Association
MICHAEL D. SCHWARTZ, SBN 91124
Special Assistant District Attorney
Ventura District Attorney's Office
JERRY P. COLEMAN, SBN 78744
Special Assistant District Attorney
San Francisco District Attorney's Office
ALBERT C. LOCHER, SBN 66616
Assistant District Attorney (Retired)
Sacramento District Attorney's Office
Attorneys for Amicus Curiae
California District Attorneys Association
921 – 11th Street, Suite 300
Sacramento, CA 95814
Telephone: (916) 443-2017

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST

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

The California District Attorneys Association (CDAA) as amicus curiae respectfully requests permission to file the attached brief in support of the position of real parties in interest Los Angeles County Sheriff's Department, Sheriff Jim McDonnell, and County of Los Angeles.

CDAA has been in existence since 1910 and was incorporated as a non-profit corporation in 1974. It has over 2,700 members including all of California's 58 district attorneys, the Attorney General of California, city attorneys engaged in criminal prosecutions, deputy district attorneys, deputy attorney generals, and deputy city attorneys. CDAA is dedicated to promoting justice through enhanced prosecutorial excellence. CDAA advocates the highest professional standards for prosecutors, including education and training, effective advocacy, integrity, and compliance with constitutional and other legal mandates. CDAA provides training seminars, educational publications, and legislative advocacy on issues affecting the criminal justice system. CDAA has more than 35 committees, which use and coordinate the resources of prosecutorial agencies throughout the state to address cases that may have major statewide impact on the prosecution of criminal cases.

The current case involves the validity of a Los Angeles County Sheriff's policy relating to peace officer personnel records, and disclosure of certain aspects of those records to prosecutors. The LA Sheriff's policy shares the essential characteristics of policies used by many jurisdictions

throughout the state to harmonize procedures under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, with the government's obligations under *Brady v. Maryland* (1963) 373 U.S. 83, to disclose favorable information to criminal defendants. Under these policies, law enforcement agencies provide the district attorney with the names of officers whose personnel files may contain information relevant to dishonesty or moral turpitude. In some counties, the alerts are given in reference to a specific case prosecution in which the officer will be a witness; in other counties, the alerts are given in advance of the officer being subpoenaed as a witness. The prosecution then provides these "alerts" to the defense so that it may make a *Pitchess* motion; the prosecution may also bring a *Pitchess* motion. We are informed and believe that some 22 counties have such policies: Alameda, Amador, Calaveras, Contra Costa, Fresno,[1] Inyo, Marin, Monterey, Nevada, Placer, Sacramento, San Francisco, San Joaquin, San Luis Obispo, Santa Barbara, Santa Clara, Solano, Sonoma, Tuolumne, Ventura, Yolo and Yuba. Affirmance of the ruling of the Court of Appeal in this case would prohibit the use of these widespread policies.

The parties in the lawsuit at bar represent two stakeholders in this issue: the association representing peace officers, and the Sheriff (as management of the law enforcement agency and employer of the peace officers). Statewide, there are at least two additional stakeholders significantly affected by this controversy: prosecutors who are required by the United States Constitution to provide defendants material exculpatory evidence, and criminal defendants who are constitutionally entitled to receive such evidence in order to receive a fair trial. So while the case comes to the Court as a significant labor issue between peace officers and

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[1] The Fresno County District Attorney's Office has an informal agreement with some law enforcement agencies in its jurisdiction.

their employer, the impact on the participants in the criminal justice system for cases in which the officers are witnesses is at least as significant.

CDAA has an interest in this case, since its outcome will have a significant impact upon the ability of prosecutors throughout the state to comply with our duties under *Brady* and to ensure that defendants are afforded due process of law.

CDAA has knowledge and expertise with the issues in this case. CDAA provides periodic training addressing criminal discovery. CDAA developed and proposed a policy for the California Highway Patrol similar to that addressed in the current case. (98 Ops.Cal.Atty.Gen. 54 at *1 (2015).[2]) CDAA filed amicus briefs regarding the prosecution's *Brady* obligations in both the Court of Appeal and the Supreme Court in the recent case of *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696. CDAA also wrote an amicus letter in support of the grant of review in the present case.

The proposed amicus curiae brief submitted herewith will assist the court in deciding the matter because it is based on our experience throughout the state with policies and practices substantially similar to the one challenged in the current proceeding. (Cal. Rule of Court 8.520(f)(3).)

The prosecutors who wrote the proposed amicus brief have extensive expertise regarding *Brady*. All have taught courses for CDAA, law enforcement, and other audiences on ethical standards of prosecution, *Brady* and criminal discovery. They have written and administered *Brady* policies for their offices, have written appellate briefs on the subject, and have served on and/or chaired CDAA committees including the Appellate Committee, Legislation Committee, Training and Publications Committee,

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[2] Although the Attorney General opinion upheld the legality of such a policy, the CHP has not implemented it.

and ad hoc *Brady* Committee. Between them, they have published in scholarly journals on these topics,[3] and taught in law schools to advance the values of ethical prosecution to the next generation of California criminal litigators.

The following disclosures are made pursuant to California Rule of Court 8.520(f)(4): No party or counsel for a party authored the proposed amicus brief in whole or in part, nor did any party or counsel for a party make a monetary contribution intended to fund the preparation or submission of the brief. The brief was authored in whole by the undersigned. No person or entity other than amicus curiae, its members and its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

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[3] See Coleman and Lockey, *Brady "Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It* (2016) 50 U.S.F. L. Rev. 199.

Accordingly, your amicus requests that this Court grant this application, and file the amicus curiae brief submitted herewith.

DATE: May 3, 2018

Respectfully submitted,

MARK ZAHNER
Chief Executive Officer,
California District Attorneys Association

MICHAEL D. SCHWARTZ
Special Assistant District Attorney
Ventura District Attorney's Office

JERRY P. COLEMAN
Special Assistant District Attorney
San Francisco District Attorney's Office

ALBERT C. LOCHER
Assistant District Attorney (Retired)
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Attorneys for Amicus Curiae
California District Attorneys Association
921 – 11th Street, Suite 300
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Telephone: (916) 443-2017

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ARGUMENT

I. THIS COURT SHOULD ADDRESS THE RELATIONSHIP BETWEEN *BRADY* AND *PITCHESS*

A. Background of *Brady, Pitchess*, and "Alert" Systems

"*Brady* and *Pitchess* are not perfectly congruent." (98 Ops.Cal.Atty.Gen. 54 at *5.) Under *Brady v. Maryland* (1963) 373 U.S. 83 and its progeny, prosecutors have an affirmative duty, with or without a defense request, to disclose information in possession of the prosecution or investigating agencies that bears on the credibility of prosecution witnesses. (See *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, at p. 709.) Under *Pitchess*,[4] the prosecution is not in actual possession of personnel information of investigating agencies; the defense or prosecution must bring a motion and show good cause for disclosure; and often only the date of incident, witness names, and contact information are provided. (*Id.* at p. 713; Evidence Code, § 1043; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

This Court has examined the intersection of *Brady* and *Pitchess* in the past, finding them essentially in harmony. "[T]he "'*Pitchess* process' operates in parallel with *Brady* and does not prohibit the disclosure of

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[4] We use *Pitchess* interchangeably to refer to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to the statutes that codify *Pitchess* motions (Penal Code § 832.7; Evidence Code §§ 1043-1047), and to motions made pursuant to these provisions.

Brady information." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14.) But the *Pitchess* "procedural mechanism for criminal defense discovery . . . must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial." (*Ibid.*) While this Court has upheld the validity of the *Pitchess* statutes in general, it has reserved the issue of whether the exclusivity of the *Pitchess* statutes "would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*." (*Id.* at p. 12, fn. 2; see also *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1047, fn. 6: "To the extent a prosecution-initiated *Pitchess* motion yields disclosure of such information, the prosecutor's obligations, as in any case, are governed by constitutional requirements in the first instance.")

Working in this legal landscape, district attorneys in approximately 22 California counties, working with law enforcement agencies (LEAs), have adopted policies to reconcile *Pitchess* and *Brady*. The LEA with knowledge of misconduct by officer employees – culled by review of their personnel files and the maintenance of *Brady* lists internal to the LEA – willingly provides the prosecutor with an "alert" or "tip" that an officer's personnel file contains potential *Brady* information, with no further information provided. The prosecution provides that "alert" to the defense. Then, the defense and/or the prosecution brings a *Pitchess* motion so the court may determine whether information from the file should be provided. Such policies incorporate the essential protections of the *Pitchess* process, including in camera review by a judicial officer and a protective order for any information provided.

These "alert" or "tip" policies fall into two categories. In some jurisdictions, alerts may be given in advance of any specific prosecution, as

to officers with such misbehavior in their history (hereinafter describe as "in advance" notice, alert or tip). Such alerts have been in use in Ventura, San Francisco, Sacramento, and other counties for many years. Just such a system was at issue in *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, which this Court unanimously found to be "laudabl[e]" (at p. 721). In fact, this Court in *Johnson* included the implementation order from the San Francisco Police Department as an appendix to its opinion, as a model for other LEAs. Such a system was the precise model that real party in interest the Los Angeles County Sheriff's Department tried to implement. In fact, the Sheriff in announcing the policy specifically referred to this Court's *Johnson* opinion, and the subsequent Attorney General Opinion finding such a procedure "legally valid." (98 Ops.Cal.Atty.Gen. 54 (2015) at *2 - *4.)

Another variation on LEA *Brady* alerts is when the agency makes no alert to the prosecutor until a specific officer has been subpoenaed in a specific case. In such a system, the subpoena triggers a review of personnel files by the LEA, and then the LEA responds to the DA, a process repeated in every case for every officer (even repeatedly for the same officer in each new case, as he/she may have suffered a new investigation for misconduct in the interim since the last time her/she was subpoenaed). Such a system will be referred to hereafter as a "case specific" notice, alert or tip system.

Under either system, following a *Pitchess* motion, the superior court in those counties reviews the materials in camera, after notice to the officer in keeping with *Pitchess* protections (Evidence Code, § 1043(a); *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 56.) These policies allow defense attorneys and prosecutors to efficiently obtain relevant *Brady* material, subject to court protective orders (Evidence Code § 1045(e)), so they can be both informed and prepared on their pending cases.

B. The Type of Alert System Adopted by Real Parties in this Case, the Rulings Below, and Issues for this Court to Address

Real party Los Angeles County Sheriff adopted an "in advance" *Brady* alert system. Petitioner, the Association for Los Angeles Deputy Sheriffs, then began this litigation by seeking an injunction in superior court prohibiting the Sheriff's use of the alert system. The superior court disapproved the "in advance" alert system as a violation of the *Pitchess* statutes. But the superior court ruled in favor of, and the dissent in the Court of Appeal supported, a "case specific" alert or notice, albeit on different rationales. The superior court approved a "case specific" alert system, not based on a construction or interpretation of the *Pitchess* statutes (which the superior court felt prohibited even "case specific" alerts), but rather based on the overriding constitutional obligation of *Brady*. The Court of Appeal dissent would have approved a "case specific" alert system, as being permitted by its interpretation of the *Pitchess* statutes. But the Court of Appeal majority reversed the superior court and allowed no LEA alert system, holding that any alert system would violate the *Pitchess* scheme.

Real party in interest, the Sheriff, did not seek an interlocutory writ to challenge the superior court's ruling against the "in advance" alert system, so the validity of that ruling is not strictly before this Court in the current proceeding. Petitioner did seek a writ in the Court of Appeal to challenge the superior court's ruling allowing a "case specific" alert system, which led to the Court of Appeal's ruling prohibiting that system, and now brings the matter to this Court.

This Court, in accepting review, has asked if a law enforcement agency may disclose to the prosecution the name and ID number of an officer having relevant impeaching/exonerating material, when that officer is a potential prosecution witness in a pending criminal trial. Essentially,

your Court is asking if a "case specific" alert system is permissible. As noted, for the procedural reasons set out above, that is the precise issue presented in the current litigation.

But your amicus notes that this Court need not find the answer to this question in a limited analysis, based on a narrow rationale. It may be answered with an analysis and rationale which covers both "in advance" and "case specific" alert systems, since if an "in advance" alert system is valid (through either interpretation of the *Pitchess* statutes or the overriding constitutional *Brady* obligation), then a fortiori a "case specific" alert system will be valid. Should this Court decide the issue employing a rationale that has a broader application to the various *Brady* alert systems actually in use in California, the ruling would avoid ongoing, piecemeal litigation by any criminal justice stakeholder or participant seeking to exploit perceived chinks in the armor of earlier opinions (as Petitioner has done with *Johnson* here). Such an opinion would also promote the efforts of courts, the defense bar, and prosecutors to ensure that the government meets its *Brady* obligations that are required for fair trials.

II. IMPEACHMENT EVIDENCE IN POLICE OFFICER PERSONNEL FILES MAY BE EXCULPATORY EVIDENCE WITHIN *BRADY* AND CALIFORNIA DISCOVERY RULES

The Los Angeles County Sheriff's policy at issue here includes eleven administratively-founded categories of misconduct by law enforcement officers that real party proposed to share with the Los Angeles County District Attorney, until petitioner sued to enjoin disclosure of this misconduct. (*Association for Los Angeles Deputy Sheriffs v. Superior Court* [hereafter *ALADS*], slip opinion, p. 8.) The United States Supreme Court has made it clear that impeachment evidence is covered under *Brady*. *Giglio v. United States* (1972) 405 U.S. 150, 154-155; *Youngblood v. West*

Virginia (2006) 547 U.S. 867, 869-870. Legal precedent establishes that each of these categories is disclosable under *Brady* or *Pitchess*, and/or constitutes moral turpitude (and accordingly is impeachment evidence subject to prosecution discovery under *Brady*): [5]

(1) immoral conduct (*People v. Castro* (1985) 38 Cal.3d 301, 315 [witness may be impeached by crime involving "moral depravity"]; *Golde v. Fox* (1979) 98 Cal.App.3d 167, 181 ["any 'dishonest or immoral' act" is moral turpitude]; *People v. Jaimez* (1986) 184 Cal.App.3d 146, 150 [prostitution, pimping are crimes of moral turpitude]; *People v. Ballard* (1983) 13 Cal.App.4th 687, 691 [indecent exposure is crime of moral turpitude]);

(2) bribes (*In re Rothrock* (1940) 16 Cal.2d 449, 454 [bribery is crime of moral turpitude]; *In re Crooks* (1990) 51 Cal.3d 1090, 1101 [same]);

(3) misappropriation of property (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1021 [misappropriation of client's funds is moral turpitude]);

(4) tampering with evidence (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1027 [evidence of planting evidence may be sought via *Pitchess*]; *Price v. State Bar* (1982) 30 Cal.3d 537 [tampering with evidence is moral turpitude]);

(5) false statements (*People v. Wheeler* (1992) 4 Cal.4th 284, 288, superseded on another point as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1460 [incidents of dishonesty may be admitted to

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[5] For purposes of this brief, we consider impeachment evidence and exculpatory evidence to be constitutionally indistinguishable and use the terms essentially interchangeably. (See *United States. v. Bagley* (1985) 473 U.S. 667, 676: "Impeachment evidence... as well as exculpatory evidence, falls within the *Brady* rule... Such evidence is 'evidence favorable to the accused...."; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 433.)

impeach credibility]); *People v. Jordan* (2003) 108 Cal.App.4th 349, 362 [must disclose conduct showing dishonesty, including misdemeanors, whether or not they led to conviction]; see *People v. Steele* (2000) 83 Cal.App.4th 212, 221–223 [witness may be impeached with misdemeanor conviction for providing false information to a police officer]);

(6) making false statements during internal affairs investigations (see *People v. Wheeler, supra*; *People v. Jordan, supra; People v. Steele, supra*);

(7) obstructing an investigation/influencing a witness (see *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1230-1232 [*Brady* error to suppress prior interview of child suggesting coaching or pressure that might affect courtroom testimony]; see *Banks v. Dretke* (2004) 540 U.S. 668, opinion on remand, *Banks v. Thaler* (5th Cir. 2009) 583 F.3d 295, 300 [defendant entitled to appeal on *Brady* grounds prosecution's failure to produce prior "practice sessions" with witness leading to "closely rehearsed" testimony]; see *People v. Williams* (1999) 72 Cal.App.4th 1460, 1465 [deterring, preventing or resisting officer by use or threat of force or violence in violation of Penal Code § 69 is a crime of moral turpitude];

(8) providing false information in records (*Warrick v. Superior Court, supra,* 35 Cal.4th 1011, 1027 [evidence of fabricating police reports may be sought via *Pitchess*]);

(9) discriminatory harassment (Evidence Code, § 780(f) [bias may be considered regarding witness credibility]; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-508 [evidence of racial bias is relevant to credibility]);

(10) unreasonable force (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86 [history of excessive force may be sought via *Pitchess* and may be admissible]); and

(11) family violence (*People v. Rodriguez* (1992) 5 Cal.App.4th 1389 [domestic violence under Penal Code § 273.5 is moral turpitude]).

With respect to discovery standards, it is worth noting that *Brady* and *Pitchess* have different standards of "materiality." (*City of Los Angeles v. Superior Court (Brandon), supra*, 29 Cal.4th 1, 14.) Under *Pitchess* the evidence must be material (i.e., relevant) "to the subject matter involved in the pending litigation." (*Id.*, at pp. 9 – 10). *Brady* materiality requires a showing that the evidence will likely affect the outcome of the trial. (*People v. Roberts* (1992) 2 Cal.4th 271, 330). Thus, the *Brady* standard is narrower than *Pitchess*: all evidence that meets the *Brady* standard will also meet the *Pitchess* standard, but not vice versa. (*Brandon, supra*, 29 Cal.4th at p. 14.) In terms of timing, however, evidence can be disclosed under *Brady* even if it goes beyond the five-year time limit of *Pitchess*. (Evidence Code § 1054(b)(1); *Abatti v. Superior Court, supra,* 112 Cal.App.4th 39; *Johnson, supra*, 61 Cal.4th at p. 720.) Also, the Criminal Discovery Act requires the prosecution to provide the defense "any exculpatory evidence," a standard that does not have the *Brady* materiality requirement. (See Penal Code § 1054.1(e); *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; *People v. Cordova* (2015) 62 Cal.4th 104, 124.)

In summary, these authorities establish that the categories of evidence in the Sheriff's policy are categories which may be exculpatory evidence, as defined in *Brady*, its progeny, the *Pitchess* framework, and California criminal discovery law.

III. PEACE OFFICER PERSONNEL RECORD INFORMATION IS HELD BY THE "PROSECUTION TEAM" FOR *BRADY* PURPOSES

The prosecution is responsible for disclosing to the defendant *Brady* evidence in a criminal prosecution, when that evidence is held not just by

the prosecutor, but by other persons or entities associated with what has come to be called the "prosecution team." (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1476.) The prosecution team includes not just the prosecutor's office, but also investigative agencies and personnel. (*Id.* at p. 1476; *Youngblood v. West Virginia*, *supra*, 547 U.S. at p. 870.) "The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police 'suppression of the material information, the state's failure is not on that account excused." (*Barbee v. Warden* (4th Cir. 1964) 331 F.2d 842, 846.)

While the reach of the government's responsibility for disclosure certainly extends to the investigative file in the specific criminal case at issue, the U.S. Supreme Court has indicated that it is not limited to just that material. Thus, in *Kyles v. Whitley*, *supra*, the Court held that impeachment evidence about an informant's criminal conduct in a different crime was part of the evidence deemed to be *Brady* material. (514 U.S. at pp. 428-429, and 442, fn. 13.)

Petitioner places great reliance on *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, for the proposition that the personnel records of an LEA should not be considered as covered by the prosecution team rules for *Brady* purposes. *Barrett* involved a defendant, an inmate charged with an in-prison murder, who sought 73 categories of Department of Corrections (CDC) information from the District Attorney, 17 of which became at issue in the Court of Appeal. The information sought included not only items specific to the crime investigation in that case, but also administrative information not related to that case, such as memos regarding a change in prison cell "celling" policies, memos regarding weapons found in the prison over a four-year period, the percentage of life inmates and the prison over a four-year period, and for a six-month period both prison yard policies and investigation packages from all in-prison

assaults. (80 Cal.App.4th 1309 – 1310.) The Court of Appeal held that CDC had a dual status with respect to the District Attorney's obligations. With respect to investigative material on the specific murder, the D.A. was obligated under Penal Code § 1054.1 to gather and disclose those materials. With respect to the various categories of administrative materials, however, the Court held that CDC was a third party as to both the D.A. and the defense. Therefore the D.A. was not obligated to provide those materials, though the defense could seek them on its own through a subpoena directed to CDC. *Barrett* noted that the defendant was better positioned to make his own discovery claims and present his own theories as to the relevance of the wide range of CDC administrative materials sought. (80 Cal.App.4th at pp. 1318 – 1321.)

Petitioner's simplistic equating of the CDC administrative records in *Barrett* with the officer personnel records held by the sheriff in this case does not stand up to careful analysis. The posture of the LEA, the prosecutor, the criminal defense, and the information at stake is sharply different in the case at bar. *Barrett* dealt with administrative records that were not only extensive (in an agency the size of CDC), but also had no immediately apparent connection or relevance to the murder investigation, so it would not be obvious or even knowable to the prosecutor, CDC, or the superior court what defense theory might make such evidence important to the defendant's case. To sweep such records into the *Brady* prosecution team category would expand, to a wholly impractical extent, what the prosecutor was responsible to search out and provide to the defense.

The officer personnel records at issue here, however, are a discrete class of administrative records, further limited for present purposes by the specific categories of misconduct listed as *Brady* relevant in the Sheriff's policy. When an officer is identified as having a role in a case which merits a subpoena, it is a relatively simple matter to check his/her personnel file,