No. 93428-2

45880-2

IN THE WASHINGTON STATE SUPREME COURT

MICHAEL AMES, an individual,

Petitioner,

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY PROSECUTOR'S OFFICE, a public agency,

Respondent,

MICHAEL AMES' PETITION FOR REVIEW

Joan K. Mell
III Branches Law, PLLC
1019 Regents Blvd. Ste. 204
Fircrest, WA 98466
253-566-2510
joan@3brancheslaw.com
Attorney for Michael Ames,
Petitioner

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A. IDENTITY OF PETITIONER

Petitioner Michael Ames, a state expert witness in criminal proceedings involving digital evidence with the Pierce County Sheriff's Department, seeks review by the Supreme Court of the published split Court of Appeals opinion terminating review referenced in Part B.

B. COURT OF APPEALS' DECISION

The Court of Appeals, Division II, filed its published majority and dissenting opinions on May 17, 2016. A true and correct copy of both are attached as **Appendix A** pages 1 - 32.

C. ISSUES PRESENTED FOR REVIEW

(1) May a detective use a declaratory judgment action to get a name clearing hearing from the prosecutor's office when labeled a "Brady" officer for retaliatory reasons?

(2) Is a detective entitled to the due process protections promised in departmental protocols and civil service rules when the prosecutor's office prepares questionable accusatory materials about the detective outside the internal affairs process?

(3) Is a dispute between law enforcement and the prosecutor's office over the validity of "Brady" materials justiciable for purposes of relief under the Uniform Declaratory Judgments Act ("UDJA")?

(4) Is it a matter of major public importance whether a criminal defendant receive as "Brady" material a detective's unfounded whistleblower report against the prosecutor's office as well as other declarations prepared by the prosecutor's office that falsely

accuse the detective of dishonesty for purposes of relief under the UDJA?

(5) May Superior Court issue a writ of mandate to compel a prosecutor to clear the name of a detective labeled dishonest for retaliatory reasons?

(6) May Superior Court issue a writ of prohibition to stop the prosecutor from disseminating fabricated "Brady" material generated by the prosecutor's office for retaliatory reasons?

(7) Does a prosecutor's "Brady" obligations require him to disseminate false information about a detective's credibility when the prosecutor's office fabricates the false information for self serving or retaliatory reasons?

(8) Does the prosecutor's use of an unfounded whistleblower complaint against his office as "Brady" material constitute impermissible retaliation against the whistleblower detective in violation of state and local whistleblower protections?

D. STATEMENT OF THE CASE

Petitioner Michael Ames is a state witness in criminal cases prosecuted in Pierce County, primarily those cases that involve digital forensic evidence.[1] He was the exclusive Sheriff's department detective certified to examine digital data to testify competently in support of Pierce County Sheriff's Department investigations. Pierce County Prosecuting Attorney Mark Lindquist decided to discredit Detective Ames using materials the prosecutor's office fabricated then disseminated later as

[1] Op. 2

"Brady" material to protect the prosecutor's office.[2] The purported potential impeachment evidence ("PIE") includes statements from Ames and civil and criminal prosecuting attorneys.[3] The prosecutor's relentless attacks on Ames' integrity ultimately caused Detective Ames' constructive discharge effective May 10th, 2014.[4] After the trial court denied equitable relief in this matter, Ames pursued alternative relief because defendants refused his requests for a name clearing hearing and otherwise defended this declaratory judgment action and writ case on the grounds that the proper relief for Ames was a tort action or a civil rights Section 1983 claim.[5] Ames filed these other remedies, but defendants removed Ames' damages case to Federal Court and immediately moved to dismiss on immunity grounds.[6]

Presently, Pierce County has denied Ames a remedy of any kind to clear his name and restore his ability to work as a witness on those criminal cases still pending in the system and alternatively as an expert

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[2] *Dalsing v. Pierce County*, 189 Wn. App. 1024, (2015).

[3] Op. 2; CP 141-142 (Penner 9/18/13 PIE Ltr); 449-485 (Coopersmith Rept.); CP 545 -575 (Ames' Decs.); CP 576- 582 (Richmond 7/17/13 Dalsing Dec.); (Penner 8/12/14 PIE Ltr); (Ames Statement to Coopersmith); CP 1594 - 1616 (Lewis 5/12/14 Dec. in Ames); CP 1617 - 1640 (Kooiman 5/12/14 Dec. in Ames); CP 1587 - 1589; **App. B**

[4] Dkt. 24: First Amended Complaint, *Ames v. Lindquist*, U.S. Dist. Crt. W. Dist. of Wash. ECF: 3:16-cv-05090 filed 2/5/16.

[5] Br. of Respondent/cross-Appellant at 24.

[6] *Ames v. Lindquist*, U.S. Dist. Ct. W. Dist. of Wash. ECF: 3:16-cv-05090 filed 2/5/16. Defendants' Motion to Dismiss noted June 10, 2016.

witness in civil matters. The Supreme Court court should accept review to ensure law enforcement officers like Detective Ames have a viable means to seek prompt redress to prevent ongoing harm to their property interests in their career and liberty or privacy interests in their reputation when the prosecutor's office decides to discredit the officer for testifying against the prosecutors' interests.

Exculpatory E-Mail - *Dalsing*[7]

The prosecutor's animus towards Ames arose in part when the detective's professional duties were shown to conflict with the prosecutor's office directives in the Lynn Dalsing wrongful incarceration and arrest case.[8] Civil deputy prosecutor James Richmond filed a contradictory declaration accusing Detective Ames of dishonesty in response to Ames' motion for attorney's fees and costs.[9] Ames appeared separately to ensure disclosure of an exculpatory e-mail exchange wherein Ames affirmed Dalsing could not be seen in the photograph that formed the basis for the criminal charge supporting her arrest. The prosecutor's office refused to disclose Ames' e-mail in both the criminal and civil

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[7] CP 1727-1728; **App. C.**

[8] Op. at 3. Dalsing recently voluntarily dismissed her claims due to the emotional costs associated with civil litigation.

[9] CP at 577

proceedings despite the criminal deputy's admission that it was bona fide "Brady" material.[10] The *Dalsing* court sanctioned the prosecutor's office for violating the discovery rules.[11]

Richmond testified in *Dalsing* that he never received the the e-mail to disclose and generally claimed he did not use words like "exculpatory" that Ames said Richmond did use when they discussed the e-mail.[12] Later in this case Richmond changed his testimony filing a second declaration that ultimately admitted Richmond had received the e-mail.[13] At the same time, Richmond maintained his recollection of the timing and content of their conversation was not exactly word for word as Ames described. The prosecutor's office did not treat Richmond's clarifying declaration as "Brady" material.[14]

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[10] *Dalsing v. Pierce County*, 189 Wn. App. 1024 (2015)

[11] *Id.*

[12] CP 576 - 582 (Richmond 7/17/13 Dec. in Dalsing), **App. B:** "Mr. Ames' reply declaration in support of his motion to compel payment of his attorney's fees and costs contains false assertions made under oath about Mr. Ames' interactions with the Prosecutor's office....Mr. Ames falsely states he turned over to me County e-mails that would clear his name and his department. Notably Richmond had a different impression of Ames' credibility earlier in the Dalsing case: CP 632, RP 5/8/13 "When Ms. Mell called me, she said someone's not telling the truth. And I said I know Mr. Ames said the truth, and I always felt that way. So that's my view of it."

[13] **App. D** (Richmond 5/12/14 Dec. in Ames) ("Contrary to petitioner's repeated claims in the current case, I have never denied receiving the June 9, 2011, email. Instead, I stated that it was not given to me at the October 12, 2012 meeting.") Ames never testified that he gave the email to Richmond at the October 12, 2012 meeting. Ames emailed it to Richmond on October 18, 2012. **See App C.** and CP 1830 - 32.

[14] **App. D** (Richmond 5/12/14 Dec. in Ames) Not treated as PIE. (Penner 8/12/14 PIE Ltr) **App. B**

The prosecutor's office generated two additional declarations from criminal prosecutors implicated in *Dalsing*'s wrongful incarceration that the prosecutor's office filed in this case.[15] Similar to Richmond they generally declared Ames dishonest based on their 2014 recollections of their 2011 conversation with Ames about reinvestigating Dalsing's computers without probable cause, a conversation that Ames described in 2013 to a whistleblower investigator.[16] Apparently in 2014 these deputies scrutinized Ames' 2013 statement to prepare declarations to discredit his testimony in *Dalsing,* but the declarations were filed in this case in May of 2014 after Ames retired early. The criminal deputies did not describe how their memories differed; they simply said Ames was not truthful.[17] Neither declaration served any legitimate purpose when filed in these proceedings because the trial court had already dismissed the complaint. In August 2014, the prosecutor's office notified Ames that these deputies

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[15] **App. B.** Kooiman and Lewis Decs.

[16] **App B** (Coopersmith Interview Transcript of Ames)

[17] **App. B** Kooiman and Lewis similarly generally declare Ames dishonest without specifics or explanation: "On May 9, 2014, I reviewed a transcript of an interview betweeen Mike Ames and Jeffrey Coopersmith that was recorded on April 1, 2013. During the course of the interview, Mike Ames talks about a meeting he had with me and Deputy Prosecutor Lori Kooiman on June 13, 2011, regarding the *Dalsing* case. During the course of the interview, Ames made many false statements about his interactions with Lori Kooiman and me."

declarations and Ames' whistleblower statement were potential impeachment evidence.[18]

Unfounded Whistleblower Investigation Report

In 2013, Pierce County hired attorney Jeffrey Coopersmith to investigate Ames' reports of prosecutor interference in Sheriff's department matters as a whistleblower complaint.[19] Lindquist knew Coopersmith from Seattle where they both ran for an open state house seat in 1994.[20] Neither disclosed this connection when Ames was interviewed. Lindquist did not allow Coopersmith to record Lindquist's interview.[21] Coopersmith ordered Ames to provide a recorded statement under threat of termination.[22] The prosecutor's office took the transcript to use as "Brady" material a year after Ames gave it after he had already testified in various criminal matters.[23] The prosecutor's office targeted the part of the statement that pertained to Ames' explanation of his previously mentioned 2011 meeting with the two deputy prosecutors when they pressured him to

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[18] **App. B.** (Penner 8/12/14 PIE Ltr)

[19] **App. B** (Coopersmith Report) and Ames' request for an outside investigation. CP 340 - 342, 346 - 367.

[20] *See,* September 1994 Primary Elections Search Results for State Representative District #36 Position #2. http://www.sos.wa.gov/elections/results_report.aspx?e=14&c=&c2=&t=&t2=4&p=&p2=&y=

[21] CP 1838 - 1843 (Coopersmith notes from Lindquist interview)

[22] **App. B** and CP 102.

[23] **App. B** (Penner 08/12/4 PIE Ltr.)

reinvestigate the Dalsing computers after the office knew they held Dalsing on erroneous charges. Coopersmith considered Ames' statement about the *Dalsing* matter to be beyond the scope of his investigation, so he did not investigate the subject.[24] The two deputy prosecutors at the meeting with Ames were never questioned.

The matters Coopersmith did investigate pertained to the handling of a teacher involved school bullying incident at Kopachuck Middle School in Gig Harbor. Lindquist published a three page press release with a comment critical of Ames' connection to the student's attorney.[25] Ames used the same private attorney to amicably settle an overtime issue the involved higher ranking officials would have preferred to handle in house.[26] Based solely on this connection, Lindquist had Ames' e-mails searched for evidence of "possible misconduct".[27] Lindquist found nothing.[28] Coopersmith found Ames acted in "good faith" and that he "expertly recovered the evidence and wrote a thorough report."[29]

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[24] CP 485 (Coopersmith Report)

[25] CP 369 - 371. "To complicate matters, the civil attorney reported the matter to a PCSD detective who had been represented by that same attorney on an unrelated matter."

[26] CP 398

[27] CP 465-467, CP 1833-34

[28] CP 361: Chief Adamson to Lindquist 10/12/12: "IT didn't find any email between Ames and Joan Mell...Just fyi. Please don't forward this. Rick."

[29] CP 469

Coopersmith offered his opinion that Lindquist's conduct was not "improper governmental action" under the whistleblower statutory definition in his May 2013 final report.[30] Several months later in September 2013 again after Ames had testified in other matters, the prosecutor's office notified Ames that the Coopersmith report was potential impeachment evidence, and that Ames was now for the first time a "Brady" officer, a label commonly recognized as the "scarlet letter" of law enforcement because it connotes dishonesty and suggests there is evidence to impugn the officer's credibility. The rationale provided was that Coopersmith found "no evidence" to support Ames' allegations of misconduct.[31] The prosecutor's limited highlight was deceptive because Coopersmith actually found that Lindquist did issue a critical press release and did have Ames' e-mail searched. Coopersmith simply did not share Ames' opinion that this conduct was improper. Coopersmith does not discredit Ames as dishonest anywhere in his report.

The irony of this case is that the prosecutor's office labeled Ames a "Brady" officer to discredit him because the prosecutors had failed to fulfill their "Brady" duties to Dalsing, which exposed them to liability.

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[30] CP 484

[31] CP 142, **App. B**

Basic fundamental principles of fairness dictate further review to reconcile this power shift that gives prosecutors dangerous control over the testimony to be presented in criminal proceedings. Law enforcement officers, unlike other professionals, apparently have no way to protect their most valuable asset, which is their credibility, other than to remain silent even when an officer knows the prosecutor is withholding exculpatory evidence or is otherwise engaged in questionable conduct. Ames argued and the dissent agreed that this case presents an issue of major public importance in regards to the integrity of the criminal justice system.[32] Indeed it does, the ramifications impact others who likely would not make the same choices Ames made to disclose exculpatory evidence over the prosecutor's objections. The multiple declarations from legal scholars, the Sheriff's Guild, and lawyers filed in support of Ames shows no one practicing in this community wants that outcome.[33] Lindquist

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[32] Br. of Appellant at 33.

[33] CP 1342 - 1346 (Attny James Cline), 1347-1402 (Prof. John Strait), 1296-1290 (Sheriff's Guild Det. Lloyd Bird), 1300 -1304 (Attny Thomas Nast), 1405-1410 (Attny Bryan Hershman), 2056-2058 (Prof. David Boerner), 1478 - 1479 (Attny Rodney Ray), 1411-1413 (Attny Mary Robnett), 1423 - 1425 (Attny Angela Lindsay), 1414-1416 (Attny Eric Trujillo), 1417 - 1419 (Attny Ephraim Benjamin), 1420 - 1422 (Attny Paul Landry), 1426 - 1428 (Attny Joseph Cutter), 1429 - 1431 (Attny Ryan Anderson), 1432 - 1434 (Attny John O'Connor), 1435 - 1437 (Attny Martin Duenhoelter), 1438 - 1440 (Attny Mary Ann Dire), 1441 - 1443 (Attny George Kelley), 1444 - 1446 (Attny John Meske), 1447 - 1449 (Attny Kenneth Gormly), 1450 - 1452 (Attny Donald Powell), 1456 - 1458 (Attny John Cain), 1459 - 1461 (Attny Brian Meikle), 1462 - 1464 (Attny Douglas Sulkosky), 1465 - 1467 (Attny Heather Bliss), 1468 - 1470 (Attny Harry Steinmetz), 1471 - 1473 (Attny Gary Clower), 1474 - 1475 (Attny John Miller), 1476 - 1477 (Attny Peter Kram)

referred to these declarants as the "confederacy of dunces", which led to two top deputy prosecutors from Pierce County filing whistleblower complaints against the prosecutor, and others filing bar complaints that are still pending, and a campaign to Recall Mark Lindquist. The media has followed this case, keeping the public apprised of the substantial costs associated with the prosecutor's actions.[34] This case is of broad public importance in the community. The Supreme Court should accept review to restore balanced justice to Pierce County.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) RAP 13.4(b)(4) Substantial Public Interest:

The Supreme Court should review the Court of Appeals' split published opinion because fair and impartial criminal justice depends upon a balanced working relationship between the Sheriff's Department and Prosecutor's Office that the majority opinion perpetually skews when allowing the prosecutor's office to discredit an honest sheriff's department detective using fabricated "Brady" material for improper reasons with impunity. A name clearing hearing opportunity is essential to protect the value of a state witness like Detective Ames whose credibility the County

[34] **App. F** (Media Coverage - "$531,762 to defend the Dalsing case" plus several hundred thousand on these proceedings that has involved three outside law firms.)

otherwise insures through well established civil service and internal affairs due process protocols. Here those protections are ignored in favor of criminal defendants getting information from prosecutors even when the prosecutors know the information is false because the prosecutors fabricated it for self-serving and retaliatory reasons. Even the Division II panel was conflicted as to this outcome, which this court should reconcile. The dissent aptly pointed out this case presents questions of major public importance: "Even without reaching into the hypothetical, the record before us is unmistakably an overture of interests more profound than those of the individual players."[35] The majority erred when it presumed good faith conduct by the prosecutor in contravention to CR 12(b)(6) as explained by the dissent:

> "Because the declaratory judgment action was dismissed under CR 12(b)(6), no judicial determination of the facts necessary to resolve this claim has occurred. The evidence we have before us, summarized here and in the majority opinion, would be consistent with a determination that the prosecutor acted entirely in good faith in keeping with his duty under *Brady*...and *Giglio,* ... to disclose potential impeachment evidence. The evidence could also be consistent with the view that the disclosures were a misuse of the prosecutor's duties and authority in an attempt to retaliate against Ames for his actions in the Dalsing case.... Given the context and timing ... one cannot reasonably conclude that Ames can prove no set of facts, consistent

[35] Dissent at 26.

> with his petition, which would justify a conclusion that these disclosures did not include legitimate potential impeachment evidence. Especially where, as here, the documents that would be truly impeaching were prepared by the prosecutor's office, one may reasonably conceive of hypothetical circumstances under which these disclosures might not be compelled by the case law.... It must be stressed, and stressed again, that hypothesizing is a far distant exercise from determining the truth. *...the public interest would be enhanced by reviewing the case...*"[36]

The Supreme Court should accept review to correct the error on matters of substantial public importance.

(2) RAP 13.4 (b)(3) Significant Question of Law Under the Constitution:

The majority presumed the rights of criminal defendants are paramount to the rights of law enforcement to defend their honor and professional reputation. The court weighed a question of major public importance of constitutional significance, specifically a criminal defendant's right to a fair trial against a law enforcement officer's 1st Amendment rights of petition to access the courts and 14th Amendment procedural and substantive due process rights to a writ to arrest further harm to his career, yet the majority found no major public interest. Ames disagrees on the presumption and the holding, and points to the dissent's explanation that illegitimate potential impeachment evidence does not

[36] Bjorgen dissent at 28 and 31.

affect a prosecutor's duty to disclose. Ames merely sought a name clearing hearing, a fundamental right he would be entitled to under departmental protocols if he had been wrongfully accused of dishonesty by the Sheriff's department. Internal affairs never opened an investigation into the prosecutor's allegations of dishonesty against Ames. The fact that a department outside the Sheriff's department was Ames' accuser should not be an absolute barrier to clearing his good name.

The United States Supreme Court has long-recognized that a public sector employee has a constitutionally-based liberty interest in clearing his name when stigmatizing information is publicly disclosed.[37] Failure to provide a "name-clearing" hearing in such circumstances is a violation of the Fourteenth Amendment's due process clause.[38] The stigmatizing "Brady" process contributed to Ames' constructive discharge, which requires procedural protections to date not afforded Detective Ames.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's

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[37] *See Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972) and *Cleveland Bd. of Educ., v. Loudermill*, 470 U.S. 532, 542 (1985)

[38] *See id.*; *see also Cox v. Roskelley*, 359 F.3d 1105, 1110 (9th Cir. 2004) (where public employer placed stigmatizing information in employee's personnel file, "[t]he lack of an opportunity for a name-clearing hearing violated his due process rights.").

protection of liberty and property."[39] "The Fourteenth Amendment protects against the deprivation of property *or liberty* without procedural due process."[40] A person "has a constitutionally protected property interest in continued employment only if he has a reasonable expectation or a legitimate claim of entitlement to it, rather than a mere unilateral expectation."[41] Detective Ames was a fully vested civil servant promised due process in departmental protocols and merit based employment protections with just cause termination rights that were ignored by Pierce County. Ames vested property interests were impaired.

A *liberty* interest is at stake "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[42] The liberty interest is implicated when discharge jeopardizes the employee's "good name, reputation, honor, or integrity."[43] While governmental damage to reputation alone is not sufficient to establish a

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[39] *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

[40] *Brady v. Gebbie*, 859 F.2d 1543, 1547 (9th Cir. 1988) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added).

[41] *Brady v. Gebbie*, 859 F.2d 1543, 1547 (citing *Board of Regents v. Roth*, 408 U.S. 564. 577 (1972).

[42] *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Ritter v. Board of Com'rs of Adams County Public Hos. Dist. No. 1*, 96 Wn. 2d 503, 637 P.2d 940 (1981).

[43] *Roth*, 408 U.S. at 573; *see also, Hyland,* 972 F.2d at 1141-42.

deprivation of a liberty interest implicating due process, "governmental action defaming an individual" that affects other interests, such as employability, can entitle a person to procedural protections.[44] This has come to be known as the "stigma plus" requirement.[45] Under this test, "a plaintiff must show public disclosure of a stigmatizing statement, the accuracy of which is contested, *plus* the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by law."[46] The prosecutor's office fabricated "Brady" material to discredit Ames, which led to his constructive discharge and further limitations in his private sector employment opportunities. His liberty interests are implicated and he should have been afforded a name clearing hearing.

The dissemination of false potential impeachment evidence implicates not only the liberty and property interests of Ames, but the liberty interests of criminal defendants like Dalsing who now may not encounter an honest officer like Ames who is willing to disclose exculpatory evidence over the objections of the prosecutor's office. The

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[44] *Paul v. Davis*, 424 U.S. 693, 701 (1976).

[45] *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (holding that test had been met where stigmatizing statements affected re-hire employability).

[46] *Id.* (emphasis in original) (citing *Paul*, 424 U.S. at 701).

risk of a repeat of *Dalsing* is high where the prosecutors never have to account for their false statements.

Without a singular name clearing opportunity, judicial economy is compromised as well. Each criminal trial court has limited resources to hold repetitive mini-trials to allow Ames to clear his name. The trial courts should not have to decide on a case by case basis whether it believes Ames or Richmond. And, Ames should not have to prove repeatedly he is honest, and that he did indeed give the exculpatory e-mail to both civil and criminal deputies. No court should have to waste time on fabricated evidence, especially when prosecutors have improper motives for creating the information.

Another question of constitutional import concerns the scope of "Brady" and its progeny. While logically self-evident, Washington cases do not yet exist that hold a prosecutor may not fabricate evidence against a law enforcement officer and disseminate it as "Brady" material. Unfortunately, the Court of Appeals' decision appears to hold just the opposite when pointing out prosecutors disseminate untruthful information as a matter of course under their "Brady" obligations. The dissent disagreed with that universal presumption, suggesting plausibly that defendants may have no right to false information particularly where such

false information is fabricated by the prosecutor's office, not a third party, for nefarious reasons and where the content has not been vetted in any other venue like an internal affairs process. This court has recognized constitutional privacy interests in protecting the identity of lower level civil servants who are the subject of unfounded accusations of wrongdoing or other professionals who have vested considerably in their reputation like Ames.[47] State witnesses should similarly have some protection from false accusations of dishonesty by prosecutors. Such protection would be consistent with "Brady" wherein the prosecutor is obligated not to judge nor weigh whether the evidence is material or in fact impeachment evidence.[48] Officials who fabricate evidence to achieve a desired outcome violate fundamental due process principles.[49] Prosecutors who fabricate "Brady" materials are indeed commenting on the evidence and are effectively manipulating the facts a jury may hear when deciding the merits of a case. This case turns a prosecutor's "Brady" duties upside down, a problem this court should correct. Fabricating evidence is

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[47] *Bellevue John Does 1-11 v. Bellevue School Dist.* 3405, 164 Wn.2d 199, 189 P.3d 139 (2008), *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn. 2d 398, 259 P.3d 190 (2011), *Sargent v. Seattle Police Dept.*, 179 Wn. 2d 376, 314 P.3d 1093 (2013).

[48] *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984 (1976).

[49] *Jones v. DOH*, 170 Wn. 2d 338, 242 P.3d 825 (2010)("Pharmacists had a procedural due process right not to be deprived of his property interest in his professional and business lines, based on a fabricated emergency as the purported justification for failing to provide notice and an opportunity to be heard.")

properly considered outside the scope of a prosecutor's authority, which would allow for entry of a writ of prohibition to stop the prosecutor's office from disseminating fabricated information, or alternately and inversely a mandate to compel disclosure of a fact finding determination that Ames was honest in his declarations and whistleblower complaint.

Unlike Washington where the "Brady" question is of first impression, New Hampshire's Supreme Court decided law enforcement officers have fundamental privacy rights to removal of their name when erroneously added to a "Brady" list because "an interest in one's reputation, particularly in one's profession is significant" and government actions affecting it require due process.[50] New Hampshire's Supreme Court found a significant private interest that required protection, which is precisely the recognition criminal justice professionals like Ames seek from this court.

F. CONCLUSION

This is an extremely important case to law enforcement and to criminal defense attorneys and other practitioners who work in the

[50] In New Hampshire the list is referred to as a "Laurie list." *Gantert v. City of Rochester,* — A. 3d — 2016 WL 1069042; *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 119 A.3d 188 (2015)(Law enforcement officers entitled to have their names removed from the "Laurie list. "[t]here must be some post-placement mechanism available to an officer to seek removal from the "Laurie List" if the grounds for placement on the list are thereafter shown to be lacking in substance." See **Appendix E** (N.H. Opinions attached)

criminal justice system. Division II split on the merits. This case presents questions of first impression that warrant further review because of the constitutional implications. Law enforcement have been silenced in deference to the prosecutor's office where now prosecutors are given license to lie. Any detective to point out prosecutorial misconduct may be labeled dishonest using fabricated allegations incontrovertible in any state forum. The result is unjust and should be reviewed and reversed.

DATED this 2nd day of June, 2016.

Respectfully submitted,
III BRANCHES LAW, PLLC

Joan K. Mell, WSBA #21319
1019 Regents Blvd. Ste. 204
Fircrest, WA 98466
253-566-2510
joan@3Brancheslaw.com
Lawyer for Petitioner
Michael Ames

CERTIFICATE OF SERVICE

I, Misty M. Carman certify that on the 3rd day of June, 2016, I caused to be filed and served true and correct copies of the above Petition for Review, Appendices and this Certificate of Service; on all parties or their counsel of record, as follows:

Via: Electronic Mail Service
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Ste C
Seattle, WA 98126
phil@tal-fitzlaw.com
matt@tal-fitzlaw.com

Michael Patterson, WSBA #7976
Charles Leitch, WSBA #25443
Patterson Buchanen fobes & Leitch P.S.
2112 - 3rd Ave., Ste 500
Seattle, WA 98121
map@pattersonbuchanan.com
cpl@pattersonbuchanan.com

Original Petition for Review and Appendices electronically filed:
Supreme Court of Washington
Supreme@courts.wa.gov

Copy of Petition for Review and Appendices electronically filed with the Court of Appeals, Div.II
https://www.courts.wa.gov/jis/?fa=jis.coaFilingForm&div=2
950 Broadway, Ste 300
Tacoma, WA 98402-4427

I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 3rd day of June, 2016 at Fircrest, WA.

Misty Carman

Misty M. Carman, Paralegal

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Joan Mell <joan@3brancheslaw.com>; Ryan Sundberg <ryan@3brancheslaw.com>
Subject: Petition for Review COA Div II Case No. 45880-2

Attached please find Petitioner Michael Ames' Petition for Review and Appendices A-F, and certificate of service to all parties of interest, filed by Joan K. Mell, WSBA No. 21319. The appendices, pages 1-217, exceeds the page limit. Please let me know to send hardcopies via U.S mail, if so required.

Thank you.

Misty Carman, MAOL
Managing Paralegal
III Branches Law, PLLC
1019 Regents Blvd., Suite 204
Fircrest, WA 98466
(253) 566-2510

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1019 Regents Blvd. Ste. 204
Fircrest, WA 98466
253-566-2510
joan@3brancheslaw.com
Attorney for Michael Ames,
Petitioner

Appendix A - Div. II Opinion Ames

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL AMES, Appellant and Cross-Respondent, v. PIERCE COUNTY, Respondent and Cross-Appellant.	No. 45880-2-II PUBLISHED OPINION

JOHANSON, J. — Michael Ames appeals the trial court's CR 12(b)(6) dismissal of his claims for a writ of prohibition and declaratory judgment. Ames argues that he is entitled to (1) a writ of prohibition because the Pierce County Prosecuting Attorney's Office (PCPAO) acted outside its jurisdiction and (2) a declaratory judgment because a justiciable controversy exists and, in the alternative, this case presents an issue of major public importance. Pierce County cross appeals, arguing that the trial court abused its discretion when it granted Ames's motion for reconsideration, reversing its CR 11 sanctions order against Ames.

We hold that Ames failed to state claims for (1) a writ of prohibition because he does not allege facts that demonstrate the PCPAO acted outside or in excess of its jurisdiction and (2) a declaratory judgment because this controversy is not justiciable nor is this an issue of major public importance. Regarding the County's cross appeal, we hold that the trial court did not abuse its discretion when it concluded that Ames's claims are not baseless because he argued for a good

faith extension of the law and supported it with a reasonable inquiry into relevant precedent. We affirm.

FACTS

I. SUMMARY OF BACKGROUND FACTS

Michael Ames was a detective with the Pierce County Sheriff's Department (PCSD). He was a recurring government witness for the State in criminal prosecutions. The instant case arose when the PCPAO sent Ames a letter dated September 18, 2013 stating that several of Ames's "*Dalsing*" declarations and the "Coopersmith" report would be disclosed to defense counsel as potential impeachment evidence in the prosecution of *State v. George* and in any other case where Ames was expected to testify.[1] Ames disagreed that the *Dalsing* declarations and the Coopersmith report should be disclosed to defense counsel as potential impeachment evidence.

Ames filed this lawsuit, requesting a writ of prohibition to generally prohibit the PCPAO from disclosing these materials as potential impeachment evidence and an order declaring that his *Dalsing* declarations were truthful and not properly characterized as potential impeachment evidence under *Brady*.[2] Specifically, Ames requested the following relief:

> 5.1 A trial by jury of any factual disputes pursuant to RCW 7.24.090;
> 5.2 A writ of prohibition ordering defendant to cease and desist with any further communications that the materials identified in [the PCPAO's] letter of September 18th are impeachment evidence or potential impeachment evidence;
> 5.3 An order declaring the materials identified in [the PCPAO's] letter of September 18th are not impeachment evidence or potential impeachment evidence;
> 5.4 An award of attorney's fees and costs to Det. Ames under equitable theories to include good faith and fair dealing, or any other applicable statute or doctrine;

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[1] *Dalsing v. Pierce County*, cause no. 12-2-08659-1, the Coopersmith report, and *State v George*, cause no. 05-1-00143-9, are discussed in detail below.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

5.5 For such other and further relief as the court deems just and equitable.

Clerk's Papers (CP) at 10-11.

The trial court denied Ames's request for the writ of prohibition and for a declaratory judgment on a CR 12(b)(6) motion. Ames appeals.

A. THE *DALSING* CASE

In December 2010, Lynn Dalsing was arrested and charged with several child pornography-related offenses. Dalsing's attorney sought photographic and computer evidence that allegedly were the bases of the charges against Dalsing. Ames was the PCSD's forensic computer examiner. In June 2011, Ames e-mailed the lead detective on the *Dalsing* case that there was no evidence on any of the computers to link Dalsing to the crimes. That same day, the lead detective forwarded Ames's opinion to Deputy Prosecuting Attorney Timothy Lewis, but the PCPAO did not disclose this exculpatory information until over a month later when the PCPAO dropped the charges and released Dalsing.

In March 2012, Dalsing filed a civil complaint against the County, claiming that the PCPAO's and the PCSD's actions amounted to false arrest and malicious prosecution. In Dalsing's civil case, Ames filed four declarations to support his various motions for costs and attorney fees he incurred. Ames had hired his own attorney during the Dalsing civil case because he believed that his interests, i.e., disclosing his involvement with the Dalsing criminal investigation and sending e-mails to the lead detective, conflicted with the County's interests in the civil case, such as denying misconduct from the PCPAO and avoiding liability. In his declarations, Ames stated that (1) prior to his deposition in Dalsing's civil case, he did not know the PCPAO had never disclosed his e-mails to the lead detective to Dalsing, (2) he wanted to tell

the truth about the e-mails because the PCPAO's decision not to disclose them was "not in [Ames's] best interest," and (3) the deputy prosecutor told him not to answer Dalsing's deposition questions about the e-mails. CP at 546.

In response to Ames's motions for attorney fees and costs, Deputy Prosecutor James Richmond[3] declared that Ames's declarations contained "false assertions." CP at 577. Specifically, Richmond declared that contrary to Ames's declaration, at their October 2012 meeting, Ames did not give the e-mails at issue to Richmond; they did not discuss whether there were "supposedly 'exculpatory' e-mails or that Mr. Ames was aware of information that would be considered exculpatory"; and Richmond did not say that there was an "e-mail [that] would 'clear [Ames] of any wrong doing in the case'" or that Richmond would see that such e-mails were "'turned over as part of discovery.'" CP at 577. Richmond stated that Ames was not a party to the "numerous communications [exchanged] about plaintiff's discovery requests and Pierce County's objections and responses" and that when he met with Ames again in February 2013, contrary to Ames's declaration, they did not discuss or review county e-mails. CP at 577.

Regarding Ames's deposition, Richmond denied that Ames asked him (Richmond) about whether what happened in the deposition would have any repercussions for Ames or expressed concern about Richmond's advice not to answer questions. Richmond also denied that Ames ever expressed that he thought the County's assertion of work product protection of e-mails was erroneous or having been concerned that he was being prevented from clearing his name, the name

[3] Originally, Richmond was counsel for the County when Dalsing sued the County and advised Ames in that capacity. Later, Ames asserted that there was a conflict of interest and he retained independent counsel in the matter.

of the PCSD, or from testifying truthfully. Richmond also stated that contrary to Ames's declaration, Ames sought the advice of independent counsel two months before the deposition, not after the deposition.

B. THE COOPERSMITH REPORT

Also in 2012, a student alleged that he had been bullied at a local school and that a teacher had participated in the bullying. The attorney who represented the student's parents had also represented Ames in a recent dispute with the PCSD. The attorney tried to contact the head of the PCSD's special assault unit but eventually contacted Ames, who went to the attorney's office to take a report from the parents. The head of the special assault unit investigated the bullying allegations and forwarded the results of her investigation to the PCPAO, who declined to prosecute.

The PCPAO released a long, detailed statement to the media explaining its decision and mentioning Ames's personal relationship with the attorney who "initiated" the investigation, though not naming Ames directly. Around the same time, the PCSD reviewed Ames's e-mails to see if he had any contact with the parents' attorney to determine whether Ames's involvement with the investigation presented a conflict. The PCSD found no suspicious e-mails.

Based on the PCPAO's "handling of the [school] Case," the PCPAO's press release, and the PCSD's search of his e-mails, Ames filed a complaint alleging retaliation and misconduct. CP at 450. That complaint was forwarded to the County's human resources department, who hired Jeffrey Coopersmith, an outside civil attorney, to conduct an independent investigation. Coopersmith's report found that there was "no merit" to Ames's retaliation allegations, that the

PCSD and the PCPAO handled the school bullying case properly, and that there is "no evidence that Det. Ames acted in anything other than good faith." CP at 485, 469.

C. THE *GEORGE* CASE

In September 2013, the PCPAO sent Ames a letter explaining that it planned to disclose "potential impeachment evidence" regarding Ames in the *George* case. CP at 858. Specifically, the letter said that the PCPAO had four signed declarations from Ames regarding Dalsing that contained assertions that were disputed by Richmond, the deputy prosecuting attorney in that case in another signed declaration. The letter also said that the PCPAO had the Coopersmith report. The letter concluded by stating that the PCPAO intended to release Ames's and the prosecuting attorneys' declarations and the Coopersmith report to defense counsel as potential impeachment evidence in its prosecution of Dmarcus George.

The declarations, which included a signed statement by Richmond, were disclosed to George's attorney. The trial court had a hearing to discuss whether the PCPAO must disclose the Coopersmith report. The deputy prosecutor argued for an in camera review of the Coopersmith report to determine whether it was potential impeachment evidence, and Ames argued that a determination whether the report was potential impeachment evidence should be made by writ of prohibition and declaratory relief, but ultimately conceded that the report was likely discoverable as a public record.

II. PROCEDURAL FACTS

In October 2013, Ames petitioned for a writ of prohibition seeking to prohibit the PCPAO from disclosing the *Dalsing* declarations and the Coopersmith report as potential impeachment evidence in future cases and a declaratory judgment that the declarations and report are not

potential impeachment evidence. The County moved to dismiss Ames's claims under CR 12(b)(6), arguing that (1) a writ of prohibition is improper where the PCPAO did not act outside or in excess of its jurisdiction, and (2) a declaratory judgment is improper because this dispute is not justiciable and a declaratory judgment would affect the interests of nonparties. The County also moved to strike under RCW 4.24.525 (the anti-strategic lawsuits against public participation (SLAPP) statute), which the trial court denied.

Ames argued that although the PCPAO has mandatory obligations to disclose potential impeachment evidence, it acts outside its role when it "generat[es] so called '*Brady*' material for the purposes of discrediting a witness." CP at 686. Ames also argued that based on case law from other jurisdictions and legal treatises, a declaratory judgment action is a proper proceeding for clearing his name; that such a claim is justiciable; and that, even if it were not justiciable, it presents an issue of major public importance.

The trial court granted the County's CR 12(b)(6) motion, concluding that (1) the PCPAO had jurisdiction to create the declarations in *Dalsing* and to disclose those declarations and the Coopersmith report as potential impeachment evidence, and (2) Ames's claim for a declaratory judgment is neither justiciable nor an issue of major public importance. The trial court also initially granted the County's motion for attorney fees and sanctions under CR 11, finding that Ames's claims were "baseless and frivolous" and not supported by a reasonable inquiry, which would have shown the absence of any controlling law. CP at 1203. After Ames moved for reconsideration, the trial court reversed its CR 11 sanctions order finding that Ames provided enough argument, case law from foreign jurisdictions, and law review articles to make a good faith argument for an extension of the law.

Ames appealed the trial court's CR 12(b)(6) dismissal and the County cross appealed the trial court's decision not to order CR 11 sanctions.

ANALYSIS

I. CR 12(B)(6) DISMISSAL ORDER

A. STANDARD OF REVIEW

We review a dismissal under CR 12(b)(6) de novo. *Worthington v. Westnet*, 182 Wn.2d 500, 506, 341 P.3d 995 (2015). CR 12(b)(6) motions should be granted only "'sparingly and with care'" and only when it is "beyond doubt" that the plaintiff can prove "no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (quoting *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). We accept all facts in the plaintiff's complaint as true. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). When reviewing the trial court's CR 12(b)(6) dismissal, we ask whether "there is not only an absence of facts set out in the complaint to support a claim of relief," but also whether there is any "hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Worthington*, 182 Wn.2d at 505.

B. WRIT OF PROHIBITION

Ames argues that a writ of prohibition is appropriate because the PCPAO does not have jurisdiction to knowingly disclose false information that it created in separate proceedings as *Brady*

evidence.[4] The PCPAO has both jurisdiction and an ethical obligation to decide what potential impeachment evidence is and to make *Brady* disclosures. Thus, we hold that even if we assume the content of those disclosures is false, the PCPAO has jurisdiction to make *Brady* disclosures and a writ of prohibition is not appropriate. Accordingly, CR 12(b)(6) dismissal was proper.

1. RULES OF LAW

A "writ of prohibition . . . arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." RCW 7.16.290. A writ of prohibition is a "drastic measure" that may be granted only if the official is acting in the "'(1) [a]bsence or excess of jurisdiction, and [there is an] (2) absence of a plain, speedy, and adequate remedy in the course of legal procedure. The absence of either [condition] precludes the issuance of the writ.'" *Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 722-23, 305 P.3d 1079 (2013) (first alteration in original) (quoting *Kreidler v. Eikenberry*, 111 Wn.2d 828, 838, 766 P.2d 438 (1989)). The statutory writ of prohibition may be issued to "arrest" the improper exercise of judicial, quasi-judicial, executive, and administrative power. *Skagit County Pub. Hosp. Dist. No.*

[4] Ames argues repeatedly that he is entitled to a "name-clearing" hearing. Br. of Appellant at 1. A name-clearing hearing is part of the remedy he requests as part of his claims both for a writ of prohibition and a declaratory judgment and is based on the case law from other jurisdictions that have, in certain instances, given public employees the right to a "name-clearing hearing." *See, e.g., Cotton v. Jackson*, 216 F.3d 1328, 1333 (11th Cir. 2000) ("If Plaintiff were without another legal remedy and proved in a state mandamus proceeding that Defendants had deprived Plaintiff of his federal liberty interest in his reputation without a hearing, then Plaintiff would have shown that he had a clear legal right to a name-clearing hearing."). A "name-clearing hearing" is not a proceeding explicitly recognized in Washington law. Because Ames does not demonstrate that he is entitled to either a writ of prohibition or a declaratory judgment, we need not determine what the proper remedy or proceeding on remand would be.

304, 177 Wn.2d at 722. It is not a proper remedy where the only allegation is that the actor is exercising jurisdiction in an erroneous manner. *See Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996).

In *County of Spokane v. Local No. 1553, American Federation of State, County & Municipal Employees, AFL-CIO*, Division Three of this court considered whether employees of the county prosecutor's office acted outside their "jurisdiction" when going on strike because a public employee strike is contrary to Washington law. 76 Wn. App. 765, 769, 888 P.2d 735 (1995). The court held that a strike was not necessarily outside the employees' jurisdiction just because it was unlawful. *Local No. 1553*, 76 Wn. App. at 769. Instead, historically, writs of prohibition apply where the officials' actions would encroach on the jurisdiction of others and "enlarge the powers of their positions." *Local No. 1553*, 76 Wn. App. at 769.

In *Brady v. Maryland*, the United States Supreme Court explained a prosecutor's disclosure obligations prior to a criminal trial. 373 U.S. 83, 86-87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Court held that a prosecutor's decision not to disclose material "evidence favorable to an accused" violates that defendant's due process rights. *Brady*, 373 U.S. at 87. In the years after *Brady*, several cases expanded and clarified *Brady*'s reach. *See State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). The Supreme Court extended the *Brady* rule to require the State to disclose impeachment evidence probative of witness credibility if that evidence is favorable to the accused. *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *United States v. Bagley*, 473 U.S. 667, 676-78, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The prosecutor is also obligated to disclose evidence in his or her possession and evidence in law enforcement's possession. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed.

2d 490 (1995). If the prosecutor is unsure about whether certain evidence should be disclosed, he or she should err in favor of disclosure. *Kyles*, 514 U.S. at 439-40; *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure"). The prosecutor is the only person who knows of undisclosed evidence and therefore is charged with the responsibility to gauge which evidence should be disclosed. *Kyles*, 514 U.S. at 437.

2. THE PROSECUTOR HAS JURISDICTION TO DISCLOSE POTENTIAL IMPEACHMENT EVIDENCE

Here, the PCPAO has jurisdiction to disclose potential impeachment evidence. Ames contends, however, that the PCPAO exceeded or acted outside of its jurisdiction when it disclosed the *Dalsing* declarations and the Coopersmith report because Ames's statements in those materials were truthful and Richmond's declaration was untruthful and created to discredit Ames. We disagree that the PCPAO exceeded or acted outside its jurisdiction when it determined the *Dalsing* declarations and the Coopersmith report constituted potential impeachment evidence.

(a) THE *DALSING* DECLARATIONS

Regarding the *Dalsing* declarations, Ames confuses the PCPAO's authority to file or make declarations to defend itself in a civil case with its separate and constitutional *Brady* obligation to disclose evidence to criminal defendants that might impeach potential witnesses. *Giglio*, 405 U.S. at 153-54. The PCPAO had jurisdiction to create declarations in *Dalsing* to defend against the allegations made by Ames in his motion for attorney fees. Therefore, the prosecuting attorney acts within his or her duties as an advocate for the State by creating an opposing declaration. The truth or falsity of that declaration was up to the trier of fact in *Dalsing*, and the truth or falsity of that declaration does not affect the prosecuting attorney's jurisdiction.

And even assuming, as we must when reviewing the trial court's CR 12(b)(6) dismissal, that Ames correctly alleges that Richmond's declaration was untruthful and was filed to discredit Ames, the PCPAO's *Brady* obligation to disclose potential impeachment evidence to future criminal defendants remains. *FutureSelect*, 180 Wn.2d at 962; *see also Kyles*, 514 U.S. at 439-40. The PCPAO's decision to disclose evidence under *Brady* is not a determination of credibility or truthfulness of a witness. Disclosure is only precautionary, with a final determination of credibility left to the specific fact finder in the case where the evidence may be considered.

Regardless of the truth of Ames's and Richmond's *Dalsing* declarations, the PCPAO's duty is to determine whether the defendant might consider those declarations to be probative of Ames's credibility as a witness. *Bagley*, 473 U.S. at 676. In fulfilling this duty, prosecutors must err on the side of disclosure. *Kyles*, 514 U.S. at 439-40. Therefore, Richmond's proper or improper intentions when filing his *Dalsing* declaration, and the truthfulness of Ames's and Richmond's declarations, are irrelevant. The issue here instead is whether a future defendant *might* use Ames's dispute with Richmond's and Ames's conduct during the *Dalsing* investigation to impeach Ames. The PCPAO has jurisdiction to decide whether to disclose Ames's and Richmond's *Dalsing* declarations to future defendants. Ames fails to show that the PCPAO has exceeded its jurisdiction and thus the drastic measure of a writ of prohibition is precluded.

(b) THE COOPERSMITH REPORT

The County's human resources department commissioned the Coopersmith report in response to Ames's allegations against top officials in the PCSD and the PCPAO. Although the Coopersmith report found no misconduct or bad faith from Ames, it also found that his claims had "no merit" and that it was not proper for Ames to take a police report in his official capacity from

his personal attorney. If the findings in the Coopersmith report call Ames's judgment into question, it is within the PCPAO's *jurisdiction*, as discussed above, to determine whether to disclose this report to future defendants as potential impeachment evidence.

Ames relies on whistleblower protections against retaliation for county employees to support his argument that the PCPAO acted outside or in excess of its jurisdiction. But whistleblower protections apply only when a retaliatory action is taken against the whistleblower. RCW 42.41.020(3); PCC 3.14.010(B).[5] A "retaliatory action" is

> (a) [a]ny adverse change in a local government employee's employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action; or (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official.

RCW 42.41.020(3).

Here, Ames's argument fails for three reasons. First, the possible disclosure to future defendants of the Coopersmith report as potential impeachment evidence is not a "retaliatory action" as defined under RCW 42.41.020(3) or PCC 3.14.010(B). Second, it is not clear that, in the Coopersmith report, Ames is even a whistleblower. And third, even if the disclosure of potential impeachment evidence to criminal defendants is a "retaliatory action," Ames offers no argument about whether that affects the PCPAO's jurisdiction. Again, that an official's act was unlawful does not inherently establish that the act was outside the official's jurisdiction. *Local*

[5] Local government whistleblower protection act. Ch. 42.41 RCW; Pierce County Code, ch 3.14, Whistleblower Protection.

No. 1553, 76 Wn. App. at 769. Future disclosure of the Coopersmith report as potentially impeaching evidence is, therefore, not outside or in excess of the PCPAO's jurisdiction.[6]

In conclusion, Ames points to no authority, and we know of none, for the proposition that a prosecutor acts in excess of or outside his or her jurisdiction when he or she discloses potential impeachment evidence even if known to be false, when created by the prosecutor to defend himself or herself in a separate civil suit. When witnesses change their stories or recant previous accounts, prosecutors must regularly disclose information, statements, or declarations to defendants under *Brady* that they know or believe to be false. Even if Richmond's declaration is false and an individual prosecutor lacks authority to create false declarations, it does not mean that the prosecutor acts without jurisdiction when he or she discloses those declarations to future defendants as potential impeachment evidence. *See Local No. 1553*, 76 Wn. App. at 769. Regardless of the truth of the *Dalsing* declarations, the PCPAO did not seek to "enlarge the powers of [its] position" because, according to *Brady* and its progeny, it is the PCPAO's exclusive duty to disclose *potential* impeachment evidence. *Local No. 1553*, 76 Wn. App. at 769; *Brady*, 373 U.S. at 86-87; *Giglio*, 405 U.S. at 153-54.

[6] The County argues repeatedly that Ames agreed to turn over the Coopersmith report to George. This argument is misleading. Ames agreed that the Coopersmith report was a public record and was likely available to George for that reason. But Ames also repeatedly and emphatically stressed that he did not want the trial court to rule on whether the Coopersmith report was potential impeachment evidence outside the context of Ames's petition for a writ of prohibition and declaratory judgment. Therefore, the County's contention that Ames somehow waived his argument that the Coopersmith report is potential impeachment evidence or agreed to characterize it as such is inaccurate.

Because Ames cannot demonstrate that the PCPAO acted outside or in excess of its jurisdiction when it determined whether to disclose the *Dalsing* declarations and the Coopersmith report, the dismissal of Ames's claim for a writ of prohibition was proper.[7]

C. DECLARATORY JUDGMENT

Ames next argues that his claim is justiciable because he "presents an actual, immediate dispute in which [he] has a direct and substantial interest." Br. of Appellant at 24. We hold that Ames's claim is not justiciable because this dispute does not meet at least two of the four elements required to raise a justiciable controversy.

1. RULES OF LAW

The Uniform Declaratory Judgments Act (UDJA)[8] gives "[c]ourts of record" the authority "to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. However, a claim for relief under the UDJA exists only if there is a "'justiciable controversy'" or if the dispute pertains to "'issues of major public importance.'" *League of Educ. Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (quoting *Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990)).

A justiciable controversy requires proof of four elements:

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[7] As to the second element to establish a claim of a writ of prohibition, Ames argues that the "[PCPAO] has not offered him any relief in any other forum." Br. of Appellant at 47. The County argues that Ames had an adequate legal remedy to prohibit the PCPAO from disclosing potential impeachment evidence because there was a hearing in the *George* case to determine whether the Coopersmith report should be disclosed. But neither party cites any relevant law in support of their arguments. Since Ames's claim for a writ of prohibition fails with the first element, we need not address this argument.

[8] Ch. 7.24 RCW.

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

League of Educ. Voters, 176 Wn.2d at 816 (alteration in original) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). If any one of these four elements is lacking, the court's opinion in this case would be merely advisory, and Ames will have failed to raise a justiciable controversy. *Lewis County v. State*, 178 Wn. App. 431, 437, 315 P.3d 550 (2013), *review denied*, 180 Wn.2d 1010 (2014).

2. AMES'S CASE IS NOT JUSTICIABLE

(a) NO ACTUAL, PRESENT DISPUTE EXISTS

Ames argues that the record here "indisputably evidences adversarial proceedings." Br. of Appellant at 31. We disagree.

In *Diversified Industries Development Corp. v. Ripley*, the trial court granted a declaratory judgment to a lessor against his tenants and their insurers. 82 Wn.2d 811, 812, 514 P.2d 137 (1973). The lessor sought to determine who would be liable for injuries to the tenants' social guests on the premises. *Diversified Indus.*, 82 Wn.2d at 812. Our Supreme Court held that this dispute was not justiciable because a claim for financial responsibility was not yet "more discernible than an unpredictable contingency." *Diversified Indus.*, 82 Wn.2d at 815.

In *Walker v. Munro*, the court rejected a claim of justiciability where the dispute was over the impact of a statute not yet in effect. 124 Wn.2d 402, 412, 879 P.2d 920 (1994). There, citizen action groups sought a declaratory judgment that provisions of an initiative limiting expenditures, taxation, and fees were unconstitutional. *Walker*, 124 Wn.2d at 405. The Supreme Court held that

because most provisions of the initiative were not yet in effect and could still be amended, no actual harm was shown, and the dispute was "speculative" and "essentially political" such that it could only result in an improper advisory opinion. *Walker*, 124 Wn.2d at 412-13.

Here, Ames does not allege that the County has any current or future plans to call him as a witness and to disclose the potential impeachment evidence. Although he might be called to testify again, he has no current dispute with the County and the possibility that potential impeachment evidence may be disclosed in the future is merely an "unpredictable contingency." *Diversified Indus.*, 82 Wn.2d at 815. Importantly, Ames seeks to bind future and unidentified defendants by the declaratory judgment he seeks here. But there is no current dispute regarding the disclosure of the *Dalsing* declarations and the Coopersmith report that involves Ames and the County, much less the future defendants he hopes to bind. A claim for declaratory judgment that seeks to bind defendants that are not a party here must be rejected as merely advisory. Therefore, we conclude that there is no actual present or existing dispute.

(b) A JUDICIAL DETERMINATION WOULD NOT BE FINAL OR CONCLUSIVE

Ames appears to argue that a judicial determination could be a final judgment that the declarations and Coopersmith report are not potential impeachment evidence and should not be disclosed in future cases. Here, Ames's argument fails because he takes an overly narrow view of the PCPAO's *Brady* obligation.

Ames claims that if he secures a declaratory judgment that his declarations and the Coopersmith report were truthful, those materials will not be *Brady* evidence. But the PCPAO must disclose any potential impeachment evidence about witnesses whose testimony will be probative of the defendant's guilt or innocence. *Giglio*, 405 U.S. at 153-54. Whether Ames's

statements were truthful, therefore, is not the relevant question. Whether the evidence is actual impeachment evidence is also irrelevant. The deputy prosecutor and defense counsel in future cases must decide whether, assuming the deputy prosecutor should err on the side of disclosure, the declarations and Coopersmith report "*might* [be] used to impeach" Ames. *Bagley*, 473 U.S. at 676 (emphasis added). A declaratory judgment would not be final or conclusive because the future deputy prosecutor, defense counsel, and trial court will still have to determine whether the evidence at issue is potential impeachment evidence under the particular circumstances of that future case. *Kyles*, 514 U.S. at 437. Attempting to make that determination here would invade the rights of the parties in future ligation.

Because the absence of any of the justiciability elements defeats Ames's claim and here his claim does not meet at least two of the required elements, we hold that Ames's claim does not present a justiciable controversy.[9]

D. THIS DISPUTE IS NOT AN ISSUE OF MAJOR PUBLIC IMPORTANCE

Alternatively, Ames argues that even if his claims do not present a justiciable dispute, he may invoke the UDJA because this dispute raises an issue of major public importance because the issues here "concern the integrity of the criminal justice system." Br. of Appellant at 33.[10]

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[9] The County also argues that Ames's claim for declaratory judgment is procedurally defective because he failed to join all necessary parties who have an interest that would be affected by a declaratory judgment as required under RCW 7.24.110. Ames disagrees, arguing that future criminal defendants' rights are not implicated unless the declarations and the Coopersmith report are actually potential impeachment evidence. But since Ames and the County focus their arguments on whether this controversy is justiciable and the lack of justiciability defeats Ames's claims, we do not address the potential procedural defect.

[10] The dissent diverges from the majority opinion at this point in the analysis. The dissent agrees with Ames that this case presents an issue of major public importance and that the public interest would be enhanced by review of this case.

"'The presence of issues of broad overriding import may persuade a court to exercise its discretion in favor of reaching an issue which is otherwise not justiciable.'" *Kitsap County v. Smith*, 143 Wn. App. 893, 908, 180 P.3d 834 (2008) (internal quotation marks omitted) (quoting *Snohomish County v. Anderson*, 124 Wn.2d 834, 840-41, 881 P.2d 240 (1994)). In deciding whether an issue of major public importance exists, we must identify the public interest that the subject matter of the case presents and examine the "*extent to which* [that] *public interest would be enhanced by reviewing the case.*" *Anderson*, 124 Wn.2d at 841. Courts should find that an issue of major public importance exists only rarely and where the public's interest is "overwhelming." *Lewis County*, 178 Wn. App. at 440 (citing *To-Ro Trade Shows*, 144 Wn.2d at 416). Washington courts have applied the major public importance exception in cases involving, for example, eligibility to stand for public office, freedom of choice in elections, the constitutionality of increasing excise taxes, and the statutory duty of the State to provide child welfare services. *Wash. State Coal. for the Homeless v. Dep't. of Soc. & Health Servs.*, 133 Wn.2d 894, 917-918, 949 P.2d 1291 (1997).

Ames asserts and the dissent agrees that the public interest implicated here is the integrity of the criminal justice system. We disagree and reject the notion that this case has the potential to impact the integrity of the criminal justice system such that the public's interest is overwhelming. This case does not reach the level of overwhelming public interest that is involved in elections, public office, the constitutionality of excise taxes, and maintaining statutorily mandated child welfare services as established in other cases that have granted review under this exception.

The public interest here will not be enhanced by review of this case for several reasons: (1) the PCPAO's actions here were within its jurisdiction,[11] (2) we cannot and should not anticipate future defendants' use of the potentially impeaching evidence, and (3) Ames seeks to repair only his own credibility. Thus, Ames's claim that his dispute raises issues of major public importance is unpersuasive.

First, although the integrity of the criminal justice system in the County would be impacted if the PCPAO acted outside its jurisdiction here, as discussed above, the PCPAO's decision to release potentially impeaching evidence was within its jurisdiction. It is well settled that where a prosecutor is unsure whether evidence amounts to potential impeachment evidence or is exculpatory, the prosecutor should err on the side of disclosure. *Kyles*, 514 U.S. at 439-40; *Agurs*, 427 U.S. at 108.

Second, neither we nor the trial court can adequately anticipate all possible uses that future defendants might make of the potential impeachment evidence at issue here. And we are concerned that future defendants, those arguably most affected by a declaratory judgment here that the evidence is not potentially impeaching, are not party to this lawsuit and therefore are prevented from challenging the declaratory judgment ruling that might prevent disclosure of this evidence under *Brady* to future defendants. In our view, a declaratory judgment today regarding whether certain evidence is potentially impeaching evidence in future cases would damage rather than enhance the criminal justice system.

[11] The dissent takes issue with only the majority's decision regarding the declaratory judgment claim and does not dispute that the PCPAO acted within its jurisdiction.

Third, Ames primarily seeks to repair his own credibility. His prayer for relief requested (1) a jury trial to determine whether his or the deputy prosecutor's declarations were truthful, (2) a writ of prohibition ordering the PCPAO to cease and desist with any further communications that the materials at issue are impeachment evidence or potential impeachment evidence, (3) an order saying the materials are, in fact, not potential impeachment evidence, (4) attorney fees, and (5) any other just and equitable relief as determined by the court. Thus, Ames primarily seeks to clear his own name and to establish his declarations as truthful.

The public's interest in his declarations' truthfulness is certainly not overwhelming and will have little positive impact on the integrity of the criminal justice system as a whole. Even if we assume as the dissent asserts that the PCPAO here misused his powers to create the potentially impeaching evidence, such misuse in this case does not reach the level of broad public import as described in *Coalition for the Homeless*, 133 Wn.2d at 917. The issues presented in this appeal, in our view, simply do not rise to the level of broad public and overwhelming importance that would trigger the application of the exception to the general rule that courts do not review issues that are not justiciable.

Accordingly, because the integrity of the criminal justice system will not be enhanced by a review of the issues presented in this case, we hold that there is no issue of major public concern and the trial court properly dismissed Ames's declaratory judgment claim.[12] The integrity of the

[12] Ames also argues several other claims that he did not raise in his initial petition: that (1) he, as a public sector employee, is entitled to a "name-clearing" hearing as due process because he has a "constitutionally-based liberty interest" in his reputation, and (2) his free speech rights are implicated by the disclosure of his declarations and the Coopersmith report as potential impeachment evidence. Br. of Appellant at 34-35. However, because he did not raise these arguments as separate claims in his petition for review and does not argue them sufficiently here, we do not address them. RAP 10.3(a)(6).

criminal justice system is best served when the prosecutor fulfills its duties and obligations under *Brady* to disclose potentially impeaching evidence to defendants and their counsel. This tried and true approach allows the prosecution and the defense, on a case-by-case basis, to advocate to the trial court whether to admit the evidence as impeachment evidence.

II. THE COUNTY'S CROSS APPEAL: CR 11 SANCTION

In its cross appeal, the County argues that the trial court abused its discretion when it granted Ames's motion for reconsideration of its CR 11 award of sanctions to the County because Ames's claims are frivolous.[13] We disagree.

A. STANDARD OF REVIEW AND RULES OF LAW

We review a trial court's decision to award or deny sanctions under CR 11 for an abuse of discretion. *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 135, 252 P.3d 406 (2011); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *West*, 162 Wn. App. at 135.

CR 11 requires attorneys to make certain guarantees when they sign pleadings, motions, briefs, and legal memoranda. *Biggs v. Vail*, 124 Wn.2d 193, 196, 876 P.2d 448 (1994). Specifically, an attorney's signature is his or her certification that the pleading, brief, or motion is "(1) . . . well grounded in fact; [and] (2) . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR

[13] The County also argues that (1) the trial court erred when it denied the County's special motion to strike under the anti-SLAPP statute, RCW 4.24.525(4), and (2) Ames failed to preserve his claim for fees and penalties under the anti-SLAPP statute. Both the County's and Ames's claims under the anti-SLAPP statute fail because our Supreme Court recently held that the anti-SLAPP statute is unconstitutional. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015).

11(a). The rule is not meant to be a "fee shifting mechanism" or to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," but to curb abuses of the judicial system and to deter baseless filings. *Biggs*, 124 Wn.2d at 197; *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

A filing is "'baseless'" when it is "'(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.'" *West*, 162 Wn. App. at 135 (internal quotation marks omitted) (quoting *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996)). A trial court may not impose CR 11 sanctions for a baseless filing unless it determines both that (1) the claim was without a factual or legal basis and (2) the attorney who signed the filing failed to perform a reasonable investigation into the claim's factual and legal basis. *West*, 162 Wn. App. at 135.

B. AMES'S FILINGS NOT BASELESS

Ames's response to the County's CR 12(b)(6) motion demonstrates that his claims for a writ of prohibition and for a declaratory judgment were both made in good faith and after a consideration of and inquiry into relevant precedent. First, Ames began his response to the County's CR 12(b)(6) motion with citations to case law, arguing that a judgment on the pleadings is not appropriate because the decision to grant a writ of prohibition is a fact-specific inquiry. He continued with a lengthy explanation of the PCPAO's common law *Brady* obligation to disclose exculpatory evidence, including potential impeachment evidence. He argued that although the PCPAO may determine what constitutes potential impeachment evidence and whether the evidence should be disclosed under *Brady*, the PCPAO's "discretionary authority . . . does not equate to a jurisdictional power to create [potential impeachment evidence]." CP at 685. Ames

distinguished the cases the County cited, arguing instead that there is something fundamentally different about this case because the PCPAO created the potential impeachment evidence declarations to discredit Ames in *Dalsing* where the PCPAO's own misconduct was at issue.

The argument in Ames's CR 12(b)(6) response demonstrates that he considered case law relevant to writs of prohibition and the PCPAO's duty to make *Brady* disclosures specifically and made a good faith argument that his situation differed. Therefore, the trial court did not abuse its discretion when it concluded that Ames's legal research demonstrates that he performed a reasonable investigation into his claim for a writ of prohibition and that his claim was made in good faith.

Second, regarding Ames's claim for a name clearing by declaratory judgment, Ames argued in his response to the County's CR 12(b)(6) motion that "Washington does not have any specific case law on the use of a declaratory judgment action for purposes of name clearing; however, the theory is not novel." CP at 692. He then cited to the *Restatement (Second) of Torts Five* 27 Spec. Note (1977), one law review article, and two out-of-state cases that discuss "the propriety of a declaratory action for purposes of name clearing." CP at 693. The trial court found that "[t]he[se] articles and cases do not necessarily place the potential remedy into the context of Ames' [sic] case, but the fact that there are discussions in law review articles and case law makes the argument for the extension of such a remedy to this situation plausible." CP at 2069. The trial court also found that Ames's legal research suggests that his attorney made a reasonable investigation. This demonstrates that the trial court applied proper reasoning to the CR 11 sanctions question and that Ames's claim for a name clearing by declaratory judgment was not

baseless because he supported his good faith argument for an extension of existing law with a reasonable investigation into that argument's legal basis by providing legal research and analysis.

We hold that the trial court did not abuse its discretion when it granted Ames's motion for reconsideration and decided not to impose CR 11 sanctions because Ames's claims were made in good faith and after a reasonable inquiry into relevant case law.

III. ATTORNEY FEES

The County requests attorney fees on appeal under RCW 4.24.525(6)(a) if it prevails on its anti-SLAPP issue and under RAP 18.9 because Ames's appeal is frivolous. We hold that the County is not entitled to attorney fees because the anti-SLAPP statute is unconstitutional and Ames's claims are not frivolous.

Affirmed.

Johanson, J.
JOHANSON, J.

I concur:

Melnick, J.
MELNICK, J.

BJORGEN, C.J. (dissenting) — Assuming that Michael Ames's declaratory judgment claims are not justiciable, those claims still raise issues of major public importance which demand resolution. Therefore, I would reverse the trial court's dismissal of Ames's petition for a declaratory judgment and remand for trial of that petition.

The majority opinion ably sets out the factual background of this appeal and the legal standards governing its resolution. Among those standards, threaded throughout the analysis are the rules governing dismissal under CR 12(b)(6). Dismissal under that rule should be granted only "'sparingly and with care'" and only when it is "beyond doubt" that the plaintiff can prove "no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (quoting *Tenore v. A T & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). To this end, we review dismissals under CR 12(b)(6) by asking whether there is any "hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Worthington v. Westnet*, 182 Wn.2d 500, 505, 341 P.3d 995 (2015).

Even without reaching into the hypothetical, the record before us is unmistakably an overture of interests more profound than those of the individual players. After Ames e-mailed the lead detective on the Lynn Dalsing case that there was no evidence on any of the computers linking Dalsing to the crimes the prosecutor had charged, the detective forwarded Ames's opinion to a deputy prosecuting attorney the same day. The prosecutor, however, did not disclose this exculpatory information until over a month later when the charges were dropped. The following year, Ames filed a number of declarations in Dalsing's subsequent suit against Pierce County. In those declarations, Ames stated, among other matters, that the prosecutor told

him not to answer Dalsing's deposition questions about the e-mails he had sent to the detective and that only at that time did Ames know those e-mails had not been disclosed. In response, the County filed a declaration by Pierce County Deputy Prosecutor James Richmond, declaring that Ames's declarations contained "false assertions made under oath" and setting out supporting details. Clerk's Papers (CP) at 576-82. Also, in a separate matter Ames filed a complaint with the County dated December 20, 2012, alleging retaliation and misconduct for its actions relating to the Coopersmith Report.

Then, in September 2013, the prosecutor notified Ames by letter that he planned to disclose four declarations by Ames in the Dalsing case, the Richmond declaration accusing Ames of making false accusations under oath, and the Coopersmith Report to defense counsel as evidence potentially impeaching Ames's credibility as a witness called by the State. The prosecutor's letter stated that he would make this disclosure in cases where Ames is expected to be called as a witness by the State. The next such case, the prosecutor stated, is its prosecution in *State v. George*.

Ames's petition for writ of prohibition and declaratory relief claims that these materials are not potential impeachment evidence that must be disclosed. Because the declaratory judgment action was dismissed under CR 12(b)(6), no judicial determination of the facts necessary to resolve this claim has occurred. The evidence we have before us, summarized here and in the majority opinion, would be consistent with a determination that the prosecutor acted entirely in good faith in keeping with his duty under *Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), to disclose potential impeachment evidence. The evidence

could also be consistent with the view that the disclosures were a misuse of the prosecutor's duties and authority in an attempt to retaliate against Ames for his actions in the Dalsing case.

Proof, though, is not the question before us. Instead, as shown, we must ask whether it is beyond doubt that Ames can prove no set of facts, consistent with the complaint, which would justify recovery. *San Juan County*, 160 Wn.2d at 164. We must ask whether there is any hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim. *Worthington*, 182 Wn.2d at 505.

Given the context and timing of Ames's e-mails about the absence of evidence against Dalsing, his declarations in Dalsing's civil suit, Richmond's declaration accusing him of making false accusations under oath, and Ames's complaint for retaliation against the County, one cannot reasonably conclude that Ames can prove no set of facts, consistent with his petition, which would justify a conclusion that these disclosures did not include legitimate potential impeachment evidence. Especially where, as here, the documents that would be truly impeaching were prepared by the prosecutor's office, one may reasonably conceive of hypothetical circumstances under which these disclosures might not be compelled by the case law.

It must be stressed, and stressed again, that hypothesizing is a far distant exercise from determining the truth. In law, as in science, many hypotheses poorly correlate to the actual facts. A dismissal under CR 12(b)(6), though, prevents a party from developing the facts that may prove its case. A dismissal with that severe a consequence is allowed only when we can say, consistently with *San Juan County* and *Worthington*, that there is no reasonably conceivable set

of facts Ames could have proved that would entitle him to relief. Under the circumstances of this case, one may hypothesize such an array of facts.

That, though, does not end the inquiry. To conclude that dismissal of the claim for declaratory relief was improper under CR 12(b)(6), the hypothetical facts must either show that the claim was justiciable or that it falls within the exception for issues of major public importance. Assuming the majority is correct that the claim is not justiciable, one must ask whether a hypothetical set of facts, consistent with the petition, would show this to be an issue of major public importance.

As the majority points out, in deciding whether an issue is of major public importance, "courts examine not only the public interest which is represented by the subject matter of the challenged statute, but the *extent to which public interest would be enhanced by reviewing the case*." *Snohomish County v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (emphasis in original). The Uniform Declaratory Judgments Act, chapter 7.24 RCW, is designed "'to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'" *Osborn v. Grant County By & Through Grant County Comm'rs*, 130 Wn.2d 615, 631, 926 P.2d 911 (1996) (quoting RCW 7.24.120; *Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Comm'rs*, 92 Wn.2d 844, 848, 601 P.2d 943 (1979)). This rule of liberal construction will apply to determinations of major public importance.

The majority contends that the issues raised in this appeal are not of major public importance because, among other reasons, they only touch on Ames's attempt to clear his own name and to establish his credibility. Ames, without doubt, is attempting to clear his name and

repair his credibility. His petition for declaratory judgment, though, also raises claims that reach far beyond any narrow, individual interest. For example, the petition claims that

> Defendant is motivated to wrongfully discredit Det. Ames because he has spoken out truthfully on matters that discredit Mark Lindquist and expose his office to liability.

CP at 7.

> Defendant is abusing its power and the judicial process to benefit itself and its officials and to mitigate against liability against the Prosecuting Attorney's Office.

CP at 7.

> Mark Lindquist has an apparent bias and prejudice against Det. Ames because he has spoken out against Mark Lindquist and his office and because he refuses to remain silent on matters of public concern that negatively impact the prosecutor's office even though he has been directed to do so by Mark Lindquist and his deputies.

CP at 7-8.

> Mark Lindquist is abusing the power of his office to retaliate against Detective Ames.

The Petition also characterizes the issue on declaratory judgment as

> whether Det. Ames has been truthful or whether the prosecuting attorney's office has been dishonest in characterizing the evidence and in its declarations and representations to the court.

CP at 9.

None of these claims have been proven. As shown above, however, that is not the standard before us when reviewing dismissal under CR 12(b)(6). Instead, we ask whether it is "beyond doubt" that the plaintiff can prove "no set of facts, consistent with the complaint, which would justify recovery." *San Juan County*, 160 Wn.2d at 164. With the evidence before us, it is certainly conceivable that Ames could prove additional facts consistent with his allegations of

governmental abuse. Those allegations, if true, would directly contest the integrity of the criminal justice system and of an agency that administers it. Such issues rank high in any measure of public importance. More to the point, the relief Ames requests is a declaration that the materials at issue are not potential impeachment evidence. If he is able to prove his allegations, this relief would remove any misuse of the duty to disclose in this case and would discourage similar tactics in the future. As such, the "*public interest would be enhanced by reviewing the case*," which is the heart of the standard set by *Snohomish County*, 124 Wn.2d at 841, for determining whether an issue is of major public importance. (Emphasis in original.)

The majority also makes the critical points that the prosecutor is under a duty to disclose potential impeachment evidence, that the prosecutor should err on the side of disclosure if in doubt, and that no one can adequately anticipate all possible uses that future defendants might make of the potential impeachment evidence at issue here. Before us, though, is a case where the principal evidence impeaching Ames was created by the prosecutor's office, where the sequence of events could suggest some adversity between Ames and the prosecutor's office, and where Ames's petition alleges various flaws in the prosecutor's development of the potential impeachment evidence. These allegations call into question whether the information created and released by the prosecutor in fact is legitimate potential impeachment evidence. If it is not, then the duty to disclose would likely not apply and future prosecutions would not be affected.

Against the backdrop of the evidence presented and the petition's allegations, there are reasonably conceivable sets of facts Ames could have proved that would have raised issues of

major public importance. With that, the petition for declaratory judgment should not have been dismissed under CR 12(b)(6). For that reason, I dissent.

Bjorgen, C.J.

BJORGEN, C.J.

Appendix B - “PIE Ltrs w/Enc”

Pierce County
Office of the Prosecuting Attorney

REPLY TO:
CRIMINAL FELONY DIVISION
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Criminal Felony Records: 798-6513
Victim-Witness Assistance: 798-7400
FAX: (253) 798-6636

MARK LINDQUIST
Prosecuting Attorney

Main Office: (253) 798-7400
(WA Only) 1-800-992-2456

September 18, 2013

Det. Michael Ames
Pierce County Sheriff's Department
930 Tacoma Ave South, First Floor
Tacoma, WA 98402

Re: Potential Impeachment Evidence

Dear Det. Ames:

In representing the State of Washington, the Prosecuting Attorney functions as a minister of justice. To administer justice, the Prosecuting Attorney has responsibilities for the integrity of the criminal justice system and responsibilities that run directly to a charged defendant. One specific responsibility is an affirmative duty to disclose potential impeachment evidence to a charged defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983); *Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Giglio v. United States*, 405 U.S. 92 S. Ct. 763; 31 L. Ed. 2d 104 (1972). "Potential impeachment evidence" includes not only exculpatory evidence but also any evidence that could be used to impeach the credibility of a witness called by the State. We have recently finalized a policy for disclosure of potential impeachment evidence, based on a model policy adopted June 19, 2013, by the Washington Association of Prosecuting Attorneys.

This letter is to notify you that potential impeachment evidence exists regarding you. We intend to disclose such evidence to defense attorneys, either directly or after *in camera* review by a judge, on cases where you are expected be called as a witness by the State. Although we are required to disclose this information, such disclosure does not necessarily mean the information will be determined to be admissible in the criminal proceedings.

Specifically, we are in possession of declarations dated May 14, 2013, June 13, 2013, July 2, 2013, and July 19, 2013, signed by you and filed in the matter of *Dalsing v. Pierce County*, King County Superior Court Cause no. 12-2-08659-1 KNT, which contain assertions which are disputed in signed declarations filed by the civil DPAs assigned to that case. In addition, we are in possession of a report of investigation of allegations by you against numerous

employees of the Pierce County Sheriff's Department and the Pierce County Prosecutor's Office, wherein it was found that there was "no evidence" to support your allegations of misconduct, and your allegations had "no merit." At this time, it is our intent to release the declarations directly to defense counsel and to seek an *in camera* review of the report of investigation.

The next scheduled trial wherein you might be called by the State to testify is *State v. George*, 05-1-00143-9. Trial is scheduled to begin October 3, 2013.

If you would like to provide our office with additional information which you believe is relevant before disclosure, please do so by 4:30 p.m. on September 23, 2013, in writing, and delivered to my attention at the Prosecutor's Office, room 946 of the County-City Building. Please be aware that such materials may also be disclosed to defense attorneys.

Sincerely,

Stephen M. Penner
Assistant Chief Criminal Deputy
(253) 798-7314
FAX: (253) 798-6636
spenner@co.pierce.wa.us

cc: Hon. Paul Pastor, Pierce County Sheriff

Judge Beth Andrus Department 35
MOTION DATE: 3-20-2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LYNN DALSING, Plaintiff, v. PIERCE COUNTY, A MUNICIPAL CORPORATION, Defendant.	NO. 12-2-08659-1 KNT DET. MIKE AMES' DECLARATION IN SUPPORT OF HIS MOTION TO COMPEL PAYMENT OF HIS DEFENSE COSTS

I, Detective Mike Ames, state and declare the following under oath pursuant to penalty of perjury under the laws of the State of Washington:

1.1 I am the detective Lynn Dalsing references in her claim form and complaint against Pierce County. I am over the age of eighteen, and I am competent to testify in this case. I make this declaration based upon my personal knowledge.

1.2 I offer my declaration in support of my motion to compel Pierce County to pay my attorney's fees and costs incurred since the date of my deposition forward wherein the prosecuting attorneys assigned to represent me instructed me not to answer questions that clear my name and my office from the allegations of wrongdoing made by Lynn Dalsing.

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

1.3 . When I was deposed, I learned Deputy Richmond and Deputy Koolman had never produced my e-mail communications. The first e-mail documents my belief that there was no probable cause to charge Lynn Dalsing with child pornography from the photographs I examined on the computers taken from her home. The second e-mail confirms Deputy Koolman considered my first e-mail "Brady" material and that she was obligated to disclose it to defense counsel Gary Clower.

1.4 . The Prosecutor's Office decision to withhold from disclosure my e-mail communications that support my testimony is not in my best interest. Instructing me to remain silent about my contact with the deputy prosecutors in the criminal matter is also contrary to my interests. I want to show Lynn Dalsing I did not misidentify her. I did not do the things she claims I did in her claim form or in her complaint. I want the opportunity to tell the truth about these matters.

1.5 In order to protect my interests and that of my department, I sought independent legal advice. I think the Pierce County deputies are protecting their staff at the expense of the Sheriff's department, and me personally. My reputation as a trusted law enforcement officer is at issue in this case. I need representation to protect my position, which is distinct from the prosecuting attorneys.

1.6 Attached as Ex. A are true and correct copies of my deposition testimony showing where I learned the e-mails were not disclosed, and where I was instructed not to answer questions about my communications with the deputies from the prosecutor's office.

1.7 I have retained III Branches Law, PLLC and the services of Joan K. Mell to provide me independent representation from Pierce County because I believe the Pierce County Prosecuting Attorney's Office has an unresolvable conflict. Ms. Mell charges an

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd, Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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hourly rate of $325.00 per hour. She has represented my interests well previously and she has continued to do so in this matter. To date, I am obligated to pay her attorney's fees and costs. I expect to require her services in the future in further defense of the case. My hope is that Lynn Dalsing amend her complaint, striking her allegations against me. I hope to be merely a witness, rather than one of the agents responsible for her damages.

1.8 Pierce County has not provided me independent counsel. Pierce County has not agreed to cover the fees and costs I am incurring with Ms. Mell.

1.9 I heard Mr. Richmond tell the court that Pierce County hired an attorney to represent me, but no one has contacted me or provided me any information about independent counsel. At this time, I wish to proceed with Ms. Mell representing my interests. I believe Pierce County is obligated to pay the fees and the costs of representing my interests under the code given the conflict of interest with the prosecutor's office. I have at all times acted in the best interests of Pierce County and within the course and scope of my duties and responsibilities.

1.10 Ms. Mell's rates are reasonable and she provides professional and well informed advocacy to protect my career.

The above information is true and correct to the best of my ability.

DATED this 14th day of May, 2013 at Fircrest, WA.

Detective Mike Ames

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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00002282

Ames - 000391

Judge Beth Andrus Department 35
MOTION DATE: 6-14-2013 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LYNN DALSING, Plaintiff, v. PIERCE COUNTY, A MUNICIPAL CORPORATION, Defendant.	NO. 12-2-08659-1 KNT REPLY DECLARATION OF DET. MIKE AMES' IN SUPPORT OF HIS MOTION TO COMPEL PAYMENT OF HIS DEFENSE COSTS

I, Detective Mike Ames, state and declare the following under oath pursuant to penalty of perjury under the laws of the State of Washington:

1.1 I am the detective Lynn Dalsing references in her claim form and complaint against Pierce County. I am over the age of eighteen, and I am competent to testify in this case. I make this declaration based upon my personal knowledge.

1.2 I offer this declaration in reply to Pierce County's response to my motion to compel Pierce County to pay my attorney's fees and costs incurred since the date of my deposition forward wherein the prosecuting attorneys assigned to represent me instructed me not to answer questions that clear my name and my office from the allegations of wrongdoing made by Lynn Dalsing.

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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Ames - 000392

1.3 I would like to emphasize the fact that I was "told" not to answer.

1.4 During the deposition was the first time I learned the exculpatory information was never disclosed. I do have concerns regarding the ongoing conflict with the prosecutor's office in this case, however after telling me not to answer multiple times the deposition was stopped. Mr. Ruyf immediately left saying he had a meeting and Mr. Richmond remained seated and said he needed to remain and work on some things, so I was left with no explanation as to what had just transpired and what if any repercussions could apply to me for not answering. I did not think the deposition was done. Furthermore, I have not yet been deposed or provided the appropriate opportunity to explain the prosecutor's actions with me in the investigation. These facts together with the failure to timely disclose information as promised makes me confident I need independent representation. While Mr. Richmond has told the court he knows I am telling the truth, I know my testimony raises concerns about the conduct of the prosecutors, which indicates to me there is a conflict between my department and the prosecutor's office.

1.5 Mr. Richmond told me that the email I turned over to him from Lori Kooiman in October 2012 was "exculpatory" regarding my involvement in this case. He also told me that it would clear me of any wrong doing in the case and he would see to it that it was turned over as part of discovery. I was attempting to disclose the fact that an instruction was given to me by the prosecutor's office in a meeting with the prosecutors in June of 2011 when Mr. Richmond stopped me from answering.

1.6 I have always understood that e-mails between detectives and prosecutors regarding criminal investigations are discoverable. Mr. Richmond never informed me of any discussions or information regarding a discovery conference between the parties prior to

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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my deposition.

1.7 Mr. Richmond refused to tell my attorney who the special prosecutor was and we were not informed of his identity until after we filed our motion for attorney's fees.

1.8 I expressed my concerns to Dan Hamilton and Donna Matsumoto of the Pierce County Prosecutors Office when they represented me in this case prior to Mr. Richmond's representation. Mr. Richmond advised me he was aware of those concerns when I asked him about them at our first meeting.

The above information is true and correct to the best of my ability.

DATED this 13th day of June, 2013 at Fircrest, WA.

Detective Mike Ames

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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KING COUNTY
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Judge Beth Andrus Department 35
MOTION DATE: 7-11-2013
WITHOUT ORAL ARGUMENT
CASE NUMBER: 12-2-08659-1 KNT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LYNN DALSING, Plaintiff, v. PIERCE COUNTY, A MUNICIPAL CORPORATION, Defendant.	NO. 12-2-08659-1 KNT DET. MIKE AMES' DECLARATION IN SUPPORT OF HIS MOTION FOR ATTORNEY'S FEES AND COSTS UNDER CR 26 AND 37

I, Detective Mike Ames, state and declare the following under oath pursuant to penalty of perjury under the laws of the State of Washington:

1.1 I am the detective Lynn Dalsing references in her claim form and complaint against Pierce County. I am over the age of eighteen; and I am competent to testify in this case. I make this declaration based upon my personal knowledge.

1.2 I offer my declaration in support of my motion for attorney's fees and costs incurred on my discovery motion for an order permitting me to file my emails under seal and to decide whether I could answer deposition questions.

1.3 I have incurred the follow fees and costs in this matter:

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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Date	Description	Hours Billed	Rate	Amount
Dec 8, 2012	Conference with Client	0.4	$325.00	$130.00
Feb 21, 2013	Phone call with Richmond	0.2	$325.00	$65.00
Feb 22, 2013	Phone call with Richmond and Ruyf	0.4	$325.00	$130.00
Feb 23, 2013	Discussions with client regarding case	1.5	$325.00	$487.50
Feb 25, 2013	Review documents	1	$325.00	$325.00
Mar 4, 2013	Motion	3	$325.00	$975.00
Mar 11, 2013	Prep declaration with attachments	1.5	$325.00	$487.50
Mar 12, 2013	Work on motion for file documents under seal; filed and served	2	$125.00	$250.00
Mar 25, 2013	Finalized Mell declaration regarding motion to seal	0.5	$125.00	$62.50
Mar 25, 2013	Bench copy cost - Mell reply declaration on motion to seal	x	x	$22.49
Apr 3, 2013	Phone call with Court regarding records under seal	0.1	$325.00	$32.50
Apr 5, 2013	Travel to and from Seattle	2.7	$325.00	$877.50
Apr 5, 2013	Court appearance; motion to seal	1	$325.00	$325.00
Apr 22, 2013	Decision of Court; phone call with client	0.5	$325.00	$162.50

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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Date	Item	Hours Billed	Rate	Amount
Apr 23, 2013	E-mail to the Court regarding filing of e-mails	0.3	$325.00	$97.50
Apr 24, 2013	Added E-mails to declaration; filed and served	1	$125.00	$125.00
Total	x	x	x	$4,554.99

1.4 Attached hereto as Exhibit A is a true and correct copy of written instructions I was provided before my deposition.

1.5 Attached hereto as Exhibit B is a true and correct excerpted copy of my deposition depicting questions I was instructed not to answer by Mr. Richmond.

1.6 Because representations of the prosecutor's office before my deposition, I believed that the e-mails regarding the Lynn Daising matter had been disclosed in this matter as well as the preceding criminal investigation, and I would be able to testify truthfully. At my deposition, I learned this was not the case. Attached hereto as Ex. C is a true and correct copy of my May 14, 2013 and June 13, 2013, declarations filed in this matter.

The above information is true and correct to the best of my ability.

DATED this 2nd day of July, 2013 at Fircrest, WA.

Detective Mike Ames

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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Judge Beth Andrus Department 35
MOTION DATE: 7-22-2013
WITHOUT ORAL ARGUMENT
CASE NUMBER: 12-2-08659-1 KNT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LYNN DALSING, Plaintiff, v. PIERCE COUNTY, A MUNICIPAL CORPORATION, Defendant.	NO. 12-2-08659-1 KNT SECOND DECLARATION OF MIKE AMES IN SUPPORT OF HIS MOTION FOR ATTORNEY'S FEES AND COSTS UNDER CR 26 AND 37

I, Detective Mike Ames, state and declare the following under oath pursuant to penalty of perjury under the laws of the State of Washington:

1.1 I am the detective Lynn Dalsing references in her claim form and complaint against Pierce County. I am over the age of eighteen, and I am competent to testify in this case. I make this declaration based upon my personal knowledge.

1.2 I offer this declaration in support of my motion for attorney's fees and costs incurred on my discovery motion for an order permitting me to file my emails under seal and to decide whether I could answer deposition questions.

1.3 Between the times I was first contacted by the Pierce County Prosecutors Office regarding this case and my deposition on Feb. 14, 2013, not once was I

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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informed of any work product privilege regarding any emails in this case. It was not until I was told not to answer questions in my deposition that I realized exculpatory email evidence had not been disclosed in the both the criminal and civil phases of the discovery process. I knew it was my duty as a Pierce County Deputy Sheriff to bring to the Court's attention that information. I sought out the legal advice of a well respected civil attorney, Joan Mell to assist me in this process. I produced to the Court copies of all the emails in my possession under seal. I have always maintained a proper chain of custody of the email copies in my possession and I have not improperly disseminated them without proper leave of the court.

1.4 I have always been truthful and honest about my interactions with the prosecutor's office in this case. I will continue to be truthful and honest about those interactions as these proceedings move forward.

1.5 I did attend the meeting on October 16, 2012 with Mr. Richmond, Jason Ruyf and Chandra Zimmerman. It was after that meeting that I contacted Mr. Richmond and discussed the emails because they had not come up in that meeting. I expressed to Mr. Richmond the importance of the email from Lori Koolman, and he asked me to email him a copy of it. I emailed him the copy, and he called me after receiving it. Mr. Richmond did advise me it was exculpatory and needed to be disclosed during discovery. He did make the statements as stated in my declaration. I would not expect Mr. Ruyf or Ms. Zimmerman to have direct knowledge of those conversations as they took place over the phone solely between Mr. Richmond and me. I would also like to emphasize the fact that at our first meeting, Mr. Richmond advised me he was fully aware of all information regarding the Dalsing case, and since I was informed by Lori Koolman in June 2011 that my email to her would be disclosed to the

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

defense in the criminal matter, I fully expected Mr. Richmond to be aware of the existence of that email. As a Detective with the Pierce County Sheriff's Department I have to trust that when a prosecuting attorney in both a criminal and civil matter advises me directly that the information I provide to them has to be disclosed to opposing parties then that disclosure must take place. It did not occur in this matter in regards to my emails.

1.6 Mr. Richmond states "The parties to this civil lawsuit exchanged numerous communications about plaintiff discovery requests and Pierce County's objections and responses. As a non-party witness, Mr. Ames was not part of those communications." This is untrue, as there were numerous communications between the prosecutor's office and the plaintiff's counsel regarding discovery requests in relations to the computer forensic examination and requests being made by plaintiff's counsel and forensic expert. I was directly involved in several of those communications and provided direct input into those conversations.

1.7 On February 7, 2013, Mr. Richmond and Mr. Ruyf did contact me in the Tacoma / Pierce County Computer Lab to discuss my upcoming deposition. We also discussed at that meeting the fact that I had been deposed before as a police officer and understood the process of answering truthfully and honestly to ALL questions asked of me. Mr. Richmond was very adamant about me understanding that if he tells me not to answer a question, then I was not to answer. However, he would not elaborate as to why that request was so important for me to understand.

1.8 When Mr. Richmond told me multiple times not to answer in my deposition his advice was given very directly and assertively to me. Mr. Richmond was very clear prior to my deposition and during it regarding that instruction. There was nothing

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

erroneous about the way Mr. Richmond was instructing me not to answer, it was very purposeful. I also was unaware of any work product privilege that the county was going to be invoking. It was never discussed with me prior to my deposition. I always believed the prosecutor's office had disclosed the exculpatory emails I provided both in the civil and criminal cases. I was shocked at my deposition to find out they had not.

1.10 My statements that Mr. Richmond agreed a certain email was "exculpatory" and would be "turned over" is true. Mr. Richmond stopped me from answering when the deposition started to center around those emails to Lori Kooiman and my meeting with her and Tim Lewis in June 2011.

1.11 It was after my deposition that I realized the Pierce County Prosecutor's Office was willing to protect their own deputies' actions at my expense and the expense of the Pierce County Sheriff's Department. I am shocked as a 26 year law enforcement veteran that a prosecutor's office would purposely withhold discovery.

1.12 The Pierce County Prosecutor's Office has made several false allegations and assertions regarding my actions in this case. I would like the Court to know that I have always acted professionally, honestly, and truthfully in the criminal and civil aspects of the Daising matter. For the Prosecutor's Office to allege I have somehow acted improperly with the Plaintiff in this case is simply absurd and untrue. The Prosecutor's Office is asking the Court if tax payer money should be expended to pay the fees I am requesting here. I believe in an open and transparent government that the citizens of Pierce County should be aware not only of the fees I am asking for, but also informed of the thousands of dollars in taxpayer funds that have been expended to prevent me from completing my deposition and answering truthfully in

III BRANCHES LAW, PLLC
Joan K. Mell
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

this case.

1.13 The public website for the Pierce County Prosecutor's Office has a section titled "Core Values" with a subsection titled "Accountability" which states in part: "We believe in open government and accept responsibility for the decisions we make." Another subsection titled "Integrity" states: "We hold ourselves to the highest ethical standards in carrying out our responsibilities."

1.14 Pierce County Prosecutor's Office willful withholding of exculpatory discoverable evidence in both a criminal and civil case and the instruction to repeatedly not answer questions in a deposition by a detective involved in the investigation, completely violates their publicly stated Core Values of Accountability and Integrity. As a result I respectfully ask the Court to award sanctions in the form of attorney fees and costs in this matter.

The above information is true and correct to the best of my ability.

DATED this 19th day of July, 2013 at Fircrest, WA.

Detective Mike Ames

III BRANCHES LAW, PLLC
Joan K. Moll
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

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CASE NUMBER: 12-2-08659-1 KNT
Judge Beth Andrus
Department 35

Motion Date: July 22, 2013
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

LYNN DALSING, Plaintiff, vs. PIERCE COUNTY, A MUNICIPAL CORPORATION, Defendant.	NO. 12-2-08659-1 KNT DECLARATION OF JAMES P. RICHMOND IN OPPOSITION TO AMES' MOTION FOR ATTORNEY FEES AND COSTS

I, James P. Richmond, declare that I am over the age of 18, have personal knowledge of the matters set forth below, and I am competent to testify to the matters stated herein.

1. This declaration supports the County's opposition to Mr. Ames' request for attorney fees. Mr. Ames and his attorney, Joan Mell, filed declarations and briefs to support plaintiff Lynn Dalsing's motion to compel production of work product. Mr. Ames copied County e-mails that were sent and/or received through his County e-mail account and then sent those County e-mails to his home e-mail address. Mr. Ames copied the County e-mails and delivered the County e-mails to his private attorney, Mell. Those are among the same e-mails that the County produced to the plaintiff or withheld and listed in a protection log.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

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2. Mr. Ames' reply declaration in support of his motion to compel payment of his attorney's fees and costs contains false assertions made under oath about Mr. Ames' interactions with the Prosecutor's office.

3. Mr. Ames attended a meeting on October 16, 2012, at the Civil Prosecutor's Office with Deputy Prosecuting Attorneys Jason Ruyf, myself, and paralegal Chandra Zimmerman. Mr. Ames falsely states he turned over to me County e-mails that would "clear his name and his department." Mr. Ames did not deliver or discuss e-mails at that meeting, even though he did later provide me other related records. At no time during that meeting did we discuss that there were supposedly "exculpatory" e-mails or that Mr. Ames was aware of information that would be considered exculpatory. I did not say that a Lori Kooiman e-mail would "clear him of any wrong doing in the case" or that I would see to it that "It was turned over as part of discovery" *Compare* Ames Declaration, Paragraph 1.5:20-24, June 13, 2013.

4. The parties to this civil lawsuit exchanged numerous communications about plaintiff's discovery requests and Pierce County's objections and responses. As a non-party witness, Mr. Ames was not part of those communications. For example plaintiff's Request for Production (RFP 5) asked for "... the entire Pierce County Sheriff's Department Files ..." and went on to request specific information, including emails, about the investigation of Michael Dalsing, Lynn Dalsing, and William Maes in their criminal case. That request was objected to by Pierce County and led the County and the plaintiff to meet and confer several times about discovery.

5. In a September 28, 2012, letter to Pierce County, plaintiff's attorney, Fred Diamondstone, summarized the chronology of discovery requests and listed "Discovery Requests at Issue." That letter is attached as Exhibit A. E-mails were conspicuously not on

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

Diamondstone's discovery requests "at issue." Mr. Diamondstone asked for the following documents: "Employment Applications, Probation Reviews, Training Materials, Evaluations, Commendations, and Disciplinary Records.

6. In preparation for Michael Ames' deposition, Deputy Prosecutor Jason Ruyf and I also met with Mr. Ames at the computer lab on February 7, 2013. We discussed the fact that he was a witness and not a party. We reviewed Mr. Ames' incident reports that detailed what Mr. Ames discovered as part of his computer forensic investigation. We reviewed a set of deposition guidelines I provided. Those guidelines stated: "If Advised Not To Answer by Your Counsel, Do Not Answer Even If You Believe the Answer Would Be Helpful. *If you feel the advice was erroneous, request a break to confer with counsel.*" See Ames July 2 Declaration, Ex. A. The deposition preparation did not include a discussion or review of County e-mails.

7. At his deposition Mr. Ames did not request a break to meet and confer about erroneous advice. Mr. Ames did not express any concern that he was not being allowed to "clear his name" nor did he express any concerns about the County's work product objections.

8. Mr. Ames was allowed to answer questions during his deposition for more than six hours, as reflected in 150 pages of questions and answers about Mr. Ames' "limited role in this investigation." Ames Dep at 149:3-13, attached hereto as Exhibit B.

9. At Mr. Ames' deposition numerous questions were asked about that "particular photograph." Mr. Ames testified that the "particular photograph" was not Ms. Dalsing. Ames Dep. at 79:18-25; 80:1-16. The "particular photograph" was alleged in the Dalsing complaint to have been mistakenly identified as Ms. Dalsing. In its answer, Pierce County admitted the photograph was not Ms. Dalsing.

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955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

10. Mr. Ames' statement that the Prosecutors agreed a certain e-mail was "exculpatory" and would be "turned over" is not only untrue but affirmatively disproven by the deposition record. At Mr. Ames' deposition, when asked what documents Mr. Ames reviewed to prepare for his deposition, the following colloquy took place:

Q (By Mr. Diamondstone) In preparing for today's deposition, did you review any documents?

A Just my case reports. Then the review of material I had to compile for you, for your expert, that's pretty much it.

Q You mentioned at some point this morning some emails that you had received from Debbie Heishman about her getting a warrant and wanting you to process some computers. Did you receive any other emails in this case beside that?

A From?.

Q From anyone other --

A Other than -- from Debbie, I did.

Q From Debbie, you did?

A Yeah.

Q Where are the emails that you and Debbie may have exchanged or at least that you received from Debbie?

A They should be in your discovery. I mean the County archives everything. So if you did a discovery for the emails, all of them should be there.

Q I'm not sure exactly what we asked for. But I haven't seen any of the emails. So...

A There was maybe only one or just a couple. I know we talked by phone. But I know there was at least one or two.

Q. Without getting into the content of any email, did you have any email communications with the prosecutor's office?

A Yes.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

Q And again without getting into the content of those emails, do you know the approximate date frame on the emails?

A The only communication I had with them was in -- would have been in June 2011 to the best of my recollection.

Ames Dep at 145:18-25 and 146:1-21 (emphasis added). Further evidence that emails were not reviewed or discussed is the fact Mr. Ames stated he limited his review to his case reports and the mirror images of the computer hard drives provided to plaintiff's computer expert.

11. During Ames' deposition, the parties agreed there were work product objections by Pierce County that Judge Andrus needed to "sort out." Therefore Mr. Ames' deposition was continued for the limited purpose of answering potential questions about the County's work product objections. Mr. Ames was told by Mr. Diamondstone he had nothing further that day but expected that, "further inquiry from us will probably be limited to those subjects...."

MR. DIAMONDSTONE: Let me check with Mr. Woodley.

THE WITNESS: Okay.

MR. DIAMONDSTONE: Mr. Ames, I have nothing else today. And I say "today "because, as you know, we've some issues that we need a judge to sort out on some questions that we weren't permitted to get into with you. And we will likely also have questions for you concerning Exhibit No. 67. I have seen Exhibit No. 67 that was in evidence. And I need to see how the real No. 67 looks as opposed to a photocopy that we have that's marked as Exhibit 9 in this case. But I expect that further inquiry from us will probably be limited to those subjects.

Ames Dep at 149:10-25 through 150:1. Mr. Ames was present during this conversation.

12. At no time following the deposition did Mr. Ames ask me any questions about "what had just transpired and what if any reporcussions could apply to [him] for not answering." *See* Ames' July 2, 2013, Dec., 1.4.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

13. After Mr. Ames' deposition, February 14, 2013, Mr. Diamondstone first requested the County e-mails. On February 22, 2013, a 26(i) discovery conference between the named parties was held on the production of County e-mails. The County agreed to produce e-mails between investigators but objected to produce e-mails to or from prosecutors based on work product and produced a protection log listing work product documents. Mr. Ames independently filed under seal the very same e-mails that the County provided to plaintiff or objected to.

14. The attached list of objected to work product questions demonstrates that the County has been consistent in asserting work product. See Ex. B, Ames Dep., p. 3. It further confirms Mr. Ames did not express any concerns that the advice not to answer questions was erroneous or that he thought the County's assertion of work product was erroneous. Mr. Ames never asked for a break to confer. Neither during the deposition nor at its conclusion did Mr. Ames express any concerns that he was being prevented from "clearing his name" and the name of his department or from "testifying truthfully."

15. The first time the County was aware that Mr. Ames was concerned that erroneous advice may have been given at his deposition was when his attorney, Ms. Mell, contacted the Prosecutor's Office on February 21, 2013, and announced she was entering an appearance for Mr. Ames. Mr. Ruyf and I asked, but Ms. Mell declined to explain, what Mr. Ames' concerns were. Ms. Mell instead alleged that her conversations with Mr. Ames were protected by attorney/client privilege and she would not share with the County Ames' concerns or the basis for a claimed privilege.

16. Without explanation it appears Mr. Ames actually sought Ms. Mell's independent representation two months before his deposition for unknown reasons even

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

though he states he sought independent advice after his deposition. See Sub. #190:7/2/13 Ames Dec. at 2. Mr. Ames seeks to be paid for a December 8, 2012, consultation with Ms. Mell as part of his motion three months later to seal records.

17. Before Mr. Ames filed his Motion to Seal on March 12, 2013, Ms. Mell did not "meet and confer" with the Prosecutors Office. Similarly, a CR 26(i) conference did not take place before the instant motion for attorney fees to be paid on behalf of a non-party witness despite the fact that I previously pointed out to Ms. Mell after Ames' motion to seal was filed that CR 37(a) expressly states that the motion will only be considered if the moving party makes "a showing of compliance with rule 26(i)."

19. Attached as Exhibit B are true and correct copies of the cover page and pages 3-4, 77-80, 96-98, 130-132, and 145-151 of the Deposition Upon Oral Examination of Detective Mike Ames taken February 14, 2013.

I declare under penalty of perjury of the laws of the State of Washington the foregoing to be true and correct.

EXECUTED this 17th day of July, 2013, at Tacoma, Pierce County, Washington.

s/ JAMES P. RICHMOND
JAMES P. RICHMOND

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2100
Main Office: (253) 798-6732
FAX: (253) 798-6713

Davis Wright Tremaine LLP

CONFIDENTIAL

REPORT OF INVESTIGATION OF ALLEGATIONS BY PIERCE COUNTY SHERIFF'S DEPARTMENT DETECTIVE MICHAEL AMES CONCERNING THE KOPACHUCK MIDDLE SCHOOL MATTER

Prepared at the Request of the
Pierce County Department of Human Resources,
Joe Carrillo, Interim Director

Jeffrey B. Coopersmith
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: 206-757-8020
Facsimile: 206-757-7020
Email: jeffcoopersmith@dwt.com

EXHIBIT C
Ames - 000300

INTRODUCTION

On December 7, 2012, representatives of the Pierce County Deputy Sheriff's Independent Guild, Local No. 1889, met with Undersheriff ("U/S") Eileen Bisson of the Pierce County Sheriff's Department ("PCSD") to tell her that Detective Michael Ames wished to file a complaint against the PCSD and the Pierce County Prosecuting Attorney's Office ("PAO"). The complaint related to a PCSD investigation, and a PAO decision not to file criminal charges, in connection with a February 2, 2012 classroom incident involving a teacher at the Kopachuck Middle School in the unincorporated Pierce County section of Gig Harbor. The incident, which was captured on video by students in the classroom, involved conduct by students and a teacher named John Rosi directed at a 13-year old middle school student with the initials "CK." At the December 7 meeting, the Guild representatives informed U/S Bisson that Det. Ames was also requesting an independent review or investigation of the Kopachuck Middle School incident by an outside law enforcement agency and prosecuting attorney's office. U/S Bisson requested that Det. Ames submit a written, signed complaint.

On December 20, 2012, Det. Ames submitted his written, signed complaint as an attachment to an email addressed to U/S Bisson. Det. Ames' complaint was dated December 12, 2012, but was submitted by him on December 20, 2012. Det. Ames' complaint stated that he:

1. was "requesting a criminal investigation by an outside State or Federal Law Enforcement Agency into the handling of the Kopachuck Middle School Case, Pierce County case number 12-2120313";

2. "believe[d] officers at the executive command level of the [PCSD] along with executive level officers in the [PAO] conspired to discredit the legitimacy of the criminal complaint filed by CK's parents against Kopachuck Middle School teacher John Rosi";

3. "believe[d] [that the PCSD and PAO,] in an attempt to assist Redaction Code 1 Redaction Code 1 in defending Redaction Code 1 personal friend and the suspect in this case John Rosi, created a false accusation of official misconduct against [Det. Ames] and [CK's parents'] attorney Joan Mell" by issuing a press release and conducting a search of Det. Ames' official Pierce County emails for evidence of "possible misconduct" by Det. Ames; and

4. believed that the PCSD and PAO executive level officers searched his emails and issued the press release "In retaliation for [Det. Ames'] filing of a whistleblower complaint against the [PCSD]" in early 2012 concerning overtime compensation.

Det. Ames' complaint further alleged that the following PCSD and PAO employees were knowing participants in "the conspiracy and acts of harassment and retaliation": Pierce County Redaction Code 1 Pierce County Redaction Code 1

[redacted] Pierce County [redacted]; PCSD [redacted]; PCSD [redacted] PCSD [redacted]; and PCSD [redacted]

U/S Bisson completed her review of Det. Ames' complaint and submitted a memorandum to Sheriff Pastor summarizing it on January 16, 2013. On February 20, 2013, Det. Ames sent an email to Sheriff Pastor and U/S Bisson asking about the status and timeframe for a decision. In that email, Det. Ames added a claim that "[t]he internal investigation which was initiated, conducted, and concluded, all without due process and notification to me and the PCSD Guild, clearly in my opinion was a direct violation of the Pierce County IT Data Investigation Policy 1.17.03 . . ." Sheriff Pastor responded by email on February 25, 2013, stating that he had forwarded the complaint to Interim Pierce County Human Resources Director Joe Carrillo because Det. Ames had made allegations against [redacted] as well as others on the PCSD command staff.

Effective April 1, 2013, the Pierce County Human Resources Department ("HR") retained Davis Wright Tremaine LLP ("DWT") to conduct an independent investigation of Det. Ames' complaint. HR gave DWT no guidance or instructions as to what the outcome of the investigation should be, and participated only by making witnesses available, providing the use of an HR conference room for witness interviews, and providing documents as requested. DWT proceeded to conduct the investigation, as described below. The PCSD internal affairs department ("I/A") attended and participated in the interviews to avoid duplication of effort in the event that there is ever a need for an I/A investigation. I/A had no input in connection with the scope or nature of the investigation or the questions posed to witnesses at the interviews, or with the preparation of this report or its findings and conclusions. No official I/A investigation was opened as far as DWT is aware.

II. INVESTIGATIVE PROCEDURE

The investigation conducted by DWT consisted of reviewing documents and interviewing witnesses, conducting legal research, and preparing this report. All facts obtained from reviewing documents and interviewing witnesses, and all claims made by Det. Ames, were considered in reaching the findings and conclusions, even if not specifically mentioned in this report.

A. Documents Reviewed

DWT reviewed the following categories of documents in connection with its investigation:

1. a 420-page set of documents consisting, among other things, of Det. Ames' written complaint and attachments, documents relating to the overtime compensation matter, internal PCSD emails relevant to the matter, and Pierce County policies and procedures;

2. documents provided to DWT by Det. Ames and his counsel, Joan Mell; as well as documents provided by other witnesses;

3. documents provided by the PAO, including the entire PAO file concerning the Kopachuck Middle School incident;

4. video taken by students present on February 2, 2012 in Mr. Rosi's classroom at the Kopachuck Middle School;

5. video of an August 9, 2012 interview of CK conducted by a forensic child interviewer; and

6. news reports concerning the Kopachuck Middle School matter.

B. Witness Interviews

DWT's investigation also consisted of conducting interviews with 17 witnesses. All witness interviews were conducted in person, except for two follow up interview by telephone with Redaction Code 1 and U/S Bisson. Most of the interviews were conducted in a conference room that HR made available at its office in Tacoma. The interviews of PAO personnel were conducted at the PAO. The one witness from the Tacoma Police Department ("TPD") was interviewed in the office of PCSD I/A. All witnesses consented to taping of their interviews, except for Redaction Code 1 and Ms. Rebecca Stover of the PAO. The tapes were only roughly transcribed, so portions used in this report may not be precise. The witnesses interviewed, in alphabetical order, were:

Name	Interview Date(s)
Redaction Code 1	04/01/2013
Det. Michael Ames	04/01/2013, 04/09/2013
Redaction Code 1	04/10/2013
U/S Eileen Bisson	04/01/2013, 04/29/2013
Det.-Sgt. Teresa Berg	04/02/2013
Redaction Code 1	04/02/2013, 04/09/2013
Det. Heath Holden (TPD)	04/11/2013
Det.-Sgt. Todd Karr	04/16/2013
Redaction Code 1	04/10/2013, 04/17/2013
Redaction Code 1	04/02/2013
Redaction Code 1	04/11/2013
Det.-Sgt. Michael Portmann	04/16/2013
Sgt. Scott Provost	04/09/2013
DPA Phil Sorenson	04/10/2013
Ms. Rebecca Stover	04/16/2013
Redaction Code 1	04/02/2013
Lt. Russ Wilder	04/09/2013

III. FACTUAL BACKGROUND

A. The Overtime Matter and Its Resolution

On January 5, 2012, Det. Ames, represented by Ms. Mell, submitted a Claim for Damages, and a Complaint of Improper Governmental Action pursuant to Pierce County Code Chapter 3.14 (Whistleblower Protection).[1] The essence of Det. Ames' complaint was that he had not been properly compensated for "nearly 200 hours" of overtime. Det. Ames alleged that in June 2011, PCSD Captain Brent Bomkamp refused to authorize further overtime for him to complete training necessary to obtain certification as a Certified Forensic Computer Examiner, while also completing his regular duty assignments in the computer forensics lab. Det. Ames alleged that from approximately June through December of 2012, his immediate supervisor, Detective Sergeant Michael Portman, together with Capt. Bomkamp, set up an illegal and unauthorized system whereby Det. Ames and other PCSD employees under Det.-Sgt. Portman's supervision would receive compensatory time off in lieu of overtime pay. During the second half of 2012, Det. Ames did not submit overtime compensation slips but instead kept a log detailing his overtime hours, which he submitted with his claim in January 2012.

The PCSD investigated Det. Ames' allegations concerning overtime compensation. The investigation found that Det.-Sgt. Portman had in fact set up an unauthorized compensatory time system, but that he did so out of a desire to get PCSD work done rather than for any malicious or criminal reasons. The investigation found that Capt. Bomkamp did not have knowledge of the unauthorized system. On February 10, 2012, as a result of the investigation, Pierce County and Det. Ames entered into a Release, Hold Harmless and Settlement Agreement that included a provision granting full overtime compensation in the amount of $12,864 for 200 hours of overtime work claimed by Det. Ames. Other PCSD employees also received overtime compensation. Det.-Sgt. Portman received discipline in the form of a verbal warning.

B. The Kopachuck Middle School Incident and Investigation

On February 2, 2012, an incident occurred in the classroom of teacher John Rosi at the Kopachuck Middle School. The incident occurred during an approximately half hour portion of the students' day known as "Kopatime." During the Kopatime session on February 2, various students, and to some extent Mr. Rosi, picked up and carried CK in various positions, put him under chairs, wrote on his feet, and engaged in other physical activities or handling of CK. Mr. Rosi either stood by or participated, although at times he told students to stop certain

[1] The overtime compensation matter raised by Det. Ames may not actually have been a matter covered by Chapter 3.14 of the Pierce County Code. Section 3.14.010(A)(4) of that chapter defines "improper governmental action" but excludes from the definition, among other things, "violations of the Pierce County Code Title 3" and "alleged violations of agreements with labor organizations under collective bargaining." Det. Ames' complaint about overtime compensation was governed, at least primarily and perhaps exclusively, by Section 3.52.050 of the Pierce County Code (part of Title 3), and by Article 5 of the collective bargaining agreement between Pierce County and the Pierce County Deputy Sheriffs' Independent Guild, Local No. 1889. Det. Ames did cite other state statutes and Pierce County Code sections in his overtime complaint, the applicability of which need not be resolved for purposes of this report.

activities. Several students captured these events on cell phone video. The Peninsula School District conducted an investigation, and Mr. Rosi received a 10-day suspension.

The April 26, 2012 letter of suspension from the school district superintendent to Mr. Rosi stated:

> This letter will serve as a reprimand imposing a ten-day suspension without pay for your behavior on February 2, 2012.
>
> On February 2, 2012, as a result of your lack of planning, you allowed students to engage in unstructured activities which included severe horseplay by members of the class and during which time you engaged in no educational instruction for an entire class period. You further participated in, as well as allowed students to engage in, potentially dangerous roughhousing behavior for which there was no educational value and there was a serious potential for the injury of one or more students. The conduct in question was inappropriate for a professional educator and not reasonably calculated to serve any legitimate professional or educational purpose.
>
> Additionally, you are directed to engage in appropriate classroom instruction and classroom management techniques in the future. You are directed to follow the appropriate classroom curriculum and to follow established learning targets and a lesson plan during each instructional day. Finally, you are directed to refrain from participating in, or encouraging students to participate in, roughhousing in the school environment.

Neither CK's parents or the school district reported the incident to law enforcement. However, on July 26, 2012, nearly six months after the incident, Ms. Mell, acting as counsel for CK's parents, contacted PCSD Detective Sergeant Teresa Berg and left a voicemail message in which Ms. Mell "advised of a case involving a video of a thirteen year old student being bullied by a teacher." Det.-Sgt. Berg was at that time the supervisor of PCSD's Special Assault Unit. Det.-Sgt. Berg returned Ms. Mell's call and left a voicemail message the same day. Ms. Mell and Det.-Sgt. Berg had two further voicemail exchanges on July 27, 2012, but were not able to connect.

On July 30, 2012, Ms. Mell contacted Det. Ames, her former client from the overtime compensation matter, about the Kopachuck Middle School incident. Det. Ames, who was assigned to the computer lab rather than PCSD's Special Assault Unit, travelled to Ms. Mell's office the same day to discuss the matter with her. Ms. Mell told Det. Ames that she believed that the February 2 classroom incident constituted abuse and needed to be reported to law enforcement.[2] Ms. Mell provided Det. Ames with a thumb drive containing video of the

[2] Under RCW 26.44.030, child abuse or neglect must be reported to authorities by certain persons, including professional school personnel. Under RCW 26.44.020(1), "'[a]buse or neglect' means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." Under RCW 26.44.020(14), "[n]egligent treatment or

February 2 incident that had been downloaded from the cell phones of students who had been present in the classroom. Det. Ames took possession of this thumb drive as well as additional documents provided by Ms. Mell, including documents obtained pursuant to a Public Records Act request relating to the investigation conducted by the school district. The same day, July 30, 2012, Det. Ames interviewed CK's parents on a conference call with Ms. Mell present on the phone. CK's parents advised Det. Ames that they would cooperate fully with any criminal investigation and would make their son, CK, available for interviews with law enforcement. Det. Ames prepared a report of his investigation and entered the report into the PCSD system on July 30, 2012. The report was approved by Det.-Sgt. Berg on July 31, 2012.

Later on July 30, 2012, Det.-Sgt. Berg finally connected with Ms. Mell by phone. Ms. Mell told Det.-Sgt. Berg that Det. Ames had taken a report earlier that day. Det.-Sgt. Berg discussed the investigative and child interview process with Ms. Mell, and arranged to obtain the video evidence and documents from Det. Ames. Det.-Sgt. Berg received these evidentiary materials on July 31, 2012. Det.-Sgt. Berg proceeded to investigate the matter by, among other things, obtaining documents and information from Ms. Mell; obtaining documents and information from the school district; interviewing CK's parents with Ms. Mell present; and having a specialized forensic child interviewer (Cornelia Thomas) interview CK while Det.-Sgt. Berg and Ms. Mell observed.[3] Det.-Sgt. Berg also obtained, on September 14, 2012, a list of the students in teacher John Rosi's class. In connection with obtaining that list, a school district official told Det.-Sgt. Berg that six to eight of the students had been contacted by Mr. Rosi's defense counsel, that all students and parents had been invited to a meeting about the matter on September 13, 2012 but only three attended, and that the parents who attended expressed concern that their children would be named in the media. The school district official also told Det.-Sgt. Berg that the district had contacted legal counsel about whether the February 2 incident was a mandatory reporting matter, and that "current counsel will have the documentation."[4]

In late September or early October, 2012, Det.-Sgt. Berg sent her investigation file to the PAO. She did not interview the students in the class other than CK (through a forensic child interviewer), although she did review the school district's investigation notes of interviews with some of the students. Det.-Sgt. Berg later explained, in an October 19, 2012 email written in

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maltreatment" means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100."

[3] In a letter to PCSD Redaction Code 1 dated November 9, 2012, Ms. Mell stated that "Detective Berg [did] not interview the witnesses and she [did] not interview the parents." According to Det.-Sgt. Berg's report dated September 28, 2012, which Ms. Mell received pursuant to a PRA request in October 2012, Det.-Sgt. Berg interviewed CK's parents with Ms. Mell present on August 9, 2012. Det.-Sgt. Berg confirmed that this interview occurred during the DWT interview of her.

[4] It does not appear that any such documentation was received. There is disagreement among the witnesses as to whether the February 2 was a mandatory reporting matter. Det. Ames believes that it should have been reported pursuant to the state statute. Redaction Code 1 does not believe it was a mandatory reporting matter. Det.-Sgt. Berg believes that the school district should have reported the incident to law enforcement so that law enforcement rather than the school district could have made a judgment as to whether the incident violated state criminal law. The question would be whether the February 2 incident resulted in "injury" to CK that caused "harm" to his "health, welfare, or safety."

connection with Ms. Mell's PRA request, that she sent the file "to the Prosecutor's Office without having interviewed the other kids in the class, which will be a mess and involve search warrants. I want to know a charge is supported prior to continuing as I think the case has problems." Det.-Sgt. Berg explained in her DWT interview that the "problems" chiefly consisted of CK's statements during his interview with Ms. Thomas, which in Det.-Sgt. Berg's view did not support a theory that the February 2 incident constituted a criminal offense. Det.-Sgt. Berg also explained that conducting interviews of the other students would have involved considerable time and disruption, and that she wanted some guidance from the PAO before proceeding. PCSD and PAO witnesses (other than Det. Ames) did not believe that Det.-Sgt. Berg's decision to seek guidance before proceeding with further investigation was unreasonable or unusual. Det.-Sgt. Berg did note in her October 19, 2012 email, written while she was waiting for the PAO guidance, that "there is always the possibility of follow-up."

At the PAO, [redacted] the [redacted] reviewed Det.-Sgt. Berg's file and met with her, consulted with Ms. Thomas about her interview of CK, and reviewed videos of the classroom incident and the video interview of CK, among other things. In a four-page memorandum dated November 6, 2012, [redacted] wrote that [redacted] found no basis for criminal charges against Mr. Rosi or anyone else. [redacted] stated that [redacted] drafted [redacted] November 6, 2012 memorandum to advise [redacted] of the reasons for the declination so that [redacted] would be prepared to field any questions from the local or national media, which had shown interest in the case. [redacted] stated that [redacted] made the decision to decline prosecution on [redacted] own. [redacted] provided the following reasons, among others, for [redacted] decision:

1. CK initially told his mother, when she saw text messages on his phone referring to the classroom incident on February 2, that "they were just playing around";

2. CK's parents told school officials on February 16, 2012 that prior to the February 2 incident CK had told them he hated school and did not want to live anymore, and that they made arrangements for CK to see a psychologist as a result;

3. CK's father told school officials that, after viewing the videos of the incident, CK appeared to be laughing. CK's mother commented that CK's facial expressions "did not look OK." CK's father further stated that from CK's perspective the entire incident "was all fun play," that he had no animosity after viewing the videos of the incident, that he did not see malicious intent on the part of the teacher, and that the incident was "bad timing" for the teacher because CK "was in crisis mode leading up to the incident";

4. CK's psychiatrist was aware of the classroom incident and had reviewed the videos of it but did not report the matter to CPS as abuse until July 31, 2012, after CK's parents consulted with Ms. Mell;

5. Redaction Code 1 reviewed the videos provided by Det.-Sgt. Berg and observed that CK and the teacher appeared to laughing and having fun;

6. Redaction Code 1 contacted the forensic child interviewer on October 11, 2012, who told [redacted] that CK did not disclose abuse or any other crime, and that she told CK's parents and civil attorney immediately after the interview that there had been no such disclosure from CK;

7. The PCSD investigation was initiated by a civil attorney (Ms. Mell) about five months after the classroom incident;

8. Ms. Mell contacted Det. Ames, with whom she had an attorney-client relationship;[5] and

9. Factors 7 and 8 would complicate a prosecution of Mr. Rosi because defense attorneys could assert that Ms. Mell worked to initiate the criminal investigation to aid CK's parents' pursuit of a civil lawsuit, and that the PCSD criminal investigation commenced only because Det. Ames had done a favor for Ms. Mell;

On November 6, 2012, the PAO issued a press release announcing its decision not to prosecute Mr. Rosi or anyone else. The press release was detailed, and was so similar to [redacted] Redaction Code 1 memorandum of November 6 that it is clear that one was derived from the other. For example, the November 6 memorandum contained the following passage:

> Defense attorneys often assert that a victim's motive for reporting a crime is to facilitate a civil lawsuit. Here, the investigation was initiated by a civil attorney, retained by CK's parents. To complicate matters, the civil attorney reported the matter to a Pierce County Sheriff's Department (PCSD) detective assigned to investigate computer crimes, who was also this attorney's client on an unrelated civil matter.

The November 6 press release contained the following, similar passage:

> Defense attorneys often assert that a victim's motive for reporting a crime is to facilitate a civil lawsuit. Here, the investigation was initiated by a civil attorney who was retained by CK's parents. To

[5] [redacted] memorandum states that "[t]he civil attorney is Ames' attorney on an unrelated civil matter." Det. Ames stated during his DWT interview that, although Ms. Mell represented him in connection with the overtime compensation matter that concluded in February 2012, she was not representing him on any matter on July 30, 2012, when he took the report about the middle school incident. Ms. Mell, who was present during Det. Ames' DWT interviews and represents him in connection with Det. Ames' current complaint, confirmed that she did not represent him on July 30. [redacted] stated during [redacted] DWT interview that in connection with preparing [redacted] November 6, 2012 memorandum, [redacted] confirmed with a PAO civil attorney that Ms. Mell represented Det. Ames. [redacted] did not place weight on whether the attorney-client relationship was past or present in concluding that the relationship would be problematic for a prosecution because it would become "fodder for the defense."

complicate matters, the civil attorney reported the matter to a PCSD detective who had been represented by that same civil attorney on an unrelated matter.

C. PCSD Actions Regarding Detective Ames

On August 29, 2012, several media outlets reported the February 2 incident at the Kopachuck Middle School.[6] As a result of media inquiries that day, the incident came to the attention of PCSD [redacted] who served as the PCSD's [redacted] At 11:29 am on August 29, 2012, [redacted] sent an email to [redacted] and Undersheriff Eileen Bisson with the comment: "Didn't mell represent ames in a matter against the county. Is there a conflict issue here. I'm sure she will filo a law suit." [redacted] stated during [redacted] DWT interview that after getting a call from a newspaper reportor [redacted] looked up the matter in the PCSD system and came upon Det. Ames' July 30, 2012 report. At 11:35 am on August 29, 2012, [redacted] followed up with an email to [redacted] stating: "This is going to jump big. Also fyi the teacher in this I know went to high school with him." [redacted] responded with an email at 1:34 pm on August 29: [redacted] So as I understand it no one called us on this until recently and till some time after this happened. Right? People are not upset with us but want to know what we do on it. Right? [redacted] [redacted] also informed [redacted] on August 29 about the Kopachuck matter. According to both [redacted] and [redacted] was not aware of the Kopachuck matter until August 29.[7]

[redacted] stated during [redacted] DWT interview that, although [redacted] did go to high school with Mr. Rosi many years ago, the two were not friends in high school [redacted] had seen Mr. Rosi only in passing or at events such as reunions, and had no social or professional relationship with Mr. Rosi. [redacted] explained that [redacted] told [redacted] that [redacted] had gone to high school with Mr. Rosi just to make sure this was disclosed from the beginning. [redacted] also explained that [redacted] mentioned the issue of a potential conflict involving Det. Ames because [redacted] believed that Ms. Mell and Det. Ames had at least a previous attorney-client relationship, that Ms. Mell had brought the middle school matter forward in the press, and [redacted] found it unusual that Det. Ames had started a PCSD investigation outside his duty assignment by taking a report from an attorney who had represented him. [redacted] also believes that Det. Ames or someone at PCSD should have alerted [redacted] to the Kopachuck matter before [redacted] learned of it from a media inquiry on August 29.

On August 29, U/S Bisson commented by email in response to [redacted] email about this alleged conflict: "I'm not seeing the conflict if this is a county case. Mike [Ames] won't be the investigator, he just obtains the materials off the electronic items and it would be assigned to a detective. I've included [redacted] in the loop." U/S Bisson confirmed in her DWT interview that she did not see a conflict. [redacted] stated during his DWT interview that [redacted] believed Det. Ames created at least the appearance of conflict. [redacted] stated during [redacted] DWT interview that [redacted] recalled hearing and was under the impression that [redacted]

[6] See, e.g., http://www.thenewstribune.com/2012/08/28/2271605/child-was-bullied-by-students.html.
[7] Det.-Sgt. Berg recalled telling [redacted] about the Kopachuck matter sometime after July 30 and perhaps close in time to July 31, 2012, but she could not recall the specific day.

believed there was such a conflict or at least some issue with Det. Ames taking the report. PCSD Redaction Code 1 and PCSD Redaction Code 1 also believed that Det. Ames should not have handled the matter by taking a report from his former personal attorney. Redaction Code 1 stated during [illegible] DWT interview that [illegible] believes that Det. Ames wrote an excellent report in the Kopachuck matter but also believes that Det. Ames should not have done so because Ms. Mell had been his personal lawyer. Redaction Code 1 also recalled that [illegible] had a conversation with U/S Bisson after her August 29 email in which [illegible] explained the circumstances of the attorney-client relationship and she agreed that although Det. Ames had written a good report, the PCSD did not want to have detectives taking reports from attorneys who represented them. U/S Bisson did not recall this conversation with Redaction Code 1

Redaction Code 1 also recalled that Redaction Code 1 had expressed concern over a potential improper release of information by Det. Ames to Ms. Mell. Redaction Code 1 recalled that [illegible] Redaction Code 1 with whom Redaction Code 1 has a social relationship, raised a concern about Det. Ames' taking a report about the middle school matter from his former attorney.

In any event, a number of the PCSD and PAO witnesses expressed concerns about the way that the Kopachuck investigation was initiated by Det. Ames. The concerns can be summarized as follows: (1) Ms. Mell had been contacting the media, the PCSD, and the PAO about the Kopachuck matter in which she represented CK's family in an effort to generate interest in the matter and spark a criminal investigation and prosecution; (2) the initiation of a PCSD investigation and/or PAO prosecution would be potentially beneficial in civil litigation brought by Ms. Mell against the school district or others; and (3) Det. Ames' initiation of a PCSD investigation by taking a report from his former personal attorney (Ms. Mell) and interviewing Ms. Mell's clients (CK's parents) might create the appearance that a PCSD investigation was initiated as a favor to Ms. Mell.

On September 25, 2012, as result of these concerns, Redaction Code 1 wrote the following email to Redaction Code 1 with a copy to Redaction Code 1:

> I recall after reviewing the emails relating to the Kopachuck case that because of the Undersheriff's comment below [referring to U/S Bisson's August 29 email] I didn't pursue the issue with Mike [Ames] writing the report.
>
> I agree that it smells because of Mike's Attorney/Client relationship with Joan Mell. Let's discuss the path forward tomorrow.

The matter did not wait until the next day. At 10:45 pm on September 25, 2012, [illegible] Redaction Code 1 sent an email to Linda Gerull, the Pierce County Information Technology Director, requesting a search of Det. Ames' PCSD email account for the specific time period July 23, 2012 through September 24, 2012 "[r]elated to possible misconduct by Sheriffs' employee Mike Ames." Redaction Code 1 sent a copy of this email to Redaction Code 1 who approved the email search request. Redaction Code 1 email requested that the email search cover the following specific items: (1) email correspondence with Ms. Mell; (2) emails referencing the names of

John Rosi, CK, CK's parents, or Kopachuck; and (3) the PCSD case number assigned to the Kopachuck investigation and certain iterations of that case number. Redaction Code 1 email noted that [redacted] request was made with the approval of Redaction Code 1 did not use any official Pierce County email search form to make the request.[8] Redaction Code 1 followed up with Ms. Gerull by email on the afternoon of October 1 asking about the status of the email search request. Ms. Gerull then sent an email the same afternoon to Betsy Sawyer, then the Pierce County Human Resources Director, requesting approval for the email search. Ms. Sawyer approved the request the same afternoon.

The email search was then conducted, by Pierce County IT Systems Engineer Supervisor Tom Jones, who reported by email to Redaction Code 1 on October 2, 2012 that "IT didn't find any email between Ames and Joan Mell." Redaction Code 1 immediately forwarded the email to Redaction Code 1 who in turn forwarded it to Redaction Code 1 with the note "Just fyi. Please don't forward this." Redaction Code 1 stated during [redacted] DWT interview that [redacted] wrote this note to inform Redaction Code 1 about the email search and asked that the email not be forwarded to make sure the matter stayed confidential. Redaction Code 1 also stated that [redacted] did not write "don't forward this" out of any concern that there was something wrong with conducting the email search or sharing the lack of results with Redaction Code 1 but rather because [redacted] prior conversation with Redaction Code 1 had been one-on-one and Redaction Code 1 thought it should stay that way. Redaction Code 1 stated during [redacted] DWT interview that [redacted] had no input into the decision to search Det. Ames' county email account and did not direct it. Redaction Code 1 also commented that if there had been any emails between Det. Ames and Ms. Mell, such emails might have to be turned over to the defense in connection with any prosecution.

Det. Ames claims that, during an October 11, 2012 visit to the computer lab at the Tacoma Police Department where Det. Ames worked, Lt. Russ Wilder told Det. Ames that he had done him a favor by refusing a direction by senior PCSD officers to open an official misconduct investigation against Det. Ames. According to Det. Ames, Lt. Wilder said that the senior officers believed that Det. Ames had conspired with Ms. Mell to file a case against Mr. Rosi to assist a civil lawsuit that Ms. Mell would file against the school district. Det. Ames further alleged that Lt. Wilder told him that the senior officers were upset by the fact that Det. Ames had retained Ms. Mell in the overtime compensation claim earlier in 2012, and that Lt. Wilder told him to watch his back because the senior officers "have it in" for him. Det. Ames claimed that Lt. Wilder told him that the senior officers' purpose was to discredit him and Ms. Mell which would in turn discredit the filing of a case in the middle school matter. Det. Ames stated that Lt. Wilder declined to provide the names of the senior officers because he had "stopped [an official misconduct investigation of Det. Ames] from happening." During his DWT interview, Det. Ames stated that after this alleged conversation with Lt. Wilder he immediately told his partner in the computer lab, Tacoma Police Department Detective Heath Holden, what Lt. Wilder had said. Det. Holden stated during his DWT interview that he had no reason to doubt Det. Ames but did not recall any such conversation with Det. Ames.

[8] The Pierce County Information Technology department ("IT") has a form called "E-mail Records Search Request" for other Pierce County departments to use in requesting searches of email records. Use of the form is not a requirement under IT's January 17, 2003 Data Investigation Policy.

Lt. Wilder reported during his DWT interview that he did in fact have a brief conversation with Det. Ames at the conclusion of his visit to the computer lab on October 11, 2012. Lt. Wilder said that prior to his visit he had a conversation with Redaction Code 1 about Det. Ames' conduct in taking a report in the middle school matter from an attorney who had represented him. According to Lt. Wilder, Redaction Code 1 had already decided that no official misconduct investigation of Det. Ames would be necessary, and that instead Redaction Code 1 wanted Lt. Wilder to have a more casual conversation with Det. Ames about PSCD concerns about taking a report from a personal attorney. Lt. Wilder recalled telling Det. Ames something to the effect that "eyes were on" Det. Ames because PCSD officials believed that Det. Ames should not have taken the report from Ms. Mell. Lt. Wilder said that there was no conversation with Redaction Code 1 about discrediting Det. Ames or Ms. Mell and he never told Det. Ames that. Lt. Wilder said that he had tried to approach Det. Ames in a friendly matter to convey that PCSD did not believe that Det. Ames should have taken the report, but that Det. Ames was incorrect that Redaction Code 1 or other senior officers wanted to open an official misconduct investigation, let alone for the purpose of discrediting or retaliating against Det. Ames. No official misconduct investigation against Det. Ames was ever conducted. Det. Ames received no official discipline.

D. PAO Actions Regarding Detective Ames

As noted above, on November 6, 2012 the PAO declined prosecution in connection with the Kopachuck Middle School matter. As also noted above, the press release issued by the PAO announcing its decision contained a paragraph stating:.

> Defense attorneys often assert that a victim's motive for reporting a crime is to facilitate a civil lawsuit. Here, the investigation was initiated by a civil attorney who was retained by CK's parents. To complicate matters, the civil attorney reported the matter to a PCSD detective who had been represented by that same civil attorney on an unrelated matter.

Det. Ames alleges that the insertion of this language into the press release constituted retaliation and harassment against him, and was part of the conspiracy to discredit him for the purpose of justifying an improper decision not to prosecute Mr. Rosi.

As also noted above, the press release language quoted above is identical in all material respects to the internal PAO memorandum written by Redaction Code 1 Redaction Code 1 stated during his DWT interview that he drafted this memorandum on his own, including the language quoted above. Redaction Code 1 stated that he made the decision on his own to decline prosecution in the Kopachuck matter. Redaction Code 1 stated that he has tried many cases and in his experience the fact that a civil attorney with a financial incentive reported the matter over five months after the incident to a PCSD detective she had represented would be problematic at a trial. Redaction Code 1 also stated that in his view Det. Ames seemed to be just trying to do his job when he got a call from Ms. Mell about a possible crime, and that it is Ms. Mell's handling of the matter, not Det. Ames' conduct, that made the case problematic from a prosecutorial standpoint. Redaction Code 1 wrote the memorandum because the Kopachuck Middle School matter had

attracted media attention and as a result [redacted] needed to be knowledgeable about the matter to be prepared for any media inquiries. [redacted] stated that [redacted] goal was not to make Det. Ames look bad.

[redacted] recalled having some input into the November 6, 2012 PAO press release, but only with respect to editing or possibly writing the quotes attributed to [redacted] in the memorandum. [redacted] also recalls approving the press release as a whole. [redacted] confirmed with [redacted] that the press release was completely accurate before approving it. The PAO press release was issued by Rebecca Stover, who at the time was the PAO press contact. Ms. Stover does not recall drafting the press release, and did not recall who drafted it, but acknowledged that it was very similar to the PAO memorandum from [redacted] and that she may have adapted it from that memorandum. [redacted] stated that [redacted] did not provide input on [redacted] November 6 memorandum. All PCSD witnesses denied having any input into the November 6 PAO memorandum, and DWT has found no evidence of any such input.

IV. LEGAL FRAMEWORK

Det. Ames' complaint of December 20, 2012 does not cite to a state statute, the Pierce County Code, or other authority as a basis for the complaint. Nevertheless, it is useful to analyze Det. Ames' complaint under a legal framework, as discussed below.

Chapter 3.14 of the Pierce County Code is entitled "Whistleblower Protection" and contains provisions to that effect. However, to the extent that Det. Ames' complaint is claiming that he was the victim of retaliation based on his having made a prior claim for overtime compensation, Chapter 3.14 does not apply. Section 3.14.010(B) defines "retaliatory action" as certain personnel actions "taken on account of, or with motivation from the employee's action protected under Section 3.14.030." Under section 3.14.030(D), employee action protected under Section 3.14.030 is action taken in connection with reporting "improper governmental action." "Improper governmental action" is defined by Section 3.14.010 (A) as including a wide range of governmental actions that violate federal, state, or county ordinances, or are otherwise improper. However, Det. Ames' prior complaint about overtime compensation is specifically excluded from the definition of "improper governmental action" because the definition excludes all forms of personnel action, including "violations of the Pierce County Code Title 3" and "alleged violations of agreements with labor organizations under collective bargaining agreements." Although Det. Ames cited a plethora of statutes and code sections in his overtime compensation claim, the claim actually alleged a violation of Section 3.52.050 of the Pierce County Code and Article 5 of the collective bargaining agreement between Pierce County and Pierce County Deputy Sheriffs' Independent Guild, Local No. 1889. Accordingly, Chapter 3.14 does not seem to apply.[9]

[9] Moreover, Section 3.14.040(B) requires a written complaint within 30 days of the alleged retaliatory action. It appears that Det. Ames became aware of the alleged retaliatory actions by November 8, 2012, even assuming for purposes of discussion that the 30 day timeline is triggered on the date of awareness of the alleged retaliatory action

Another potential statutory basis for Det. Ames' complaint might be Chapter 42.41 of the Revised Code of Washington, which contains provisions very similar to Chapter 3.14 of the Pierce County Code. However, RCW 42.41.020, like Chapter 3.14, excludes all forms of personnel actions from the definition of "improper governmental action," and also contains the same 30-day timeline for submitting a written complaint. Further, RCW Chapter 42.41 does not apply at all in the case of "[a]ny local government that has adopted or adopts a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting . . . if the program meets the intent of this chapter." It seems that Pierce County Code Chapter 3.14 is such a program, rendering Chapter 42.41 inapplicable.

This leaves Chapter 49.46 of the Revised Code of Washington, the Minimum Wage Act, as a potential statutory basis for Det. Ames' complaint. RCW 49.46.100 provides that "[a]ny employer who discharges or in any other manner discriminates against any employee because such employee has made any complaint to her or her employer . . . that he or she has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter . . . shall be deemed in violation of this chapter and shall, upon conviction therefore, be guilty of a gross misdemeanor." Although this statute is framed as a misdemeanor statute, courts have recognized that an aggrieved employee may have a claim based on it. *See, e.g., Pederson v. Snohomish County Center for Battered Women*, 2008 WL 1934846, at *5, 144 Wash. App. 1025 (2008).

Although Det. Ames did cite RCW 49.46.130 in his overtime claim, it is not clear whether it was really about violations of Chapter 49.46 as opposed to a complaint about violations of Chapter 3 of the Pierce County Code and the collective bargaining agreement. *See, e.g., Williams v. City of Tacoma*, 105 Wash.App. 1050 (2001) (City of Tacoma "must pay its police officers overtime compensation according to the terms of the collective bargaining agreement" but "[a] public agency can only violate the MWA's overtime provisions if it fails to pay its police officers according to the rate specified in RCW 49.46.130(5)."). It is also not necessarily settled that Chapter 49.46 applies to an employee in the position of Det. Ames. *See Chelan County Deputy Sheriffs' Association v. County of Chelan*, 109 Wash.2d 282, 290 n.2 (1987) (leaving open the question of whether deputy sheriffs were subject to the Minimum Wage Act's exclusion of coverage for county employees who hold "appointive office.").

Regardless of whether there is a statutory basis for Det. Ames' complaint, this investigative report analyzes the complaint on the merits below because Det. Ames is a long-serving employee of the PCSD who has made allegations of serious misconduct, including conspiracy, and improper retaliation and harassment, against senior officials at the PCSD and the PAO. This warrants an examination of the merits even if it turns out that Det. Ames is not entitled to any relief. Such an examination is also warranted because Det. Ames' complaint might have some other basis in law, based on public policy concerns articulated by the Washington state courts or otherwise. Under the Minimum Wage Act's anti-retaliation provision, Pierce County Code Chapter 3.14, or any other provision of law prohibiting retaliation, Det. Ames would be required to show the following basic elements:

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rather than the date on which alleged retaliatory action occurred. Thus, Det. Ames' December 20 written complaint would not be timely under Chapter 3.14 even if that chapter applies here.

1. that he engaged in protected activity;

2. that the PCSD took adverse employment action against him; and

3. that retaliation was a substantial factor behind the adverse employment action.

See, e.g., Pederson, 2008 WL 1934846, at *5, 144 Wash. App. 1025.

Assuming without deciding that Det. Ames' complaint about overtime compensation was protected activity under a statute, ordinance, or other provision of law, the remaining two elements would still have to be satisfied. "Adverse employment action" is defined in the context of the Washington Law Against Discrimination as "an actual adverse employment action, such as demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action." *Kirby v. City of Tacoma*, 124 Wash.App. 454, 455 (2004). "An actionable adverse employment action must involve a change in employment conditions that is more than an 'inconvenience or alteration of job responsibilities, . . . such as reducing an employee's workload and pay." *Id.* In the *Pederson* case cited above, which involved, among other things, a retaliation claim under Chapter 49.46, the court quoted with approval from *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006), for the proposition that "In order to constitute an adverse employment action, an employer's conduct in response to a plaintiff's protected activity 'must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge' of unlawful conduct by the employer." The court added that "this objective standard is one of 'material adversity' and the reactions must be those of a 'reasonable employee,'" and that "[p]etty slights, minor annoyances, and simple lack of manners will not create such deterrence."[10]

In *Kirby v. City of Tacoma*, a Tacoma police officer named Joseph Kirby brought a discrimination claim based in part on the fact that he "was the subject of numerous Internal Affairs (IA) investigations, some of which lasted for months and some up to two years." 124 Wash. App. at 460-61. Officer Kirby "had a contentious relationship with the TPD command structure," and there was testimony at trial that "it seems whenever Joe Kirby has any kind of disagreement with a superior, the matter gets referred to IA, and this has happened to other people as well." 124 Wash. App. at 461. On these facts, the court concluded that these "events . . . were disciplinary or investigatory in nature, and therefore do not constitute adverse employment actions . . . At most, these events were inconveniences that did not have a tangible impact on Kirby's workload or pay."

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[10] Pierce County Code § 3.14.030(D) defines "retaliatory action" as:

any unwarranted adverse change in a County employee's employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action taken on account of, or with motivation from the employee's action protected under Section 3.14.030.

Further, even if the actions that Det. Ames complains of were "adverse employment actions," he would not have a retaliation claim unless there was also a causal connection between his overtime compensation complaint (or other alleged protected activity) and those actions. Bearing on this question is the presence or absence of credible non-retaliatory reasons for the actions of which Det. Ames complains.

These issues are discussed below. In addition, this report will also address Det. Ames claims other than retaliation – namely, that the Kopachuck Middle School matter and the PCSD and PAO actions constituted criminal conduct that should be investigated by an outside law enforcement agency such as the Washington State Patrol or the Attorney General's office.

V. FINDINGS AND CONCLUSIONS

A. Det. Ames' Retaliation Claim

Det. Ames alleges that PCSD and PAO executive level officers searched his emails and issued a press release "in retaliation for [Det. Ames'] filing of a whistleblower complaint against the" PCSD in early 2012 concerning overtime compensation. As noted above, for purposes of this report it will be assumed, without deciding, that Det. Ames' complaint in early 2012 concerning overtime compensation constituted protected activity for which retaliation would be unlawful. With this assumption, the remaining questions are whether the PCSD took adverse employment action against him, and whether retaliation was a substantial factor behind any such adverse employment action.

1. Adverse Employment Action

Det. Ames contends that two events constituted adverse employment action against him. The first was the decision by PCSD management personnel to conduct a search of his PCSD email account for certain emails relating to the Kopachuck Middle School matter and any contact with Ms. Mell during a defined time frame, based on "possible misconduct" by him. The second event was the decision of the PAO to insert the following language in its November 6, 2012 press release concerning the middle school matter:

> Defense attorneys often assert that a victim's motive for reporting a crime is to facilitate a civil lawsuit. Here, the investigation was initiated by a civil attorney who was retained by CK's parents. To complicate matters, the civil attorney reported the matter to a PCSD detective who had been represented by that same civil attorney on an unrelated matter.

Neither of these events constituted adverse employment action.

a. The Search of Det. Ames' PCSD Email Account

The PCSD decision to search Det. Ames' PCSD email account did not constitute adverse employment action. Under the broadest available definition of adverse employment action – the

definition in Pierce County Code § 3.14.030(D) – the term means "any unwarranted adverse change in a County employee's employment status, or the terms and conditions of employment including denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work, unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations, demotion, transfer, reassignment, reduction in pay, denial of promotion, suspension, dismissal, or any other disciplinary action . . ." The search of Det. Ames' PCSD email account did not change his employment status or terms in any way. It did not change Det. Ames duties or access to staffing in any way. No disciplinary or other personnel action was taken against Det. Ames. The reason given for the search – possible misconduct by Det. Ames – cannot be construed as disciplinary action, or even as an official investigation.[11]

In fact, rather than being subjected to any adverse personnel action or official discipline, it appears that during the relevant time the PCSD actually afforded Det. Ames a benefit not generally available to other PCSD detectives. In early 2012, Det. Ames asked to be exempted from "swing shift" duties that most PCSD detectives had to do, because he said that it interfered with his duties at the computer lab.[12] At the time, Det. Ames was supervised by Todd Karr, then a PCSD lieutenant but currently a detective-sergeant, who agreed to exempt Det. Ames from swing shift. Det.-Sgt. Karr was not aware of Det. Ames' overtime compensation claim at the time, and did not change Det. Ames' exemption status after learning of that claim. In the fall of 2012, Lt. Wilder took over supervision of Det. Ames (above Det. Ames' immediate supervisor, Det.-Sgt. Portman). At that time, in early October 2012, during the same time period as Det. Ames claims he was subjected to adverse personnel action, Lt. Wilder and Capt. Bomkamp agreed to continue to allow Det. Ames to be exempt from swing shift duty.[13]

Obviously, Det. Ames was not pleased when he learned that his superiors had commenced a search of his emails on the basis of "possible misconduct."[14] No employee would be pleased about this. However, Policy No. 212.2 in the Pierce County Sheriff's Department Policy Manual provides, among other things, that:

> All e-mail messages, including any attachments, that are transmitted over department networks are considered department records and therefore are the property of the department. The

[11] As noted above, the *Kirby* case is instructive with regard to whether Det. Ames suffered adverse employment action. The City of Tacoma police officer involved in that case had a contentious relationship with the police department command structure and was repeatedly referred for internal affairs investigations. The court, however, found no adverse employment action under these circumstances. 124 Wash.App. at 465.

[12] Most PCSD detectives rotate through swing shift duty, which is evening duty requiring them to respond to crime scenes and other incidents, and then in many instances to continue to work on the matter afterward.

[13] The point here is not to quarrel with whether Det. Ames' duties are such that he is deserving of being exempted from working swing shifts. DWT assumes for purposes of this report that he is. Nevertheless, it is a fact inconsistent with a design by Det. Ames' superiors to retaliate against him.

[14] Although Det. Ames and his attorney, Ms. Mell, refused to answer the question, it appears that Det. Ames learned of the email search only as the result of a PRA request that Ms. Mell made on behalf of CK's family in October 2012. Ironically, but for Det. Ames' attorney's PRA request, it is doubtful that Det. Ames would have ever learned of the email search, since that search yielded no results and found nothing improper, and knowledge of it was limited to a small management group.

> Department reserves the right to access, audit or disclose, for any lawful reason, any message, including any attachment, that is transmitted over its email system or that is stored on any department system.

Other sections of the policy manual are to the same effect, including Sections 342.1.1, 342.3, 702.1.1, and 702.4. There was a lawful reason here, as discussed below in the Retaliatory Motive section — namely, to look into whether the initiation of the PCSD investigation of the middle school case was improper in any way.

On February 20, 2013, Det. Ames added an allegation that "[t]he internal investigation which was initiated, conducted, and concluded, all without due process and notification to me and the PCSD Guild, clearly in my opinion was a direct violation of the Pierce County IT Data Investigation Policy 6.17.03 . . ." There was no material violation of the Data Investigation Policy. The Data Investigation Policy provides that email and other records "will not be released to anyone without prior written approval from the Information Technology Department Director or the designated acting IT Director." Requests for email searches are required to follow a procedure consisting of the following requirements: (1) a written request, email preferred, from the director/head of the custodial department or his or her designee, the Human Resources Director, or the prosecuting attorney handling a legal matter specifying the requestor's name, phone number, and department, the information being requested, who will view the information, who is authorized to conduct the search/investigation, and the purpose of the request; (2) approval by the IT Director; (3) notification to the HR Director in the case of an email search relating to an internal investigation for potential employee disciplinary action; and (4) access to emails must be confined to the specific purpose and scope authorized. As noted above, the IT Department promulgated an "E-Mail Records Search Request" form, but the Data Investigation Policy does not require use of the form.

In the case of the search of Det. Ames' PCSD email account, there was a written request (by email) from Redaction Code 1 authorized by Redaction Code 1.[15] It would be hard to argue that the PCSD Redaction Code 1 was not Redaction Code 1 designee for this purpose. The IT Director, Linda Gerull, also authorized the search. The request specified the requestor's name and department (Redaction Code 1 of the PCSD), the information being requested (emails with Joan Mell or relating to the Kopachuck investigation) and the purpose of the request (possible misconduct by Det. Ames). The email request did not specify who would view the information, but there is no evidence that anyone other than very senior PCSD officers

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[15] Redaction Code 1 stated that he did not direct or authorize the email search. Redaction Code 1 recalled having a conversation with Redaction Code 1 in which Redaction Code 1 expressed a concern about improper release of information. Redaction Code 1 did not say that Redaction Code 1 directed that PCSD should search Det. Ames' emails. However, it is possible that an email search came up or was implied in the conversation between Redaction Code 1 and Redaction Code 1 or that Redaction Code 1 decided to authorize the search based on Redaction Code 1 as well as his own concerns. It also appears likely that Redaction Code 1 heard about the concern underlying the email search from a friend Redaction Code 1 and as a follow-up the results of the email search were forwarded to Redaction Code 1. Nothing about this appears to be illegitimate, and certainly cannot be interpreted as a conspiracy to discredit Det. Ames.

(captain's rank and above), Redaction Code 1 and necessary IT personnel viewed the information, which in any event consisted only of a lack of results. The HR Director, Betsy Sawyers, was notified of the request and approved it. The email search was for very specific information during a narrow time frame (July 23, 2012 to September 24, 2012). Det. Ames' allegations that the Data Investigation Policy was violated, even assuming that policy provides him with any rights, is not well founded.

b. The PAO Press Release

Turning to the PAO press release, the DWT investigation uncovered no evidence that the PCSD had any input or involvement in drafting the press release issued by the PAO. But even assuming that action taken by the PAO would be considered action by Det. Ames' employer against him, the press release language does not constitute adverse employment action against Det. Ames. Redaction Code 1 believed that it was necessary to explain the reasons for the PAO declination of prosecution in a detailed memorandum, and the reasons included the facts that a civil attorney for CK's parents had reported the classroom incident over five months later and that a PCSD detective who had retained that civil attorney as his personal attorney initiated the PCSD investigation. The press release was based directly on Redaction Code 1 detailed memorandum, which was drafted without input from the PCSD or even from Redaction Code 1 The press release was not disciplinary action of any sort against Det. Ames. Hurt feelings do not constitute adverse employment action. *Craig v. M&O Agencies, Inc.*, 496 F.3d 1047, 1059 (9th Cir. 2007); *See also, e.g., Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (holding that a supervisor's "scolding ... and threatening to transfer or to dismiss" are not adverse employment actions and explaining that "[m]ere threats and harsh words are insufficient"); *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir.1999) (holding that a supervisor's criticism and threat that the complainant would be " fired for any subsequent exercise of poor judgment " was not enough for an adverse employment action); *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir.1998) (holding that an employee had not suffered an adverse employment action when "she was unfairly reprimanded for conduct she either did not engage in or should not have been responsible for"); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3rd Cir.1997) (holding that " 'unsubstantiated oral reprimands' and 'unnecessary derogatory comments' " following a sexual harassment complaint did not "rise to the level of the 'adverse employment action' required for a retaliation claim"); *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir.1997) (holding that "an employer's criticism of an employee, without more," is not an adverse employment action).

The PAO press release did not mention Det. Ames by name, and appears to have had no impact on the status, terms, or conditions of Det. Ames' employment with the PCSD. Det. Ames may not have been pleased with the press release, and indeed the PAO could have drafted a more minimal press release without the comment referring to Det. Ames' actions, but that does not turn the press release into adverse employment action.

2. Retaliatory Motive

Even assuming that the PCSD and PAO actions of which Det. Ames complains were "adverse employment actions," the DWT investigation has uncovered no retaliatory motive in

connection with those actions. Rather, there were credible, non-retaliatory reasons for the actions in question.

On August 29, 2012, Redaction Code 1 learned of the Kopachuck Middle School matter from the media and notified Redaction Code 1 that it was becoming a big story in the press. That same day, Redaction Code 1 sent an email to Redaction Code 1 and U/S Bisson asking whether Ms. Mell represented Det. Ames in a prior matter against Pierce County, and whether this constituted a conflict in light of the likelihood that Ms. Mell would pursue a civil lawsuit in connection with the Kopachuck matter. Ms. Mell was very familiar to the PCSD and the PAO because of her representation of clients in matters adverse to these agencies, and appears to have a somewhat contentious relationship with the County. Also on August 29, Redaction Code 1 noted in an email to Redaction Code 1 that [redacted] had attended high school with Mr. Rosi.

Although U/S Bisson opined that she did not see any conflict, Redaction Code 1 [redacted] Redaction Code 1 and others did see an issue with Det. Ames' actions in taking a report from Ms. Mell on July 30. It was clear to everyone that Ms. Mell had a financial interest on behalf of herself and CK's parents to trigger a PCSD investigation of the Kopachuck matter. A criminal investigation or a criminal prosecution of Mr. Rosi would likely have enhanced her ability to successfully sue the school district and Mr. Rosi, because the presence of a parallel criminal proceeding or investigation would have made it much harder for Mr. Rosi to mount a defense in the civil case because of Fifth Amendment and other concerns. Defendants in criminal cases routinely decline to testify in parallel civil cases to protect their rights and positions in the criminal case, but defendants who assert Fifth Amendment rights in civil cases can compromise the ability to defend the civil case. Obviously, a successful prosecution of Mr. Rosi would have essentially assured Ms. Mell of success in a civil case, or at least would have put immense pressure on the school district to settle. All civil plaintiffs' lawyers know that triggering a criminal investigation or prosecution of the same conduct that is the subject of a civil lawsuit can greatly improve the likelihood of success.

Det. Ames' involvement did in fact complicate things further. Based on the DWT interviews of Det. Ames and other witnesses, there is no evidence that Det. Ames acted in anything other than good faith in taking the report from Ms. Mell. Clearly, Det. Ames trusts Ms. Mell, having retained her as his personal counsel in at least three recent matters -- the overtime compensation matter, the instant investigation matter, and a matter involving a lawsuit against Pierce County by Lynn Dalsing in which Det. Ames is a witness. Thus, when Ms. Mell contacted Det. Ames about a possible case of child abuse, Det. Ames acted on that information by obtaining evidence from Ms. Mell, interviewing CK's parents, and writing a report. However, it appears, based on Ms. Mell's actions in contacting multiple PCSD deputies and PAO prosecutors, and contacting the media to step up public pressure, that her goal, at least in part, was to trigger a criminal investigation and possible prosecution. It also appears that Ms. Mell was just trying to do her job, which was to represent CK's parents to the best of her ability, but the fact that it was Det. Ames who initiated the criminal investigation, in the view of Redaction Code 1 and others in the PCSD command structure, colored the matter with the taint of an investigation possibly triggered as a special favor to an attorney who was close to Det. Ames, regardless of whether Det. Ames realized it. This is a legitimate concern.

[redacted] was of the same view when [redacted] looked at the matter. During his DWT interview, [redacted] explained it as follows:

> Coopersmith: . . . So, you mentioned that before that this case came forward it appears when Ms. Moll was retained by the family and then she came forward. She apparently made some calls to the prosecutor's office, the sheriff's department and so forth. First of all, is there anything inappropriate about that as far as you're concerned?
>
> [redacted] No.
>
> Coopersmith: She's doing her job right?
>
> Ausserer: She's doing her job. The only reason I think it is significant in this, for my purposes, is that then becomes subject to scrutiny. Should we file charges?
>
> Coopersmith: What would be the scrutiny?
>
> [redacted] The motivation – the scrutiny would be a civil attorney has an issue that investigation that all these other people, including the alleged victim, [CK], his parents, the psychologist, the school district, didn't think to be a crime. Nobody reported it. [CK's] parents didn't call the authorities. [CK] didn't call. Nobody contacted the authorities. The only time it gets reported is once a civil attorney has been retained and then a criminal investigation is underway. And so, obviously, at trial Mr. Herschmann is going to have a field day with, look [CK's mother], you had all the information that the state has at this point. You never contacted authorities, did you? You didn't take any steps to report this, did you? Your husband took no steps. You had a psychologist who is a mandatory reporter. They didn't disclose this. They took no steps to report this incident. The only time that this comes to light is after you hire an attorney who is going to file a civil suit on your behalf and then an investigation is initiated at her request. She contacts law enforcement. She contacts Mike Ames, who was her client. She initiates it and then contacts the prosecutor's office and says look, you need to view this with an eye towards failing to report. Not, there is an assault that happened to this child. She contacts me directly and says after learning that Teresa Berg had apparently had intended to bring it to me, [redacted] you need to view this with an eye towards failing to report.

Coopersmith: Why do you think that Ms. Mell's take on it at that point or suggesting to you that it be prosecuted as a failure to report rather than an assault?

[redacted] Because it was clear to me that her intent was to, as a civil attorney, sue the individuals who were responsible or who damages can be ascertained against. The only, I guess, susceptible entity to a civil claim would be the school district. Right? So if I were to file a charge for failing to report against the school district it would enhance her ability to receive civil damages against the district for failing to report.

Coopersmith: Okay. So the possible financial motive of both the family and perhaps Ms. Mell that you are referring to, is what you're saying is that could be a problem at trial when the defense attorney gets ahold of those facts?

[redacted] Oh it is a problem and there is no doubt about it.

Coopersmith: Okay.

[redacted] And they are going to get ahold of those facts because everything that we get as part of discovery is going to be provided to them so they are going to get the school district notes as part of discovery. Teresa Berg presented those in the packet of information she provided to me. And so anything that I considered in charging this is going to be disclosable to Brian Herschmann.

Coopersmith: Okay. What about the fact that, and you mentioned this just a minute ago, Det. Ames had a previous attorney-client relationship with Ms. Mell. My understanding is it wasn't an existing attorney-client relationship at the time of the report that went to Ames in late July of 2012 but nevertheless there was a preexisting or prior attorney-client relationship. Was that at all an issue for you and your office in terms of bringing charges or not?

[redacted] Um, well let me say this, I didn't know the status of whether or not they had a continuing legal relationship. What I knew was that she represented him on an unrelated matter. That she was his attorney in that civil suit against the county. In fact, that was confirmed through our civil division when I started going through the discovery on this I had that question. Did she represent Mike Ames?

Coopersmith: Why did you want to ask that question?

> Redaction Code 1 Because it seemed odd to me that the civil attorney took steps to contact the Pierce County Sheriff's Department, specifically Teresa Berg, who is – would be the assignor – I don't even know if that's the correct word. She assigns these cases to detectives within that division. My understanding of the placement of Mike Ames at that time was that he was no longer in that unit. Mike Ames was dealing with computer forensics which had nothing to do with this investigation. So if Ms. Mell were – what I would expect to be appropriate in that case was if I contacted Teresa Berg and did not get the appropriate response, I would go to her supervisor or some other detective in that unit. To contact Mike Ames who was not in that unit, to facilitate an investigation from a civil attorney about a criminal matter, creates issues for us about the credibility of the investigation should we ever charge the case because that's going to come before the jury and we have to explain look I know this looks bad but try to overlook the fact that this was initiated as part of what appears to be a civil claim against the school district and that they circumvented what would be the usual avenues through which to get a case investigated.[16]

Based on these facts, there is no evidence that any employee of the PCSD or PAO acted with a retaliatory motive against Det. Ames based on his previous overtime compensation claim or anything else. PCSD and PAO personnel were simply of the view that Ms. Mell's actions in getting Det. Ames to take the initial report in connection with the Kopachuck Middle School matter made it at least appear that the investigation was initiated as a special favor from Det. Ames to Ms. Mell. This is a credible, non-retaliatory reason.

To be sure, some members of the PCSD, including Redaction Code 1 were not entirely pleased with the way that Det. Ames handled the previous overtime claim. Det. Ames stated during his interview that when in July 2012 Det.-Sgt. Portman improperly set up a "comp time" system in lieu of properly paying overtime compensation, Det. Ames decided to keep his own log of overtime hours with the intent that he would eventually make a claim, which he did about six months later, after he obtained his forensic certification. On this point, Redaction Code 1 stated as follows:

> Coopersmith: Okay. Did you harbor, as a result of that affair, you were alleged to have done something wrong, you were not disciplined yourself. There was no finding that you did anything wrong connected to the overtime. Am I correct about that?

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[16] Moreover, there is no evidence that [redacted] had any ill will towards Det. Ames. In fact, during [redacted] interview [redacted] stated that [redacted] believed that Det. Ames was just doing his job in good faith and that [redacted] was not trying to make Det. Ames look bad.

Redaction Code 1 No. There was no finding against me. I was disappointed in myself that I hadn't, I guess, set the parameters more clearly. I was disappointed in Mike. I felt like he, Mike Ames. I felt like we were friends and I feel like I have a very open door policy. If he was feeling like he was wronged I would have expected that he would have come to me and said hey, I'm being forced to do something that I shouldn't be. I was disappointed in him. I was disappointed in me.

Coopersmith: Okay. Why were you disappointed in Detective Ames exactly? In terms of bringing it forward at all or in terms of the way he brought it forward or either or something else?

Redaction Code 1 I guess my disappointment stems from this is something that he wanted to do and I agreed that it was a good idea but he went all the way through it, he went along with the solution that Det.-Sgt. Portman came up with, all the way through completion of the task that he wanted to accomplish and then he cries foul.

Coopersmith: I see. So you would have preferred that after the email exchange[17] that he had come forward and said, okay we need to work this out. How am I going to get this certification done and not just gone along with the system and completed the training without bringing that matter up and resolving it somehow. Is that what you are saying?

Redaction Code 1 Yes. I think we could have come to a solution and I take some of the responsibility for having it fall off my radar. There is always a lot going on. There are 10 or 12 different things that are seeking my attention at any given time it seems like and if something is not banging on my door or I haven't made a note to myself to follow up on it, it slipped through the cracks.

Nevertheless, there is no evidence that Redaction Code 1 or others took any action against Det. Ames, including the search of his PCSD email account, based on a retaliatory motive. There is no evidence that the email search was motivated by anything other than a concern about Ms. Mell's actions with respect to contacting Det. Ames to initiate an investigation on the Kopachuck matter. This was a legitimate, non-retaliatory concern, not frivolous as Det. Ames claims. The fact that some members of the PCSD command staff were less than pleased about the way Det. Ames handled the overtime compensation matter does not elevate to retaliation everything they later do in response to new events.

[17] Redaction Code 1 was referring to an email exchange from July 1, 2011, in which Det. Ames explained the need for overtime and Redaction Code 1 replied that she would meet with Det. Ames' lieutenant about setting priorities and distribution of work.

There is also no evidence that the PAO had any retaliatory motive in connection with the press release issued on November 6, 2012. There is no evidence that PCSD personnel had any input or involvement in drafting or issuing the press release. On the contrary, the evidence is that the PAO decided to explain its reasons for declining prosecution in the Kopachuck matter in some detail, because of the high level of media interest in the case. Redaction Code 1 explained this as follows:

> Redaction Code 1 ... On most cases we don't prepare lengthy memorandums for outlining our decisions. In this case I did given the contact I received from several attorneys who were somewhat related to the matter. I think Ms. Mell represents [CK] or the parent or something. Herschmann represents Mr. Rossi. Our civil department had contacted me to get the status of it, the Sheriff's Department, Teresa Berg contacted me on multiple occasions saying Joan Mell's contacted me asking the status of it. Give me an update so I can tell her when you are going to make a decision, that sort of thing. I was getting information from all over the place. Drew Michelson from I think one of the news stations calling me repeatedly and so in this instance I thought the best course was to prepare as detailed a memo as possible. When I made the decision then that was provided for purposes of the press release. So that might be why this is longer than we would ordinarily see. I don't know. You'd have to talk to Becky.
>
> Coopersmith: Okay. Understood. Was there any motivation or purpose in that paragraph at the end of the press release that talked about the motivation, you know, that the financial motivation might be or the fact that the detective took the report who had been represented by the same civil attorney. Was there any motivation or purpose to make Det. Ames look bad in some way or?
>
> Redaction Code 1 I don't think it – I can say no. I've never intended to make Det. Ames look bad at all. In fact if I was Det. Ames I probably would have done the same thing. I mean he's getting a call, he's a detective with the Pierce County Sheriff's Department and he's getting a call from somebody he knows, whether or not they still have an attorney-client relationship I don't know, saying hey, I've contacted Teresa Berg. I haven't – nobody followed up on this. Can you come collect this evidence and get it to the people who it needs to go to. From his perspective I don't find any fault in that behavior.
>
> Coopersmith: Okay.

[redacted] I don't know what their procedures are. Maybe he should have contacted another detective in the special assault unit and say, hey, I got a call from Joan Mell.

Coopersmith: And just let me ask you a question about that, and we're almost done, and you don't find any fault with Det. Ames which is fine. I think earlier you said though that you thought the fact that he had taken the report from Joan Mell and they had been in an attorney-client relationship was another potential problem. In fact, I think in your memo you wrote that that was another potential problem with the case so why do you say that – how do you say that and at the same time say that you don't find any fault with Det. Ames?

[redacted] Well, he's a detective. I think he's going to act upon, he's a law enforcement officer who is going to – once requested to initiate investigation I think he's going to initiate investigation, whether it's him himself doing it or somebody else. The problem is with Joan Mell, is from the other end. Not from the officer's perspective.

Coopersmith: In other words, are you saying that Det. Ames could have acted completely in good faith but inadvertently created a problem?

[redacted] Right. Right.

Based on the foregoing, there is no evidence that Det. Ames was the victim of any retaliation based on his overtime compensation claim or otherwise.

B. Detective Ames' Claims Regarding the PCSD Investigation and the PAO Declination in the Kopachuck Middle School Matter

Det. Ames also alleges corruption in connection with the investigation of the Kopachuck Middle School matter by the PCSD, and the declination of prosecution by the PAO. Specifically, Det. Ames claims that:

1. [the PCSD and PAO,] in an attempt to assist [redacted] in defending [redacted] personal friend and the suspect in this case John Rosi, created a false accusation of official misconduct against [Det. Ames] and [CK's parents'] attorney Joan Mell" by issuing a press release and conducting a search of Det. Ames' official Pierce County emails for evidence of "possible misconduct" by Det. Ames; and

2. "believe[d] officers at the executive command level of the [PCSD] along with executive level officers in the [PAO] conspired to discredit the

legitimacy of the criminal complaint filed by CK's parents against Kopachuck Middle School teacher John Rosi."

There is no merit to these allegations.

As an initial matter, there is no evidence that [redacted] has a personal friendship with Mr. Rosi or had any other motivation for trying to help Mr. Rosi. In fact, Det. Ames admitted during his DWT interview that he has no evidence of a personal friendship between [redacted] and Mr. Rosi. Det. Ames stated that he made the allegation only because he found it odd that [redacted] took the step of mentioning to [redacted] that [redacted] went to high school with Mr. Rosi, although Det. Ames also conceded that [redacted] could have just been mentioning it to [redacted] in passing. This is a very slender reed with which to make an allegation of corruption, and in fact is not a reed at all.

When asked about any relationship [redacted] had with Mr. Rosi, [redacted] stated as follows:

> Coopersmith: Now, if you read the email right below that on page 124, there's an email from you to [redacted] it's just about 6 minutes or so after the first one.
>
> [redacted] Mmm-hmm.
>
> Coopersmith: And you wrote, "This is going to jump big" -
>
> [redacted] Which it, which it did!
>
> Coopersmith: Yeah.
>
> [redacted] Yeah.
>
> Coopersmith: Also, FYI, the teacher in this, I know went to high school with him.
>
> [redacted] Okay. After I read the report.
>
> Coopersmith: Okay. So then you saw there was a teacher name John Rosi?
>
> [redacted] Yeah.
>
> Coopersmith: And did you go to high school with him?
>
> [redacted] Yes.
>
> Coopersmith: Okay. Now, did you have any relationship with John Rosi, other than having been a high school classmate of his? Have you seen -

Redaction Code 1 No. I've seen him in passing 3 or 4 times in 30 years.

Coopersmith: Do you socialize with him?

Redaction Code 1 No. Never have.

Coopersmith: What's the "in passing" – how did you – what context did you see him?

Redaction Code 1 Class reunion.

Coopersmith: Okay.

Redaction Code 1 In a, in a gym or an event, or in a grocery store, maybe.

Coopersmith: Were you friends in high school?

Redaction Code 1 No. I mean, we had 680 people, I knew who he was.

Coopersmith: Yeah.

Redaction Code 1 You know, he was, I think an athlete – I wasn't.

Coopersmith: Okay.

Redaction Code 1 Yeah. I, I couldn't tell you where he lived, grew up, or anything.

Coopersmith: What made you decide to tell the Sheriff that you went to high school with John Rosi?

Redaction Code 1 Because I didn't want – I was getting disclosed that I went to high school with John Rosi, and if I'm going to be talking about this case, I wanted everybody to know that I knew who this guy was, that we weren't friends, but, you know, that could come up right at the beginning.

Coopersmith: Okay.

Redaction Code 1 Yeah.

Coopersmith: Did you see that as any kind of conflict issue for yourself or anything like that?

Redaction Code 1 To?

Coopersmith: The fact that you went to high school with the guy?

Redaction Code 1 No.

Moreover, even if Redaction Code 1 passing acquaintance with Mr. Rosi was somehow an issue, there is no evidence that anyone else at the PCSD or the PAO would have let that interfere with the performance of their duties in connection with the Kopachuck matter. In other words, for Det. Ames' allegation to be true, not only would Redaction Code 1 have had to be motivated to assist an old high school classmate to avoid criminal charges, but other PCSD employees, including Det.-Sgt. Berg, and PAO prosecutors, including Redaction Code 1 would have had to be motivated to help Redaction Code 1 help that classmate in this way. This is farfetched and unsupported by any evidence. Accordingly, the claim that the PCSD or the PAO took or declined to take action based on Redaction Code 1 supposed relationship with Mr. Rosi is totally lacking in merit.

The second part of Det. Ames' allegation is that senior officials at the PCSD and the PAO "conspired to discredit the legitimacy of the criminal complaint filed by CK's parents against Kopachuck Middle School teacher John Rosi." Det. Ames alleges that the search of his emails and the PAO press release were designed to do this discrediting. This allegation also lacks any merit.

The key witnesses in connection with this part of Det. Ames' claim are Det.-Sgt. Berg, the principal investigator on the Kopachuck matter, and Redaction Code 1 the Redaction Code 1 Redaction Code 1 at the Pierce County Prosecutor's Office. Both Det.-Sgt. Berg and Redaction Code 1 Redaction Code 1 carefully reviewed the Kopachuck incident and were of the view that a criminal case was not warranted.

At the time that the Kopachuck incident came to the attention of the PCSD, Det.-Sgt. Berg was the head of the PCSD's Special Assault Unit. According to Redaction Code 1 she is "one of the best experts in child abuse and child assault in the United States." Redaction Code 1 described Det.-Sgt. Berg as "our best and brightest on child abuse investigation" and as not someone who would let anything or anyone stand in her way when investigating such cases. All witnesses, including Det. Ames, spoke highly of Det.-Sgt. Berg and described her as someone who is extremely dedicated to cases involving violence against children and not someone likely to be improperly influenced in such a case. Det. Ames stated as follows during his DWT interview:

> Coopersmith: Okay. And you've known Teresa Berg for a while, is that right?
>
> Ames: Yes.
>
> Coopersmith: And do you know her to be anything other than a dedicated law enforcement officer? Detective? Who works on these cases?
>
> Ames: I like Teresa. We've had a long relationship. She is a very competent investigator.

> Coopersmith: So I just want to make sure you're not making an allegation that she either failed to do her job or was told not to do her job or anything like that.
>
> Ames: No. Not at all. Nor would I ever second guess her. I respect her. What I'm referring to there is based on my training in conducting child abuse investigations. I've worked for Teresa in her unit. And I – In a case like that, I'm referencing my experience. I never could have took a case like that would have been considered a high profile because it occurs in school, and it's caught on video tape, no way could I submit that case to a prosecutor for review without ever having interviewed anybody.

After trading voicemails on July 26 and 27, 2012, Det.-Sgt. Berg spoke with Ms. Mell on July 30, just after Det. Ames took his report and obtained video and other evidence from Ms. Mell. Det.-Sgt. Berg reviewed Det. Ames' report and the video evidence on July 31, and contacted the Children's Advocacy Center to request a child interview the same day. Thereafter, from July 31 to September 24, 2012, Det.-Sgt. Berg took the following investigative steps, among others:

1. On August 9, 2012, Det.-Sgt. Berg met with and interviewed CK's parents with Ms. Mell present.

2. Also on August 9, Det.-Sgt. Berg, Ms. Mell, and CK's parents observed while Forensic Child Interviewer Cornelia Thomas interviewed CK on video. This interview of CK took about one hour. Ms. Thomas provided a disclosure summary and a video of the interview.

3. On September 12, 2012, Det.-Sgt. Berg obtained from the Peninsula School District a thumb drive containing video clips from the classroom incident and unredacted documents from the school district's investigation. Det.-Sgt. Berg reviewed these documents, which included the district's interviews of Mr. Rosi and students, a statement from Mr. Rosi, and other materials.

4. On September 14, 2012, Det.-Sgt. Berg obtained the list of students in Mr. Rosi's "Kopatime" class.

Det.-Sgt. Berg did not conduct her own interviews of the students in the classroom. She explained that doing so would have involved considerable time and disruption, involving obtaining parental consent or search warrants. As noted, she did review the school district's notes of its interviews of some of the students, as well as the video from the classroom incident.[11]

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[11] Det.-Sgt. Berg also asked school district officials about the issue of mandatory reporting of child abuse. The school district told her that it had received legal advice on the subject, and that its counsel would have documentation. No such documentation was provided. Det.-Sgt. Berg expressed the opinion during her DWT

After conducting this investigation, Det.-Sgt. Berg decided to seek guidance from the PAO before taking additional investigative steps, because she saw problems with the case. Det.-Sgt. Berg explained these problems as follows:

> Coopersmith: What were the problems that you saw with the case?
>
> Berg: After the child interview I knew the case was in trouble because the victim did not say he was assaulted.
>
> Coopersmith: What did he say?
>
> Berg: It was all in fun and there was no intent of harm. He himself had initiated the games, the wrestling and all the stuff and it looks bad on video but when you really look at it in conjunction with his energy I think you get a better sense of it was horseplay. Poor classroom management obviously but is it an assault? If the kid, and he's 14 so we're not talking about like a five year old being able to make a decision like that, but a 14 year old can decide whether they've been assaulted or not. They have some say in it. And he didn't say that.
>
> Coopersmith: And I guess until they – either way – that video, that testimony is what carries weight with a jury potentially, right?
>
> Berg: Huge. If he doesn't think he was assaulted.
>
> Coopersmith: Right.
>
> Berg: Then we don't have a case.
>
> Coopersmith: Okay. Did Attorney Mell know about that part of it?
>
> Berg: She watched the interview.
>
> Coopersmith: She watched it. Okay. Was there any other problems with the case, as far as you were concerned beyond the fact that [CK] said he wasn't assaulted?

---

interview that the school district should have reported the February 2 classroom incident to law enforcement, not because she believed that the incident was a case of child abuse but rather because she believe that the school district should not be making its own judgment call about what does or does not constitute abuse. As noted in text below, [redacted] did not believe that the February 3 incident was a mandatory reporting matter for the school district. Based on DWT's review of the video of the February 2 incident, and the other evidence in the file, it is not clear that the incident fell within the definition of "abuse or neglect" in RCW 26.44.020(1). Because criminal cases, including misdemeanor violations of RCW 26.44.030, must be proven beyond a reasonable doubt, most prosecutors would not launch a prosecution of conduct that does not clearly fall within the key statutory definition.

Berg: A lot of times cases have huge problems when there is a long delay in reporting. This case happened in February of 2012 but does not come to law enforcement's attention until July 30. The question the jury's going to have, and of course the prosecutor has is why the delay? If you think your child's assaulted why didn't you pick up the phone and call? Now you can say well the school didn't call. Yes and that's true too.

Coopersmith: And why exactly is that a problem if there is a delay?

Berg: Because it always is in these cases because it leaves doubt that there was a crime. Did you think you were a victim. Was this done in fun or this an assault and there are certain elements you have to show for an assault and one is intent to harm and stuff and in this case is it horseplay. Is it this and the parents weren't sure because there was no report to law enforcement. Even in their statements they're not sure initially.

Coopersmith: But when they did report it though even if it was in July. To the attorney but nevertheless they were reporting it. Can that suffice they made a decision in July to report it?

Berg: Well, no. Then the next problems that come from a delayed report is trying to recreate what happened. Witnesses are harder to find, memories are poor, documentation becomes more difficult. Difficult to do an investigation months, months later.

Coopersmith: Okay. And in this case was that of less importance since there was a video? What would the witnesses add?

Berg: Well certainly we needed testimony that this video depicts this and the context of it and you would need that. But it would also be did the child, in this case, have any injuries? There was no documentation of that. There were no injuries.

Coopersmith: The witnesses might have to talk about that issue.

Berg: And so there is all these elements that you would have to meet and it's much more difficult months later.

Coopersmith: Okay. How about motive. Did you have any concern – I'm not suggesting you should have. I'm just asking. Did you have any concern that there was some other motive to the parents coming forward five months later beyond this reporting coming to the criminal justice system?

Berg: Well, it's unusual for parents' private counsel to bring a case forward. Usually we get a call from the parents. Or somebody else who witnessed the act. So it's really unusual to get a case that way. And so yeah, I thought why this long and why through private counsel.

Coopersmith: So there is nothing wrong with private counsel.

Berg: It's not wrong certainly but it is more unusual. Usually we get a phone call the day of the act. My child was assaulted. Some kind of earlier outcry.

Coopersmith: Okay. Alright. So in addition to what the alleged victim [CK] said, would this late reporting, there were also factors for you and when you say the case had problems, that was part of it?

Berg: Yes. But the biggest problem was he didn't say it was an assault. I don't know how we can overcome that.

Coopersmith: And in your experience with children who are assaulted and cases are brought do they in all cases always say yes, I was assaulted and make that statement?

Berg: Um, although they may not use the words I was assaulted. They would say things like this happened to me and it hurt, I have this injury. He wasn't saying that.

Redaction Code 1 had a similar view of the case. Redaction Code 1 received the PCSD case file from Det.-Sgt. Berg in late September or early October, 2012. A PAO case screening sheet shows the referral date as October 3, 2012. That screening sheet shows that the charges under consideration were Assault in the Fourth Degree and Failure to Comply with Mandatory Reporting Law. Redaction Code 1 understood that the PCSD was looking for guidance from the PAO before conducting any further investigation. After reviewing the PCSD case file, Redaction Code 1 Redaction Code met with Det.-Sgt. Berg to discuss the investigation. She conveyed her concerns about the evidence at that time. Redaction Code 1 also reviewed the video of Ms. Thomas' forensic interview of CK in its entirety along with the Disclosure Summary prepared by Ms. Thomas, and spoke with Ms. Thomas. The primary reason that Redaction Code 1 spoke with Ms. Thomas was to clarify a statement in the Disclosure Summary. The Disclosure Summary stated that "[CK] was teary during the interview and claimed it was all in fun. Yet when I asked him if he would want the kids to do this to someone else he said no." When Redaction Code 1 spoke with Ms. Thomas, she clarified that it was her impression that CK was teary "because he was here having to tell the story about his friends and he was upset about that."

Redaction Code 1 also reviewed the documents from the Peninsula School District investigation. These documents included the following February 16, 2012 notes from CK's parents' viewing of the classroom video:

> Dad said - A couple days prior to the incident [CK] was having issues & they aren't sure if this compounded it or it was an issue going on prior to the incident. But kids are still talking about it because their son in high school was asked about it at GHHS.
>
> We then watched the videos, mom cries through some of them.
>
> Afterwards dad says he wants to be objective & wanted to know what was Rosi's reaction. Dad said it was hard, he could see how it can get out of control, kids start the horseplay, [CK] appears to be laughing. Mom said his facial expressions did not look okay.
>
> Rachel asked if they had met with Rosi before, they said no nothing except conferences.
>
> Dad said that [CK]'s perspective was it was all fun play. But his behavior & some things they see in texts don't seem to indicate that. Dad had huge hopes of bringing him back but feels disconnected now after watching the videos.
>
> Dad said he didn't have any animosity when he watched the videos. Mom disagreed, she said the teacher was encouraging it & putting his foot on his face & pretending to fart.
>
> Dad said he didn't think Rosi had malicious intent but was obtuse that he was fostering the behavior. It would be nice to have kids realize their roll [sic] in the group bullying. [CK] wasn't equipped to handle this situation.
>
> Mom said they are going to the psychologist & would like to have her watch the videos today if possible. It could help with [CK]'s depression with the situation with Rosi & his popularity. And the psychologist can help decide if Rachel can talk with [CK] too.
>
> Dad says managing kids is tough & maybe this was just bad timing for Rosi as [CK] is in crisis mode.

Redaction Code 1 pointed to the statements from CK's father closer in time to the incident (before Ms. Mell contacted law enforcement) as particularly problematic for a prosecution.

As noted above, Redaction Code 1 like Det.-Sgt. Berg, viewed the fact that the incident was not reported to law enforcement until over five months after the incident, and by a civil attorney

for CK's parents, as problematic for a prosecution. [redacted] also viewed the fact that the PCSD investigation might be seen as having been initiated by Det. Ames as a favor to Ms. Mell as problematic. [redacted] stated that [redacted] made the decision to decline prosecution, and prepared a detailed memorandum so that [redacted] would be prepared to field any questions about the decision. [redacted] stated that [redacted] had no input into the declination decision (although obviously [redacted] could have overruled it as the [redacted], and had no input in connection with preparation of the memorandum. [redacted] also stated during [redacted] DWT interview that [redacted] did not view the Kopachuck incident as a mandatory child abuse reporting matter for the same reasons that [redacted] did not believe it to be a viable prosecution case.

The investigation of the Kopachuck matter was handled by experienced professionals. Det. Ames expertly recovered the video evidence and wrote a thorough report. Det.-Sgt. Berg, the PCSD's expert on child abuse issues, further investigated the matter, but soon came to the conclusion that the case had problems. [redacted] thoroughly reviewed the file, including the video evidence, and personally spoke with Det.-Sgt. Berg and the Ms. Thomas. [redacted] wrote a detailed memorandum explaining valid reasons for [redacted] declination decision. Det. Ames and Ms. Mell may not agree with the PAO's decision, but that does not make the decision corrupt or suspect. Even if reasonable minds could differ on the proper resolution of the matter, the decision was the PAO's to make. There is no merit to Det. Ames' call for an outside law enforcement investigation, because the record does not support the notion that there was any improper governmental action.[19]

Moreover, if a potential prosecution of Mr. Rosi was problematic before Det. Ames brought his current complaint forward, it is even more problematic now. It appears that Ms. Mell continues to represent CK's parents while also representing Det. Ames in connection with his complaint and the DWT investigation. Det. Ames' call for an outside law enforcement investigation and prosecution of Mr. Rosi, if accepted, could be beneficial to Ms. Mell's other clients, CK's parents, to the extent they are still interested in pursuing legal action against the school district and Mr. Rosi. Any prosecutor would have to take this into account in making a decision at this point, and in defending Mr. Rosi in any future prosecution any competent criminal defense lawyer would highlight this additional issue involving Ms. Mell.

Finally, during his DWT interview, Det. Ames claimed that the PAO or the PCSD may have engaged in improper conduct in connection with its handling of a criminal case against a defendant named Lynn Dalsing, and in particular its handling of certain photographic evidence analyzed by Det. Ames as part of his forensic computer work. Ms. Dalsing, who spent time in

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[19] "Improper governmental action" means any action or proposed action by a County officer or employee that is undertaken in the office or which is related to an employee's performance of his or her official duties, and

1. Violates any state or federal law or County ordinance; or
2. Constitutes an abuse of authority; or
3. Creates a substantial and specific danger to the public health or safety; or
4. Results in a gross waste of public funds.

There is no evidence that any of this occurred with respect to the PCSD and PAO handling of the middle school incident.

Pierce County custody before being released, is currently suing the county for false arrest and malicious prosecution, and a central issue appears to be the photographic evidence. Det. Ames is a witness in this civil case, and is represented by Ms. Mell in connection with the matter. In March 2013, both Det. Ames and Ms. Mell filed declarations in the Lynn Dalsing case in connection with whether Det. Ames may testify at his deposition to certain matters that the county may be claiming as privileged. Detective Ames did not reference the Lynn Dalsing matter in his written complaint or at any other time before his DWT interview, but has now suggested that it may be relevant to his alleged mistreatment by the PCSD and the PAO. Detective Ames' comments or allegations regarding the Lynn Dalsing matter are beyond the scope of this report. They will not be investigated by DWT unless and until DWT is retained to do so.

VI. CONCLUSION

For the foregoing reasons, there is no merit to Det. Ames' current allegations. Det. Ames was not the victim of retaliation based on his prior overtime compensation claim or otherwise. Likewise, there is no evidence that the PCSD's or the PAO's handling of the Kopachuck Middle School matter was in any way corrupt, or that Det.-Sgt. Berg's handling of the investigation or the PAO's decision to decline prosecution were motivated by anything other than an honest view of the evidence.

Dated this 22nd day of May, 2013.

Jeffrey B. Coopersmith
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: 206-757-8020
Facsimile: 206-757-7020
Email: jeffcoopersmith@dwt.com

Pierce County

Office of the Prosecuting Attorney

REPLY TO:
CRIMINAL FELONY DIVISION
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Criminal Felony Records: 798-6513
Victim-Witness Assistance: 798-7400
FAX: (253) 798-6636

MARK LINDQUIST
Prosecuting Attorney

Main Office: (253) 798-7400
(WA Only) 1-800-992-2456

August 12, 2014

Michael Ames
c/o Joan Mell, Attorney at Law
1033 Regents Blvd., Ste. 101
Fircrest, WA 98466

Re: Potential Impeachment Evidence

Dear Ms. Mell and Mr. Ames:

In representing the State of Washington, the Prosecuting Attorney functions as a minister of justice. To administer justice, the Prosecuting Attorney has responsibilities for the integrity of the criminal justice system and responsibilities that run directly to a charged defendant. One specific responsibility is an affirmative duty to disclose potential impeachment evidence to a charged defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1983); *Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Giglio v. United States*, 405 U.S. 92 S. Ct. 763; 31 L. Ed. 2d 104 (1972). "Potential impeachment evidence" includes not only exculpatory evidence but also any evidence that could be used to impeach the credibility of a witness called by the State.

This letter is to notify Mr. Ames that potential impeachment evidence exists regarding him, in addition to the potential impeachment evidence which has previously been disclosed. We intend to disclose this additional evidence to defense attorneys on cases where Mr. Ames is expected be called as a witness by the State. Although we are required to disclose this information to defendants, such disclosure does not necessarily mean the information will be determined to be admissible in the criminal proceedings.

Specifically, we are in possession of (1) a transcript dated April 1, 2013, wherein Jeffrey Coopersmith interviewed Mr. Ames, and (2) declarations dated May 12, 2014, executed by Deputy Prosecutors Timothy Lewis and Lori Kooiman wherein they state that Mr. Ames made false statements about them in his April 1, 2013, interview with Mr. Coopersmith. Copies of these documents are attached.

The next scheduled trial wherein Mr. Ames might be called by the State to testify is *State v. George*, 05-1-00143-9 and we intend to disclose the above-mentioned materials to Mr. George's criminal defense attorney. If Mr. Ames would like to provide our office with additional information which he or you believe is relevant before disclosure, please do so by 1:00 p.m. on August 15, 2014, in writing, and emailed or delivered to my attention at the Prosecutor's Office, room 946 of the County-City Building. Please be aware that such materials may also be disclosed to defense attorneys.

Sincerely,

Stephen M. Penner
Chief Criminal Deputy
(253) 798-7314
FAX: (253) 798-6636
spenner@co.pierce.wa.us

Interview of Mike Ames
April 1, 2013

J Jeff Coopersmith, Davis Wright Tremaine
M Mike Ames
S Scott Mielcarek
JM Joan Mell

J OK. So we're on tape now. This is an interview of Mike Ames. And can you Mr. Ames or Det. Ames state your name and position for the tape, please?

M Michael Ames. A-M-E-S. I'm a detective with Pierce County Sheriff's Department currently assigned to Computer Crime Investigative Unit.

J Thank you. And you're here with your attorney, Ms. Joan Mell. Is that right?

M Yes.

J And she represents you in connection with this complaint that you have filed in this case?

M Yes.

J My name's Jeff Coopersmith. I'm an attorney at Davis Wright Tremaine. I'm been hired by the County's Human Resources Department to conduct an independent investigation of Mr. Ames' complaint. And with me also is Scott – and I'm sorry, Scott, I'm not gonna mess with your last name.

S It's Scott Mielcarek. Spelled M-I-E-L-C-A-R-E-K.

J Mr. Mielcarek is a Sheriff's Deputy and also in the Internal Affairs Department of the Sheriff's Office. And I think we've explained that to you before the tape was on. Is that right?

M Correct

M Yes, I did.

J And, Scott, can you go through what that was for the record?

S Is it OK if I call you Mike?

M Sure.

S Mike, do I have your permission to record your voice?

M Yes, you do.

S Can you spell your last name for me?

M Ames A-M-E-S.

S And Mike, prior to going on tape, I sent you a form titled Administrative Proceedings for Internal Affairs Investigation. I gave you an opportunity to read that form and ask me any questions about that form. Is that correct?

M Correct.

S And it appears you've signed and dated the bottom of the form. Is that correct?

M That's correct.

S Do you have any questions for me about that form?

M Not at this time.

S And then Ms. Mell, do I have your permission to record your voice?

JM Yes, you do.

S Will you please say your name and spell your last name?

JM Joan Mell. M-E-L-L. And obviously that permission is conditioned on I'm provided a copy of the audio.

S 'K. Thank you.

J I should also state that it's April 1, 2013. And we went on tape at about 1:05 and you arrived I know right before 1:00.

All right. So, let's start – if you could just tell me how long you've worked for the Peirce County Sheriff' Department?

M I've been with the County 29 years. I've been with the Sheriff's Department just completed actually this week will complete my 25th year.

J Can you just briefly go through the different positions you've had with the County and the Sheriff's Department over the years?

M Yeah. I started out in 1988 in Patrol. I worked Patrol for approximately 2 ½ years. Then I went and worked in the Peninsula Detachment as a Resident Deputy for, I believe, 2 ½ years. Then I worked in Juvenile Investigation downtown in the Criminal Investigative Division. I did that for I believe it was three years. From there I went to the – I went back to patrol in Lakewood and then after about, I believe, a year in that I went to – went into the Traffic Unit.

Worked Traffic Unit for approximately 7 years. Was promoted during the time I was in Patrol, I also held extra duty assignments as a defensive Tactics Instructor and SWAT team member. Did both those assignments for 10 years which are additional duty assignments. I was promoted to Detective in June of 2001. I spent my first five years in detective as a fraud detective where I obtained a professional certification as a Certified Forensic Examiner during that assignment. I went from there to the Sexual Assault Unit for two years. And then I went to the Computer Crimes Division in September of 2007 where I've remained til today and I just last year obtained a professional certification there as a Computer Forensic Certified Examiner.

J Thank you. And since 2007 when you started working in the Computer Forensics field, have your duties been pretty much exclusively on Computer Forensics or do you have other responsibilities as well?

M The first five years --- well, I originally was hired just to do Computer Forensics. An individual that was leaving that unit whose place I was taking did cell phone examinations at that time. He came down with a very unfortunate illness and had to leave the Department and so the cell phone job is also tasked with me for the last 5 years. So I did computers, cell phones, also am responsible for handling mandatory weekend and on-call detective call outs which is usually two weeks a swing shift and three weekends [inaudible] serve in the capacity as the on-call detective.

J And that can be any sort of matter in Pierce County where the Sheriff's Office covers, right?

M Exactly. Wherever a detective is needed. Yeah.

J Now in the Computer Forensics area, other than yourself, are there others who have the same type of responsibilities or is it just you?

M It's just me. There's one other individual who works through the Special Investigator or the Drug Unit. He does Computer Forensics but it's all through that end. He doesn't have anything to do with general assignment.

J Is that Ryan Salmon?

M No, Ryan took over cell phones [inaudible]. John Crawford does the

J Narcotics

M Narcotics. [inaudible]

J So your caseload in the forensics area is – it's not Narcotics but it's – it's what? What other? What's -- any other – any subject other than Narcotics?

M Yeah. I would say a third – probably a third – third to 40% of my case load is child pornography cases; child exploitation cases. Then it's everything else. It's – I work everything from homicides, property crimes, identity thefts, domestic violent situation. Anything where a computer or electronic media can be used as a crime or as evidence.

J And it's pretty ubiquitous now that computers are involved in everything, I suppose, right?

M Correct.

J So, before 2007, when you took the position, did you have any particular training in that area of Computer Forensics?

M No. The only experience I had in computer – dealing with any type of Computer Forensics was when I worked in Fraud. And I had – identity theft was really booming at that time and so I had the opportunity on numerous cases to seize computers. And so I worked closely with the Computer Forensic [inaudible] in submitting evidence to him and then obtaining the result after he did his examination.

J Now since 2007, did you have to take additional training in the area of Computer Forensics?

M Yeah. I just --

J I'm sorry. Go ahead.

M Yes. I've had extensive training. And I have to – I continue to have training – keeping updated training. I've taken basic and intermediate Computer Forensic courses through the National White Collar Crime Center. I've taken basic, intermediate and advanced courses through two forensic tool software vendors. One is called Guidance. Software. They use a program called In Case. And the second is Axis Data. And they have a software called FTK. And – let's see – taken some training – I've had beginning and intermediate training itself on investigations also.

J So, -- so these days do you – do you deal with the cell phones or is that Ryan Salmon who deals with the cell phones?

M Ryan now unless he's not here. Then [inaudible]

J OK. So you still have to have that skill set [inaudible].

M Yes.

J Alright. Now, at some point in time was there an issue that arose with working the overtime hours and perhaps even on training hours where you and – and others weren't being compensated appropriately?

M Yes. It was specifically me that wasn't being compensated.

J But were any others involved in that situation other than yourself, as far as you know?

M Just based on what was reported to me by a supervisor.

J What was that report? What was reported to you?

M Well, the whole program on how the overtime was being run and how certain areas were conducting the – the overtime [inaudible]. Your question's a little confusing.

J Yeah. No. I'll start again. I'm sorry. I just -- So, at some point did you make a complaint regarding how overtime hours were being paid or were not being paid?

M Yes, I did.

J And – and can you tell me when that was and what the nature of the complaint was?

M Can I give a little background to help you out?

J Of course. Please! No. Absolutely.

M When I – when I got hired to do the Computer Forensic job, at that time Lt. Bomkamp was the one who recruited me for the job. At the time he told me that I would be assigned doing just Computer Forensics and I wouldn't have to worry about doing any of the cell phone investigations because of the volume of the cases and the learning curve on learning the Computer Forensic end. So part of my interview when I took the job was that I had – I was told and in -- written in the job description was verbiage that I had to obtain a professional certification as a Computer Forensic Examiner. I was told by Capt. Bomkamp and Greg Dawson who was the previous examiner at that time that the certification they wanted me to get was through the International Association of Computer Investigative Specialists. The acronym is called IACIS. And that it's a very extensive program. It takes six months and it involved a lot of work – a lot of hours to obtain that certification which was gonna be -- have to be done in conjunction with my normal duties and also the requirement, fulfill it, took me hours on personal time. They told me when I was ready to do that that – they would give me then resources necessary to obtain that certification. So six months after taking the Computer Forensic job, I went to my first actually Computer Forensic course – was a two-weeks [sic] course for IACIS. I came

back -- Greg told me that they were giving me the cell phones. 'Cause my plan was to come back from the IACIS course and take the certification in conjunction at the end of that two-week course.

J I'm sorry. So, who is Greg – you mentioned?

A Greg Dawson is the Previous Forensic Examiner. Unfortunately he has passed away.

J And so when I got back I was tasked with all the cell phones. I didn't have any training in the cell phone end. So I then had to basically learn two forensic fields at the same time. So, I wasn't able to learn the cell phone forensics, the Computer Forensics and get the certification done right when I got back from that class. I expressed that to my --- to the administrators and they said, "Well, when you feel you're ready to take the – to take the course, let us know. We'll get you the resources you need." -- you know "We'll go from there." So when you take the IACIS course – it's a two-week course – the certification they allow you to have what's called a coach – through IACIS where you can – you send your practical problems to – he reviews them – and then it kind of helps guide you along through the process since the process is pretty extensive. They only give you three years after you've taken the course to have a coach available. If you go beyond that, you don't have a coach and the success rate of passing without a coach is low. So, I had gotten to a point where in 2010 that I knew – 2011 – I was gonna have to take that certification. So when 2010 probably in – it would have been September/October – right about the time they start popping budgeting for the next year – the other person in my lab, Rich Boce, who's an examiner – he kept track of the budget. He would send out quarterly to our administrators just an update on the lab. What our expenses were. Training we've spent. Kinda where we're at. So we made a point in 2010 in the Fall to advise the administration that I'm gonna be goin' to this class – just to let you know there's gonna be added expense and just time to give you heads up – this is the year I'm gonna do it." So they had – before I got into the program – probably maybe 10 months knowing that for sure I was gonna take the course. In June of 2011, I started the certification course.

J How long a program is that?

M It's a six-month program and I logged between 800 and 1000 hours to complete the program.

J OK. So pretty much full time, basically.

M Yeah. I spent a lot of nights. Lot of nights and weekends for that time working on that. I got into the program in June. I believe the – (I wanna say the 4th. I may be mistaken) –but somewhere around the first week. And my supervisors were all impressed that I was into the program. I had send some letters of concern to her emails letting her know, "Hey, prior to me getting the program,

likely it was after the first of the year – my case load for computers is big, cell phones are – are bogging me down here – and I'm gonna have to do the certification. You know, if I don't get relief in some area, I'm gonna be doin' a ton of this stuff on my own time and it's gonna incur a lot of overtime. Just, so you're aware."

J And who did you tell that to?

M Well, went all the way up to Mike Portmann, the Lieutenant I believe at that time was Todd Carr, and Capt. Bomkamp were all. So when it came time to actually start the program, I notified 'em I was in it. No duties had been taken away from me. I still had my normal load. Cell phones – everything else. And so I got into the program. I was paid – I started turning in overtime slips for the first –well, it was probably – I think I got paid for almost three weeks. Two and one-half to three weeks. My slips were comin' through. Capt. Bomkamp was approving 'em. And then all of a sudden one day I just get an email from him saying, "Ah, well, I don't think that – didn't realize it was gonna take this much and we really don't have the money so, not [inaudible]

J That's an email from Capt. Bomkamp?

M Yeah.

J And just flat out refusing to pay the overtime?

M Exactly.

J Even after you'd submitted the slips?

M You know – he -- he had already authorized – I'd been paid two cycles of pay periods of overtime. And then he just cut it off.

J I'm assuming that email exists somewhere? I have to – I have not seen it. Was that part of the file? Maybe it's a question for you?

M [inaudible) I'll find it.

J So we can get that?

M Should be.

JM Do you have [inaudible] complaint?

J From the earlier time. I – I do have the [inaudible] yes. As to whether I have every document that was uncovered or used in the course of that. But I'll get it. So you're describing the email though.

S Do you think that was in July though [inaudible]?

M I want to say – it's either gonna be the last week of June/first week of July. Couple -- right within that time frame.

J And – and this is an email from Capt. Bomkamp – and as you recall it, he -- he refuses to pay the overtime?

M Correct.

J Does he give a reason?

M Not really. Not really.

J So then what happened?

M I, well – I thought of two things, actually. One, in the back of my mind, I was wondering if it was related to an incident that occurred a couple weeks before that regarding another case I had with some County Prosecutors. And my first thought was, "Well, I need to report this to my direct supervisor to let him know I've been cut off." 'Cause Mike Portmann was my supervisor at the time. He was very pro-active in supporting me in getting the certification and he understood my workload so he was – he said, "Let me know regarding the overtime. "If any -- if you have any problems with it," he goes, "I know your workload. And I want to make sure that you're paid for it." 'Cause he understood how much time it was going to take. So I told him I'd been cut off. He went to the Lieutenant, Todd Carr, and advised him. I had been contacted by Todd Carr after that advising me that in his opinion he felt I should be paid for the overtime and that he actually had gone to Capt. Bomkamp and had expressed that to him. And that basically that the decision was made and I wasn't to be paid for it.

J So – so question about this. And obviously there's a lot of history here and I'm just getting up to speed so just bear with me [inaudible] The – and I don't know the answer to this. But is – was there any requirement or rule that you are aware of that prior to incurring your overtime working hours, you get pre-approval for that or anything like that? And if so, was that done or – just tell me how that works. And – and I'm not asking the question 'cause I think there is – I just want to mention.

JM Actually, you know what Mike, I think there's a whole – doesn't Masko have a recorded statement from all of that?

M In the internal affairs investigation they conducted, yeah.

JM So I think that that's probably all the detail. I hate to have him sit here and try to remember it without [inaudible] complaint [inaudible]

J Actually, I have those – those interview transcripts – like from Chief Masko

JM About the overtime thing?

J So I can look at that and if that's what it is, then that's helpful just to point that out, so thanks.

M Yeah. There were – there were emails in there from actually one's from the Chief – Chief Adamson telling me when it's time to take that, they would supply full resources [inaudible] to make sure I had what I needed to get that.

J OK. And that's fine. And I – and it's a fair comment when I try to make you do a memory test where there's documents – that's fine. But going on with the story – so –you get this email saying they're not paying you overtime and you were describing how Det.Sgt. Portmann was – had been supportive of -- and Lt. Carr had also been supportive. And then where did this end up at that point?

M That's where it stopped.

J That's where it stopped.

M I didn't hear another thing until – til towards the end of – well, Mike Portmann frequently – he comes out once – once a week or once every two weeks. I'm at [inaudible] Tacoma Police Department. So Mike comes out – check on me—see how I'm doin' – see if I need anything. He was – you know – asking me along the way – you know – make sure that ya – you keep a log of what you're – you know – of your time. Let him know of – let him know if I worked hours. And – but he wanted me to call those in. He didn't want me to put them on a document.

J Det.Sgt. Portmann wanted you to call in –

M -- and tell him if I did some work on – on the thing. Just what I did. He would keep this all on a log.

J OK. Just so I understand the two different things. On the one hand, there were slips for overtime -- whatever you want to call 'em. Documents showing the overtime that you submitted that you said Capt. Bomkamp didn't pay or refused it. Right?

M No. I submitted approximately – I think I had – I'd have to go back and look. But – maybe 10 slips that were – he signed off on. He paid.

J And those were the ones he was emailing about?

M Who was emailed?

J Capt. Bomkamp.

M When he said that – you said that there was an email which I'll get – but you said there was an email saying that they're not – he's not gonna pay – the Department's not gonna pay those – those overtime hours –

M -- ANYMORE.

J Anymore.

M He was cutting me off –

J I see.

M -- if I submit anymore.

J So the 10 you submitted, those will be paid.

M He paid 'em.

J He paid those.

M Yes.

J Then he was cutting you off – saying we're not gonna be paying you for any additional overtime going forward?

M Correct.

J And that was in approximately when? I'm not gonna hold you

M Well, end of June/beginning July. Sometime in that framework [inaudible]

J Alright.

M Might have been beginning of July.

J So the going forward after that was when Det.Sgt. Portmann wanted you to call in the hours?

M Well, he said keep track. Yeah. He said keep, "Keep track." He – he told me – "You know. They're not gonna pay ya." So he said, "You keep track of the hours you do." He said. "Let me know on weekends. When you do stuff on weekends, call me and let me know." You did some hours and I'll keep track of those." I told him I'd keep track of what I'm doin' during the week; I'll let him know the time I do on the weekends. And so that's kinda what we went with through the rest of the [inaudible]

J And that was what – what was – that was the procedure if that's what they call it after that email where you were cut off from doing further overtime. At that

point, am I right, that it moved to a system where you were calling in your overtime hours to – to Det.Sgt. Portmann?

M Just my weekend hours.

J Weekend hours.

M Correct.

J And – and then you would keep track, I'm assuming --?

M I kept my own log.

J You kept your own log and then, as far as you know, Portmann was also keeping track of those hours?

M That's what [inaudible]

J To what end? If they weren't gonna be paid,

M [inaudible]

J -- what was the point?

M The point was I was gonna re-address it later because I didn't think it was right. Because I'd been promised something that I did not get delivered [inaudible]. The time commitment that certification took and the re—and them not taking anything off my plate at work caused me a lot of time away from my family. And a lot of stress and all because of that. And I didn't think it was right. I think I was – you know – I'd been told – I'd had it in my job description that I had to get the certification. They were fully aware of it was comin' and just to be cut off – I – I thought, "No, I'm gonna – I'm gonna address this at the end. And I'll wait and see how many hours I incur. I'll figure out what I'll do at the end." I didn't have time to fight that battle; carry the load of – technically three people. A computer friend at the job today said, "It's a two-person job, no doubt about it." Cell phones is a full time job. Shown by Ryan gettin' full time position. 'K? They took none of that off my plate. Plus they expected me to do the certification. So I did everything they asked me to do. I didn't have time to fight a legal challenge over this overtime in the middle of all of this. I needed to focus on my job and on my certification.

J I understand. And so this system where you were callin' in the weekend hours to Portmann; keepin' your own log. And at the time that started, was it your understanding that you would eventually be paid for those hours or was there something else that you were gonna get? Or how was that gonna be dealt with?

M Ah, Mike said basically we would -- we would work a way to find out how I would be compensated when it was all done.

J And so, what in fact happened though – going forward? Just – my understanding from reading the file was it was – there was an issue with comp – what's called comp time. Where instead of paying you overtime – you know, the people in this situation would be told they could take off hours. So maybe you can tell me about that if that's [inaudible]

M I just don't wanna violate the non-disclosure agreement. So I'm gonna ask, can I answer in this setting? I just don't wanna get [inaudible]

JM [inaudible] These are all questions that have been actually

J And I – I don't really want to expend all our time talking about the overtime law suit. I just want to get the background so we can go to – so – Joan is absolutely right. This has all been dealt with and it's been resolved. And -- but I just wanted some – get your take on it and see who some of the characters were and I can -- [inaudible]

M Well, if I – if I can – yeah. I don't have any problems with it.

JM Let's look here. I think that there's just an admonishment here. An agreement with the County that he's not – that the claims have been resolved. He's not filing any further complaints with regard to overtime issue. Including any complaint of improper governmental action as to that. So that's – would be the only limitation. I wouldn't frame or couch any of this as [inaudible]

J I wouldn't either. But let's – let's try to move through this settlement agreement quickly for a sec.

M OK

J So, my understanding is at the end of the day, you brought a complaint about this comp time situation. And after – I mean – things happened, the investigations were conducted and so forth, eventually you were actually paid for the hours that you had worked overtime. Is that correct?

M Yes, I was.

J And it was – this is not exactly – but it was approximately $12,000, is that right?

M With legal fees.

J Yes. $12,000 including legal fees?

JM We can just put the settlement agreement in

J I have. But that's – that's correct. I mean

M And that was in February. February 2012.

J Right. I'm mostly familiar with any – a memo that went out that – I think from Undersheriff Bisson that talked about – "We don't have a comp time system; we can't do that." Do you recall that?

M Yeah.

J And I have that document. I'll show it to you in a bit but -- you had – I think – alleged originally – and tell me if this is right – that Det. – Capt. Bomkamp was knowledgeable, involved in some way in the comp time system that was not appropriate under the County rules.

M Correct.

J And also, Det.Sgt. Portmann. Is that right?

M Correct

J Now you told me about the email (which we'll get) about Capt. Bomkamp cutting you off and not paying overtime. And what I'm wondering – 'cause I have it in the file and obviously I haven't seen everything in the file– but what was the evidence, if any, that Capt. Bomkamp was involved in the comp time situation rather than just Det.Sgt. Portmann being involved?

M The – what Det.Sgt. Portmann told me – he told me the little program that they had going was that the -- he told me was at the direction of – coming from Capt. Bomkamp.

J And so that's what Portmann told you?

M Mmm, mmm

J That the – that the comp time system was at the direction of Capt. Bomkamp?

M Correct.

JM And – and there was other evidence of that too.

J On – what was that?

JM That [inaudible] remember [inaudible] conversation knowledge that we got from Masko. I think he confirmed that --

M -- it had been occurring in other areas.

JM And that was – that was the system they were doing and there was nothing they could do about it. And Todd – he asked Todd – Todd said, "There's nothing we can do about any [inaudible] claims.

M Oh, yeah. Yeah.

J What? So what was that about, sorry?

M It's just about the whole process. How – how the process of how you got your comp time. Like-- \if you want to know how it was presented to me or – would that help? Or? I mean it's in there.

J No, I know. And I don't want to spend – you know – inordinate amounts of time on this but what I'm just looking for is – I understand Det.Sgt. Portmann was directly your supervisor and was the person who was dealing with this comp time system, right, is that correct? He was directly running it, I mean.

M He was one of several people he told me about.

J But then, the evidence that Capt. Bomkamp in particular was involved was from something that Det.Sgt. Portmann told you, is that right?

M Correct.

J Is there anything else, written or oral, that suggests, proves, demonstrates in any way that Capt. Bomkamp was involved in the comp system? And I don't know whether he was or wasn't. I just want to know what the evidence was.

M I don't – I don't have anything other than what was told me by my Sgt.

J Did you feel in any way at the time that you settled that matter with the County and – you know – you were paid – did you feel in any way that anyone harbored ill-will against you or – you know – held a grudge or anything of that nature?

M At the moment – at the time I was paid, no, I didn't. When I was paid, I just wanted it done. I tried to keep it as quiet as possible and just wanted it done and – and to move on. No, I didn't. Not on this Department, anyway, I don't think anybody held a grudge against me.

J All right. So let's move to – you know – after that. That – that's February in 2012. Does that sound right?

M Correct.

J This was resolved.

M Right.

J As it turns out – around that time in February – there was an incident at the Kopachuck Middle School. You might not have known about it right then in April – I'm sorry – February. But I think that's actually when it occurred. Do you recall that?

JM That's confusing. I gotta clear up the record on that I didn't know about then so he certainly didn't know about then. He didn't know about anything happening at Kopachuck in February 2012.

J That was my point.

M I understood that's what you meant.

J The – the incident in fact occurred in February 2012 but you didn't learn of it in February 2012.

M No.

J Right. You learned about it sometime later which we'll get into.

M Correct.

J Now, there's ultimately – you eventually did a very detailed, written complaint or report that you submitted to Undersheriff Bisson, right?

M Yes, I did.

J And I wanted to show you something 'cause I think it's very thorough and it's, I think, helpful in building through the timeline, if you don't mind. So, let me just hand it to you. And these have numbers on the bottom right, and you see the first page is 22 of 420. And it's easy to refer to those numbers to direct you in certain pages. I'll just tell you the reason for that numbering is that it's just the numbering from the complete file I got from [inaudible]. So this is as part of it and it's from your complaint. So am I right that this is your December 12, 2012 complaint you submitted to the Sheriff and also to Undersheriff Bisson?

M Yes.

J And am I also correct, Mike, that this was done – this whole piece of work – the complaint – was submitted at Undersheriff Bisson's request?

M After cons – after a meeting with Guild. I – I originally went to the Guild about it. And they had a meeting with Undersheriff Bisson. That's correct. She advised them to advise me to write up something and submit it to her.

J And – and then that's what this is?

M Yes. Yes.

J All right. Thanks. So it starts out saying that you're requesting a criminal investigation by outside state or federal law enforcement agency into the handling of the Kopachuck Middle School case. I just want to clarify something. Like – there're two different things and one or both are going on –

so I understand. Is your request that there be a criminal investigation of the alleged retaliation against you or are you saying that some outside, independent law enforcement agency should reinvestigate the incident to determine whether it should be – you know – referred for criminal charges?

M I think the – I think it's a combination of both. Actually. And the reason I was asking for an outside law enforcement agency 'cause again, earlier I alluded to something I thought may have been related to something that happened to me in the -- in early June, and that, I believe, has a bearing on all of this.

J Maybe you can tell me what that is? What happened to you? You talking about June 2012?

M '11.

J '11? Well, what was that.

JM Mell oughta talk about it.

JM I think that you can give a little background.

M OK.

JM I think I would try to summarize it. I mean you can just summarize the case maybe – just say the case.

M All right. There was a case I worked in 2010 called *State v. Michael Dalsing*. Him -- he was a guy who was arrested for raping his daughter and his granddaughter; taking pictures of them. It was a huge child pornography case.

J An actual producer – alleged producer?

M Yes. Correct. The assigned investigator to that case was a detective who is retired now. Name's Debbie Highshman. Unbeknownst to me at the time that she made the arrest – she arrested the guy's wife for child molestation. She never notified me about the arrest. No prosecutor ever contacted me about the arrest. However, in June of 2011, I was called to a meeting with two prosecutors. And Debbie Highshman supposed to be there. It was June 13, 2011. It occurred at the Headquarters Division downtown. Come to find out at that meeting – again – I wor – I got that case October of 2010 and I had heard that this woman had been arrested but I thought it was on something Debbie had developed on her end of the investigation. 'Cause all I do is the electronic media. Well, I had in the beginning of that investigation, Debbie had asked me (just long story short) for some pictures that she could show the prosecutor for – to show them an update in the very beginning of if we had a child porn locator on this stuff. Well, there was a picture on there that at the time that I turned it over (I turned 40 pictures over to Debbie – most of them with pictures of kids' faces because Debbie said she didn't know how many kids may have been

involved in this case). So I said, "Well, here, just getting into it. Here're some pictures that qualify as child pornography; here's faces of kids. I can't find any file data within the files that show me when they were taken. X of data wasn't available but here -- Can you show some victim's of the family – just show the faces of these kids – see if they know any of these kids? If they know any of them, let me know. I'll focus on those pictures. If they don't, then they're just child pornography. It's added. You know – big part of the case but – I just needed to know – do we have victims ID'd in here?" Well, there was one picture that had a very obese woman laying on a bed with a small child on top of her. They're both naked; they're both – legs are – are splayed out. And you can't see the woman's face. You can only see hair, body style. I had found some pictures in the computer of the suspect's wife in a bedroom in various poses naked and she was an obese woman. Well, the picture with the kid on top – I had pretty much eliminated any of the background – any of that picture is coming from inside the house. 'Cause I looked at all the house photos from before. So when Debbie came out, I showed her these pictures and I said, -- she goes, "Oh, that looks like that could be that lady." And I said, "Well, I'm pretty sure this picture belongs to this other series of photos." There were series of photos piled with a name. A female's name. That picture, I was pretty sure, belonged to there because I had – I had eliminated all the background stuff. Nothing matched in any of their pictures in their house. I can't ID the woman 'cause she's covered. The body style was the only thing that made me go, "Mmmm, I'm wanna look a little farther." Which is why I went and looked at the background stuff – looked at the photos. So when Debbie came out in November, I told her – she goes, "Oh, that looks like it could be a woman!" I go, "Well, you know, body style similar – you know – but I really think it belongs here." Just if you can ID the kid, let me know. Because the other examiners I work with hadn't seen this series of photos before. It was child porn series. And I had seen the series before. And so I said, it was an easy way for me to eliminate that picture." If she'd just show this face to a family, they're either gonna know the kid or they're not. Well, I turned that picture to over in November. I never heard a word back from her on that picture.

J That was 2010?

M 2010. She arrests Lynn Dalsing in December 2010. I know nothing about the arrest. She doesn't call me about it. No prosecutor contacts me for any reports or anything regarding the arrest. You know – I just thought, "Well, she developed something through her investigation so she had [inaudible] she had arrested her for child molestation. So I thought, "Well, one of the kids or somebody must have gave [sic] information that led her to that PC. So again, I finished my child porn end of the case. There were two suspects involved: a guy and a friend of his who was bringing the daughters over to him and let the friend molest and rape the daughters too. So anyway, I got done with my investigation – was probably in – I wanna say—maybe – March. I'd have to go back to my report – but maybe about that time March 2011. In June 9th I think it's the 9th, I get an email from Debbie saying, "Hey, Mike, the guys have pled

guilty to this case. Good job. But the woman's not. And the prosecutor wants to know if there's anything in the computers that you can tie the "I said I did a thorough investigation. I said, "Nothing in those computers led any child porn to the user name of Lynn Dalsing." Nothing in there, going back to her. And I said, "Absolutely nothing."

J And you include in that the picture of the obese woman on the bed.

M I commented on that. I said – I said the only possible link was that one picture. And I said, we can't see the woman in that picture. I said, "So you couldn't even prove that was her either."

J And you said it didn't even appear to be the same home because of different [inaudible]

M Yeah. She – yeah! And so I said, "No, absolutely not. I don't want to go back into that case. That case was horrific. I mean the volume of child porn. That's the largest case I've done. The volume – just the horrific nature of what those guys were into. So I said, "No. No, thanks. There was nothing there." That's -- and that was that. Well, then I get a – I get an email back from Laurie Koyman who is the prosecutor in the case. Debbie had forwarded Laurie my response back to Debbie. She forwarded that to Laurie. Laurie replies back to me and Debbie and says, "Mike, I think you're missing the point. That the guys pled guilty to child rape – not child pornography. And we need to get together and go over the evidence." And I'm – like -- thinkin', "Great. Charge of child porn in it. Six months worth of work!" -- you know – so I'm not really happy with that. [inaudible]

J Although the child rape is gonna be [inaudible]

M Exactly.

J [inaudible]

M It would've but it also would've been nice to know several months ago if they were doing that – to let the examiner know so I don't get exposed to thousands of more pictures that I really don't need to be seeing – you know. 'Cause that was tough case. So, she says, "Well, we have to have a meeting. And Tim Lewis was the other prosecutor she cc'd on that. So, when are you available?" "Well, when do you want to talk?" So she said, "How about next Monday?" So we set up a time for Monday, 13th. Supposed to be me, Debbie, Tim Lewis, and Laurie Koyman. And what I'm about to say is the truth – 100% truth. This happened to me and I think it's related to this whole thing. I get into that meeting and the first thing is it's Tim Lewis, Laurie – and I say, "Where's Debbie?" "Well, Debbie couldn't make it." And I said, "OK. Well, by this -- I had some questions for her, but I guess I'll ask you." I said, "Obviously, we're here on – regarding Lynn Dalsing." And I said, "I want to know, did the picture I gave to Debbie with the child on the bed, did she use that as any probable

cause in this case?" And I said, "Because if she did, she never should've because I never identified that lady in that picture as Lynn Dalsing. So can you tell me if that was used?" "Well," Laurie says, "Well, Michael, well, it wasn't just that picture that the – Debbie showed the kid to one of the family members and the family member said, 'Well, it kinda might be look like – might have looked like her sister.'" I said, "Well, that's not really good enough. Was a positive identification made on this child?" No, there wasn't. So then I said, "Well, I'm telling you as the examiner in this case, if you guys use that picture, you were wrong. Because that picture belongs 100% to this Felicia series over here. All I asked Debbie to do was ask, does anybody know that kid?"

J Did you ever pull this is due to probable cause or anything like that?

M Yeah, I actually had – came across it inadvertently a few months prior to checking the status of Michael Dalsing's case [inaudible] and I noticed Lynn Dalsing in there. I didn't know she had been – this was a couple months after she'd been there. So I read the probable cause and Debbie talks about in there pictures about – multiple pictures about Lynn Dalsing with kids – and naked and stuff. And saying that the kid ID'd and so I'm thinkin' at the time, I thought, "She's got their work."

J Oh, so when you read that, you just assumed she might have <u>other</u> –

M I assumed she developed other probable cause.

J -- probable cause. But you didn't think it was the picture that you had discussed –

M No.

J -- with Debbie.

M No. No. 'Cause –

J So, even though you had looked at that probable cause statement prior to the meeting with the prosecutors – like – it wasn't – you didn't know that that's what they may have been referring to. So you asked the question.

M Yeah! And I didn't! 'Cause I thought, "Why are we asking – why are we talking – why are we here now? Because nobody called me. Debbie didn't call me about the arrest. The prosecutor – usually that would have been – if they used that it would have been my PC. I should have done an arrest report. In theory, if I was the one that developed that PC. So I'm – like – "Hey," you know, "Is that the only thing you're holdin' this woman on?" 'Cause I knew she was still in jail. And then she said, "Well, it was other – you know – other stuff like this." And she said, "Well, that's besides the point." She said, "We're here because we want you to go back into that case and redo the entire case with Lynn Dalsing as the suspect now for child pornography." And I said, "No

way." I said, "I can't go back into that case." I said, "One, I haven't touched that case in four months. I wrote my two reports on the Dal – on the Michael Dalsing and the Mays part of it." And I said, "That – that evidence is stale." I said, "You're gonna need a warrant now to go back in if you're gonna use her as the focus." And I said, "You don't have any probable cause." I said, "I did a good investigation. I said, "I'm telling you, like I said in my email, there is no connection to Lynn Dalsing in the child porn [inaudible] computer."

J But you already looked at it all, you're saying.

M Yeah. Yeah.

J And what – just out of – you know better than I. But why would you need a warrant if you were already legitimately asked as to all the material in the first place with other suspects?

M Because they're asking me to put a person as a suspect that I've got no probable cause. I've already been there. I've already established the fact that most computers I examine – she didn't have any link to the child porn.

J Who's computers were they?

M They were the Dalsing – they came out of their house –

J The family.

M -- the family, yes. All right. So she said – I said, "No, I'm not gonna do that. – you know – "You're gonna need a warrant to go back in there." She goes, "Well, we want you to write a warrant." I said, "I'm not writing a warrant." I said, "I don't have any PC. And I'm not doin' that."

J No PC for Lynn Dalsing.

M For Lynn Dalsing. Yeah. Because there was nothing in there at all with Lynn Dalsing. I could tie all the child porn to one guy in that computer real easily. It wasn't her. And I said, "No." I said, "No, I'm not gonna do it." I said, "You can have Debbie write it." I said, "You guys write it." But I said, "Don't bring the case to me." I said, 'Cause I'm not gonna do it. I know what you guys are asking me to do and I'm not doin' it." And she says, "Well, we want you to do that."

J Well, when you say that you know what they're asking you to do, what was it they were asking you to do?

M They were asking me to do something unethical.

J Which was go inside without a warrant without a PC.

M They had been holding the woman for six months. It's very apparent in that meeting they didn't have anything to hold her on. OK? They – and – and I said that to them. And I asked her. I said, "Laurie, Debbie didn't call me once when she arrested her. You never called me. All right? If – if you guys think any picture that I had had any association with this, why didn't you call me six months ago? I'd a told ya, if it was that picture Debbie's talkin' about?"

J Did you get an answer to that? Was it that picture that was used to support the arrest – and detention of Lynn?

M I didn't get a – yeah – well she said – she said, "That picture AND other information." So, yeah, she did. So I told her, I said, "Look." --you know – I said, "If – if that picture is what you're relying on probable cause," I said, "you need to let her out." I said, "'Cause that's not her." "Well, we want you to do this. We want you to go back in. We want you to do this with her as the focus." I said, "What's your probable cause, then?" Well, the probable cause to her was the fact that she lived in the house. I said, "Well, I did the computers already. There's no user name; with Lynn Dalsing associated to that. So I'm not doin' it." So then Mr. Lewis chimes in. And he says, "Mike, this is how this is gonna go." And he says, "You're gonna go do what we're asking you to do." He said, "We're on direct – we're here with direct" – he called it orders – "We're here at the direction of our supervisor who wants -- who is following this case closely and we have to come back and report to him what you answer to us in here today. So you're gonna do what we're asking you to do 'cause we have to go back to him. And if we go back to him, he's fully ready to go to your supervisors and tell them you're not cooperating." And I said, "Well," – I said, "You can go back to your supervisor and you can have him call my supervisor, Mike Portmann, and you can make any complaint you want." And I said, "Mike's gonna come to me and he's gonna ask me, 'What's up?'" "And when I tell him what you guys are telling me to do here today, he's gonna back me. 'Cause he knows what I went through on that case and how much work I did." And then Lewis says, "Well, it's a little bit bigger than that, Mike." And I said, "Well, OK." I said, "You got lots of supervisors. I've got lots of supervisors. Let's cut to the chase. Who are we talkin' about?" He said, "Mark Lindquist." He said, Mark Lindquist has told us to tell you this directly. You either do what we're sayin' or if you don't, he's fully prepared to go to your boss – not Mike Portmann – Paul Pastor – and tell him that you are refusing to process evidence in this case. And if we have to do that; he has to do that; you're gonna be in some trouble." And then Laurie chimes in, "Yeah, Mike, if that happens it's not gonna be good for you. It's not gonna be good for you." So I told them both, I said, "Well, you know what? I said, "Mr. Lindquist then should have come down here with you and told me himself." I said, "'Cause I'm still not doin' nothin'. I said, "I'm not doing anything that I think's gonna violate anybody's rights. And in my opinion, being the investigator of that case, knowing what I had known through that whole investigation; looking in that computer; looking at the user activity in that computer; there was nothing there to focus Lynn Dalsing with child porn." And Laurie says, "Well, you know, we can use the

argument that – that anybody in that house could a had access and could have been lookin' on it – just using – you know – loggin' on – there was no – anybody coulda logged on and if the account was open." I go, "Yeah. That's true. But you know what? What singles Lynn Dalsing out then from any other person who ever went in that house over the last year who may have been on that computer? You know. There's nothing." And I said, "No." She goes, "Well," and then she starts – takes my reports and she starts playing the – double advocate – I guess – if you call it that – "Well, Mike, it says in here there's other computers that you just previewed that had child porn on it. You need to go back and look at those." And I said, "No, I don't. You dumped the case." I go, "You're not even charging any of the child porn." I said, "When I knew – I heard this case was being pled, I stopped because of their horrific content of what I was having to see." I said, "There's no reason to go into those." I said, "You've dumped the case. He's not being charged." "But we wanna charge Lynn with this." I said, "We don't have PC to charge Lynn with." And she goes, "Well, here it says on here that there were cameras. Did you look at those cameras?" And I said, "Yeah. I have cameras in my office." But I said – I said, "Did you look at 'em?" And I said, "I don't remember Debbie said that they looked at those prior to submitting 'em – if they went through the cameras or not." I said, "Before I submitted 'em into – before I put all the property back into the property room which was after the plea had been done," I said, "I think I did look at the cameras just to make sure that there was nothin' on 'em." She goes, "Well, it doesn't say in here you did that." I said, "Well, it doesn't say in any of my reports either that I had anything to do with the arrest of Lynn Dalsing, does it?" "Well, well, it – it was kinda heated."

J [inaudible]

M So she says, "There's – there's DVDs, there's a bunch of DVDs." And I go, "Yeah. There's probably – a frickin' hundred. Most of them are like vendor-type porn. You know – stuff you buy in some porn shop." "We want you to go through those." "Oh, you want me to sit now and watch hundreds of hours of porn, now." I said, "I don't – based on one PC." I kept going back to this. "Where's your probable cause?" "Well, here's the deal," she says. "If you don't do at least the cameras and the discs, then we're gonna go and tell our boss who's gonna tell your boss that you refused to process vital evidence in this case which was the cameras" because he was taking pictures of the kids and because of that we had to dump the case against Lynn."

J Did they evade the issue of whether you needed to have – or you needed to have probable cause to have you go back through any of those materials?

M They just kept tellin' me what I was gonna do.

J And the materials that you have – like the – you know –cameras and the discs and the computers – were they seized in the search warrant of the home?

M Yeah, they were. Yeah, they were. So what I did –I'm – I'm almost 100% positive – before I put in the evidence, I went through 'em just to satisfy that in my mind. But I thought, "OK. If I didn't write it down, and they're threatening to do that, that's the only thing they can really make me do. Or they can turn around, and go, "Oh, he didn't do this." You know – so I thought, "Fine. I'll cover that argument." OK. I'll do the cameras and I'll set up to have the videos – to have the DVDs transferred to another readable format." But I said, that's all I'm doin'." I said, "Don't ask me to do anything else. 'Cause I'm not doin' anything else." And "Fine. Fine." So I left. That was the end of that.

J Did you go through the materials?

M Yeah.

J Any additional evidence against that suspect?

M Not one thing.

J What happened to the case?

M They let her out of jail a month later. Just no charges. And she has since filed a lawsuit which I am embroiled right in the middle of right now. Because Debbie had identified that I had identified Lynn Dalsing as the person in her report and I've had to be fighting ever since to prove –

J Is that a publicly filed lawsuit?

M Mmm, mmm.

J In Pierce County?

M King County.

J King County. Why King County?

M You'd have to ask the plaintiff that.

J So, have you ever brought this whole incident to the attention of anyone else in the Prosecutor's Office or in the Sheriff's Department or in the County?

M Not til right now because I didn't have what I felt was enough evidence – where I thought I had enough evidence behind me where I could prove what I was saying was true. Because it came down to two people's word against mine.

J Both the two prosecutors, you mean?

M Yep.

J Have you spoken with either of them since?

M I spoke to – I went right back and told my partner what happened.

J Who was -- ?

M Heath Holden.

J Keith –

M Heath

J Heath

M Heath

J Last name?

M Holden. H-O-L-D-E-N. He was with City of Tacoma. I mean when I went right back to work, I told him about it.

J Oh, he's the City of Tacoma officer who is –

M -- our detective. Yeah. Told him exactly what happened to me. No, I didn't tell. – No. you know – my -- when I walked out of that room, it's like – "Great. Great. Let's -- where's my career gonna go from here?" So, I wasn't gonna let them tell some lie that I did something and dropped the case. 'Cause what I felt when I walked out of there – was they were lookin' for a way to pin that case on me. And I had nothing to do with it.

J Have you been deposed in connection with that lawsuit?

M I'm in the middle of it. And that's what's interesting.

J What does that mean? Being in the middle of it.

M When we – can I say?

JM Mmm, mmm

M When we got to the point in my deposition four months before I was deposed, I asked the County attorney that was representing me, do you have the emails between me and Debbie Hirshman and Laurie Koyman and Tim Lewis right around the May-June area? "No, I don't." I said, "Well, you should because it should have been pulled with all the emails that were pulled in the discovery process." I said, "I've got an email that proves everything I'm saying is true." "Oh, well, send that to me."

J Which was that email – that proves everything.

M The one where I'm telling Debbie, "Hey, you don't have anything against this woman – "

J Oh, before the meeting with the prosecutors.

M [inaudible] the day before.

J Got it.

M Yeah. Yeah. So, he says, "Well, send me that." So I send it to him. And I send it to him on October I think October 12, 2012 four months before my deposition. He calls me and he says, "My God. This – this email – yeah. This clears you. It's obvious you'd never identified that woman." I said, "That's what I been tellin' ya from the start." "Oh, I'll make sure. I'll make sure this gets made part of discovery," he says. I said, "OK. Great." All right. So I go through another two months where I have to go back and I have to pull forensic images and make all this stuff available for their plaintiff's computer expert. 'Cause we went through a discovery process. We got in all my files and everything else. I did a ton of work doin' that. So deposition comes in February, Valentine's Day actually. So long story short, we get in the deposition and we get up to the

J February 2013.

M I'm sorry, 2013.

J That – the deposition occurs. OK.

M So we get to the point in the deposition where we're right to the point where the plaintiff's counsel is asking me, "Did you have any discussions with any prosecutors regarding this case?" And I said, "Yeah. Laurie Koyman." "Well, when did you have that?" I said, "In June 2011." And he's like, "My clients arrested in December and you don't get contacted til June by a prosecutor?" And I go, "That's correct." And then the objections start from the County prosecutors.

J County attorneys.

M County attorneys. Object. Well, every time the guy tried to ask me a question, what was said between me and Debbie and me and Debbie and the attorney, he refused to let me answer. "Don't answer the question." So – you know – before I went into the meeting, I was briefed that, "If we tell you don't answer a question, don't answer it." So I'm trying to be the – you know – just tryin' to go with the program. And then all of a sudden – they got into a big argument. The other attorneys and the County attorney over this 'cause he's refusing to let me answer.

J You go to the judge?

JM We've got a [inaudible] motion pending next week.

J District case?

M Well, let me – yeah – let me [inaudible] we're – we're getting' there. And then it realizes. And then it hits me. And then I'm like – "I know why they're not lettin' me answer. They don't want me to say what happened to me in that frickin' meeting. That's exactly what they don't want to say. And now they're hanging me out here, saying, 'Don't answer.'" Yeah, they had to end the deposition. Neither one of those County attorneys got up, walked me out, or said a word to me. Left me hang. So I went back and did some research myself. What happens if you don't answer at a deposition? Well, I didn't like what the results would be from that – not only the personal financial but also the contempt of court stuff. So I went, "You know. They're hidin' this." So then I went out and sought my own legal advice. And that's when [inaudible]

J [inaudible]

M -- she got involved in this.

J So that's a matter that's pending, I guess. You haven't filed a complaint or anything [inaudible] or you're working on that. Sorry.

JM Well, I'm not working on filing a complaint. We're working at trying to get an order from court allowing him to answer, recognizing that there's no attorney/client privilege there.

J So, that – has that already been filed – that motion?

JM Right. The hearing's noted up for Friday.

J Real time, right?

M Right.

J All right.

S May I clarify with you, Sir, during that interview with the – the prosecutors over when they were asking you to go back into the case, did they give you any indication that they had talked to anyone from the Sheriff's Department, any supervisors of yours, and briefed 'em that they were going to be bringing you in to talk to you about re-opening that case?

M No, not at all. The only person they mentioned was that they were there giving me – telling me what they were told to tell me by Mark Lindquist. That was all they said.

At 1:06:24 on Untitled No. 5 on document 303212

S And then after the meeting, did you notify anyone within the Sheriff's Department about what went on during that meeting?

M No, not at that time, no. No.

S I think earlier you told -- told us that the only person you did talk to was a City Police Officer Heath Holden. Is that right?

M Yeah.

S And he works with you in the computer lab?

M Correct.

S And did you go into detail with him like you did earlier?

M Yeah, I did. And I didn't say anything til now. 'Cause honestly, one – who's gonna believe me? Two, what's gonna happen? I wanted to see what happens. Are they gonna be satisfied with me just doing the things? Or is somethin' else gonna happen – you know. I -- it's one of those things I just went, "That part's not right. I'm only doin' these cameras. 'K? If something spills out as a result of this, then there'll be a day maybe where I'll have to say what – what happened. But no, I didn't. I was scared. Honestly.

S When you completed the review of the cameras, am I correct that you did a general report showing what you found or didn't find in those cameras?

M Yes, I did.

S And did you have any discussion with Debbie Highshrun after reviewing those cameras?

M I hadn't had any discussion with Debbie Highshrun on this case since – yeah, I got an email from her in January of 2011 telling me that she had arrested Mays. And then the email in June regarding the deal. But other than that I haven't had any discussion with her at all.

S And educate me a little bit. Because you are off site working in a joint lab with the City of Tacoma (is my understanding) – when you submit a – a report, who reviews your report and is there any approval process?

M It goes to Mike Portmann.

J So, bear with me on a question I'm gonna ask and I'm not trying to –

JM I feel like I should interject that I've spoken with chain of command on this issue on his behalf.

J And how recently was that?

JM a soon as I put in an appearance.

J -- which was? Weeks?

JM A month and a half ago, maybe? A month and a half.

J A month and a half.

JM Sometime [inaudible]

J So, Mike, bear with me 'cause I have to ask this question and please don't think I'm insinuating anything by it, OK? You filed this report (we were gonna look at it on this – this other avenue, but) I read this report that you sent to the Sheriff and to Undersheriff Bisson. And I don't see any mention of this whole thing. Right? And I understand that you're saying you believe that this was part of the reason for the retaliation both – well maybe from the Prosecutor's Office [inaudible], right? 'Cause I know that you're saying that Mark Lindquist was part of the effort to retaliate against you, right? So can I just ask you why you didn't mention this incident with these two prosecutors in June 2011 in this report of December of 2012 you gave to Bisson and Pastor?

M Because I did not know at that time that – what's the date that I filed that? That was in December.

J Yeah.

M I didn't know at that time – I thought – in the *Dalsing* matter – I thought maybe the County was representing me. I thought they were going to produce the discovery that showed that I didn't – you know – I was just gonna go with that. I thought they were gonna do the right thing: realize that I didn't have anything to do with it except whatever their fault, if any was, and produce the documents. I didn't – you know – I didn't – it didn't occur to me until I was in that deposition where I went, "Oh! I get it. I get it now."

J OK. And that's when it clicked and you decided both to hire Joan here and also to bring everybody in here up today.

M But I think this is in and of itself one thing. I think that meeting is part of something that may – may connect to this in – in a way. Yeah. Yeah.

J I think I understand. That whole deposition record where he's instructed not to answer the questions – is that public or is it under some kind of protective order, do you know?

JM No, a deposition isn't subject to – to any protective order. All the pleadings have been filed for the motion. The only thing that would be subject to

anything would be whatever the court decides to rule as discovery – as attorney/client privilege. But it's all been -- all of that information has been forwarded up the Sheriff's side of the chain and the Prosecutor's Office so as long as it's on your side of the universe dealing with it and not on Lynn Dalsing's side of the universe, I don't think it's outside the scope of what the County can see.

J So I may wanna get the motion you filed. I may wanna get the deposition transcript. I'm –I guess [inaudible]

JM I would say get that all from the County side.

J You – you don't want to provide it to me?

JM Well, it's not that I don't want to provide it to you – I can give it to you – but it's not stuff that we're in control of. It's the Lynn Dalsing matter. And we're just filing

J No, I understand that [inaudible]

JM [inaudible] it's their motion.

J Totally appreciate it. It – it just would save me the trouble if it's a matter of public record. If you want to send it.

M I've got it here.

JM I mean it's – it's not an objection to give it to you – it's – there's some weird chain delineation issues here and [interrupted]

J All – all I would ask is things that a matter of public record that I can get from the court anyway.

JM OK.

J So?

JM [inaudible].

J OK.

S Do you want me to give the copy or do you --?

JM He doesn't –

J --need it right now.

S OK.

J I mean – you know -- you can think about this. [chuckles] You can give it to me later.

JM I don't know that you have all the motion, that's the thing.

S Oh, OK. Probably not.

JM So he needs to have it in the context of the Lynn Dalsing [inaudible] responding.

S Oh, no.

JM [inaudible] his declaration.

J Yeah. I mean I can get the docket of the case. And I can pull it, you know. But – you know – I may still need you to do that but it might be helpful to have some of the basic material.

By the way, I didn't say this in the beginning but anytime you need to take a break, we should do that. And this might be a good time. And the other question I had for you – actually, if you don't mind, I'll go off the record – it's talking about scheduling. OK.

So we're goin' off the record at 2:19.

J OK. So we're back on the record at 2:29 p.m. on April 1st. And Mike, while we were taking a break, did we talk about the case at all or ask you any questions – things like that?

M No.

J So, I just wanna ask a quick question about this email you described before from Capt. Bomkamp and I want to move onto some other things. But, you described an email earlier that dealt with the overtime issue and it was from Capt. Bomkamp (as you described it) said that going forward you were not going to be paid overtime. Is that correct?

M I – in essence. I'm not gonna quote that word for word --

J Yeah.

M -- but generally, yeah, he was basically saying -- something to the effect but "I didn't think it was gonna be this entailed or something and so I can't – not gonna be – authorizing overtime for it" – something to that extent.

J And we'll get the email so – you know – I understand whatever you say is from memory and we -- we're gonna go with the email when we get it. But was there anything in the email (as you recall) about what you were gonna do with all the

things on your plate with the – you know – the forensic work on the computers and the cell phones and the training you went through – was there anything in the email – like—dealing with how you were gonna handle that without overtime?

M No. It was like a one/two sentence email I was sent.

J Anything about working with you on getting those things done or [inaudible] resources – anything of that nature?

M Nope.

J All right. [to Scott] Any other questions about that, Scott? OK.

J So, we have this complaint that you filed for – filed might be the wrong word – submitted – you know – to the Undersheriff and the Sheriff in December 2012. And if you look at it – I'm on the first page, so if you look at page 22 of 420, OK? And I just wanna get sort of an overview here. It says that, "Requesting a criminal investigation – 'K? -- you believe officers of the command level of the Pierce County Sheriff's Department along with Executive level officers of the Prosecutor's Office conspired to discredit the legitimacy of the criminal complaint filed by the Kenney family against Kopachuck Middle School teacher John Rossi. Right?

M Mmm, mmm

J And you believe these [inaudible] were in the attempt to assist Det. Ed Troyer in defending his personal friend and the suspect in this case, John Rossi. It created a false accusation of official misconduct against me and the Kenney family's attorney Joan Mell. 'K? So, Ed Troyer is a detective in the Sheriff's Department, is that right?

M Yes.

J And is he also – like – the public spokesman or public relations person? What is his job?

M Public Information Officer.

J So does he deal with – like PRA requests – things like that?

M I don't know the specific of his duties other than he's the PIO.

J All right. And we'll get into some – you know -- more specific case documents about the Middle School incident but was Ed Troyer involved in any way in that investigation other than as a public information officer?

M You mean as far as an investigating detective assigned part of the investigation, no.

J And I understand from an email (we'll look at it in a few minutes) that he had gone to high school with John Rossi. Is that your understanding?

M Based on the email I read, yes.

J Is there anything else other than that email about Ed Troyer going to high school with John Rossi? Is there anything else about the two of them being friends or having some a relationship that would lead – you know – Ed Troyer to want to protect him in a criminal investigation?

M That's the only information I had was on that email.

J So, it goes on to say that the "Pierce County Sheriff's Department used unsubstantiated accusations to engage in behind-the-scene of misconduct investigation against me while bypassing the Internal Affairs Division and the Pierce County Deputy Sheriff's Guild. Individuals of the command level of the Department used the false accusations to unlawfully access my County email in an attempt to obtain information to support the accusations."

OK. Just stopping there for a minute. I – I'm familiar because I've read the emails and, again, we'll get to them that there was some look or a – you know – a review of your emails for certain key words. And I think that those emails came out of a PRA request that somebody thought it might have been you, Joan. So, there was that action of reviewing emails for certain key words. Do you recall that?

M I – I think – I'm -- it sounds like you're confusing two different things.

J Let – let me – that's why I'm – I'm asking the question. But let me see if I can clarify the question and get to it. And it might be helpful just to look at the emails. But just, starting out at 50,000 foot level, OK? You say in the complaint on the first page that there was a use of false accusations to unlawfully access your County emails in an attempt to obtain information, right? I have seen an email from Capt. Bomkamp requesting a review of your email system. 'K?

M 'K.

J And that email – in fact if we go -- we'll just go to the page, OK? Yeah, on page 34 of 420.

M OK.

J So, this is still in your complaint. But am I right that you took emails that you obtained and then you had basically pasted them in some way into the report? Is that right?

M To make – to write my complaint?

J Yeah.

M Right.

J And – and I've seen the independent stand-alone email. And there's no reason to think – in fact – what you pasted isn't exactly what the email says. You didn't alter it in any way.

M No.

J So, in the email you pasted in – this is an email from Brent Bomkamp to Linda Gerelle; copied to Rick Adamson. It says, "Related to possible misconduct by Sheriff's employee, Mike Ames, please conduct a search of his email accounts and it has the account for the time period July 23rd through September 24th, 2012, for" and then it has a list of the things that they're supposed to search for. Email correspondence with Joan Mell; emails with responsive words relating to the Kenneys, and so forth. And then three, certain case numbers." Do you see that?

M Yes.

J When you say in the first page that there was a use of "false accusations to unlawfully access my County email in an attempt to obtain information in support of accusations" are you referring to that activity that's on page 34 of this request for emails?

M Yes, I am. Specifically to the "misconduct" -- "related to possible misconduct." That's what I'm referring to as false accusations.

J So that's – that's the false allegation that – the allegation of "misconduct" or "possible misconduct."

M Correct. Correct.

J And then up above that – going back to page 22 of the document – so the first page – where you say that "The Sheriff's Department used these unsubstantiated accusations to engage in a behind-the-scenes misconduct investigation against me while bypassing . . ." My question is, is there any other misconduct investigation that occurred other than – to your knowledge – other than the email review that you've just referenced?

M I'm referring to the information in the press release. What was said about me – that unsubstantiated allegation there.

J So, I'm familiar with the press release, right? And—and we'll go through that. And I understand there was a reference to how the case arose and some allegation of impropriety. And we'll get there.

And that's the un-- unsubstantiated allegation. But then when you say, on page 22, that those unsubstantiated accusations were used to engage in a behind-the-scenes misconduct investigation while bypassing the Guild . . ." Is there any other investigation of misconduct that occurred other than the review of your email that we – that we see on page 34?

M I – that's what I'm tryin' to find out.

J OK.

M That's what I'm here tryin' to find out.

J 'Cause I mean a misconduct investigation could take a lot of form – it could be reviewing someone's email, it could be interviews, it could be interviews with other witnesses, it could be all sorts of things, right?

M Exactly.

J So, in that whole universe, is it – I mean there may be other things, or maybe not. We don't know. But the only thing you're aware of – am I right? – is the review of your email. Is that correct?

M And the allegations made referencing me in –

J -- the press release.

M -- the press release. Yeah.

J Right. Understand.

JM Can I ask a question? For clarification?

J Sure. Absolutely.

JM Is there any confusion as to the date that the Kenney investigation file was requested by my office? That didn't happen until October. It was October 19th.

J The Public Records Request –

JM Right.

JM I don't think there should be any confusion about what they were looking for with regard to responding to that order to go look for Ames, Kenney, Mell with responding to the Kenney family's request for a copy of that investigation

J My understanding was that this was totally different.

JM Right. That's what I wanted

J You – you made a Public Records Request because you were representing a client – the Kenneys.

JM Right. And that was in October.

J Yeah.

JM Right. This one was in September.

J Right. So you're saying this was – that not part of your

JM I had . . .

J -- [inaudible] emails as part of your request, it was because of [inaudible]

JM Right. I was understanding that you were trying to ask him if they were the part of the same. Maybe I . . .

J That wasn't my question but it's helpful to know that they're not anyway, so, thanks. OK. Then it goes on to page 22 which is really page 1 in your complaint – about the retaliation – you know – the -- the previous issue with the non-disclosure agreement. And then you say, "I believe the following individuals knowingly participated in the conspiracy in acts of harassment and retaliation: Pierce County Prosecutor Mark Lindquist, Pierce County Deputy Special Assault Unit Chief Jared Assurer" and then it goes on with the other names, right?

M Yeah.

J So, I just wanna go through those and understand – like – what the reason is that they're included in the group that's – you know – based on your complaint conspiring against you and – you know – engaging in acts of harassment and retaliation. So, Mark Lindquist, right?

M Mmm, mmm.

J So, can you tell me what – what it is that led you to put him down on that list?

M The fact that when they accessed my County - well, the fact the unsubstantiated in my opinion false allegations being made regarding the detective with the County who conspired with Ms. Mell to file this complaint.

J The press release?

M the Kenney – yeah -- the press release. And then the chain that the email examinations where they ended up at the end. Who, what level it went to and the comment that was made in the email to Mark by Chief Adamson. That's when I referenced that.

J And we're gonna get to that email. I think I understand [inaudible] we'll get to it. Anything else about Lindquist?

M And then with him and Jared Assurer both – just the fact that neither one of them took the time to even ask me one question regarding this before they put that press release out.

J You mean about the evidence and about [inaudible]

M Exactly. Exactly.

J And – and you – we obviously went through – before the break – we took this issue about being in a meeting at the Prosecutor's Office with respect to the child pornography case. Was it Lynn Ahlstrom?

M Lynn Dalsing.

J Dalsing. OK. And is that also part – at this point – of the reason why Mark Lindquist is on this list?

M I think it adds to it now – knowing what I know after I'd gone through what I went through in my discovery and in my deposition.

J Would – would that also be true? Well, let's just go one to one.

So, Jared Assurer – what is the reason why he's on the list in your complaint?

M Because he's the one that – he was involved in the – in the charging thing in the press release. He reviewed the press release. The press release [inaudible] from Mark Lindquist; Jared Ausserer reviewed it; and because of some unknown conflict, caused something to have that case (because of me having some conflict with the person who reported the case) that because of that reason was one of the reasons used to drop that case. And I'm -- like – how're you gonna make that produced in the public document and have never talked to me about the case.

J And so is – is it fair to say Jared Ausserer is on the list because he reviewed the press release before it went out but did not consult with you before it went out?

M He is on the press release and reporting directly to Mark Lindquist. He's in that chain. So that's THE only reason.

J Anything else about Jared?

M No, nothing else. I didn't tie – I didn't talk to him; I've got no emails from him; it was the fact that the charging decision was made; a public press release is made; and it's very apparent when you read the release that there's – the insinuation is there that something improper occurred between the detective who took the report and the person who submitted some electronic evidence.

J Meaning – you [inaudible]

M Meaning me.

J -- [inaudible] meaning you who had reported to Joan who had previously represented you.

M Yeah. Who was not representing me at the time.

J Right.

M [inaudible]

J So – so just to get that timeline – Joan represented you during the – the

M overtime

J overtime issue

M between December and February.

J And – and when that case was over, then she no longer represented you, --

M No.

J -- is that right?

M She went her way; I went mine. We didn't talk again.

J And no attorney/client relationship until the most recent events which were just like a month and a half ago or something?

M Correct.

J All right. So next person is Pierce County Sheriff Paul Pastor. So why is he on the list?

M Because of the emails.

J So we just have to go through the specific emails, but anything come to mind specifically? Which – which emails were –

M All the mails were – well, the three emails. One, where Troyer goes to him directly saying, "Oh, there's a big conflict here. Ames took this report and Joan Mell's gonna sue because Ames took the report, I guess." And then the response – an email back to him talking about "Nobody's gonna be mad at us, right? People just want to know what we do on this, right?" And then the press release that came out the same day after that email which seems to – in my opinion – completely downplay any complaint by the Kenneys and focus solely on – basically – the attorney who filed the report, so –

J Anything else about Sheriff Pastor?

M No. That's it.

J Then, Chief of Operations Rick Adamson. So, why is he on the list?

M Because he appears to be the one directed the – was directly involved in the accessing of my email.

J Anything else?

M --for unofficial misconduct which I still don't -- to this day – don't what is. But, no, that's it.

J And then Pierce County Sheriff's Department Chief of Services Rob Masko. Why is he on the list?

M Based on the emails and the meetings he had with Brent Bomkamp regarding a comment in there about it's stinky that I had an attorney/client relationship with Joan Mell.

J And then Capt. Bomkamp. He's on the list because – ?

M Emails and behavior he exhibited towards me.

J And then Det. Ed Troyer?

M Based on the emails.

J Anything come to mind?

M Yeah the emails to the Sheriff; the email to the Undersheriff; the press release the day I put the email to Paul Pastor; email I just got the 27th from him that I'm taking as a -- another – as a threat from him.

J What was that?

M I got an email the 27th of March. I got it here if you want it.

J I – I think I was informed that you had some [inaudible]

M Where he actually –

J I would like to see it.

M [inaudible] Joan Mell sent – how I found out about the press release actually was when Joan Mell sent a letter to the Sheriff's Department cc-ing the people involved in the Kenney investigation with a letter she had written to Mark Lindquist. And part of that had the press release on it. So that's when I first saw the press release.

She had sent another letter in regards to the Kenney investigation that went to all the people involved and it went to Troyer. And she cc'd the people who were involved in the case. So I got a copy of that. Well, that was in November. And for some reason – I don't know why – last – the 27th – what was it – Wednesday – I get a letter in my email copy that he had sent to – he sent a letter to Joan and cc'ing the Sheriff, me, Glenda Nisson, Mark Lindquist with this letter. And when I read the letter I take it as a – I take it a little intimidating –

J March 27, 2013?

M Last week.

J So you're handing me the email, yes.

M Right.

J And this was printed off of your system?

M It's printed off my computer. That's a screen shot – just the email as it came. And then the letter was the attachment. 'Cause the letter itself doesn't have a date on it.

J So it's from Ed Troyer to Jonathan [inaudible]

JM [inaudible]

M Joan's Office Manager.

J Jonathan – I can't pronounce his last name.

JM Jonathan [inaudible]?

J He's someone that works for you.

JM Yes.

J Then Pau Pastor; Mike Ames, Teresa Berg, Glenda Nisson, Mark Lindquist, Joan Mell, -- and then there's an attachment which is a PDF document. And that's what attached [inaudible]

M That's what you have there. Is that attachment there.

J And the date in the email is March 27th, 2013. If you don't mind, I'm gonna turn off the tape while I just read the letter.

M That's fine.

J We're going off the record at 2:49.

J OK. Back we're back on the record at 2:50 p.m. And so, Mike, I've read the attachment addressed to Joan Mell, is that right?

M Yes.

J And you were saying that you take this as an additional threat or intimidation of some sort?

M Correct.

J And can you point out to me specifically in the letter what you see in that light?

M The last paragraph – well he has a – he states in this letter that he only go – he only went to Capt. Bomkamp regarding this. Well, in the emails I submitted clearly show he went far above Capt. Bomkamp with this information. Pertaining mostly to the last paragraph where he says, "I have retained outside counsel and have representation by County attorneys; I have also contacted Human Resources." And then I'm gonna go to the last sentence where I think it involves me. "If I hear a single word about me any further from your clients or from you, I will take appropriate action against all involved. I will be sending this to all that you originally sent it to." I take that as he obviously knows I'm – have representation by Joan – I'm one of her clients. And just as a – as a threat – I mean, intimidation. He has County attorneys. Who are they? HR – I'm supposed to be here 5 days – 3 business days later when I received this – for a meeting with HR on this whole complaint. And all of a sudden, I get this and I'm -- like – "OK. What kind of investigation am I walkin' into now?" -- you know – where – where are my rights, again, with the County gonna be – you know – how does – how -- I've got 30 years with the County. I've got a reputation I built. Where do you get these County attorneys? Who's he talkin' about? You know – that's what I mean. It's – it's just open-ended – basically – so I come here goin', "So if a talk freely about Ed Troyer, does this word get back to him or when he sees this, then – now, is he gonna come down on me, saying, 'Oh, [inaudible] I have the --!'" He tells me – I read this to say that he's got the backing of HR and the County attorneys. I get it.

J I – I don't know whether that's true or not.

M I don't either.

J But I would encourage you to be totally forthcoming and candid about Ed Troyer or anybody else. And – you know –

JM without fear of retaliation.

J Well, it's not appropriate to have retaliation. I'm not saying that there is or isn't. But, certainly – you know – that'll be dealt with in the appropriate way. Right?

M I hope so.

J And so the task at hand is to just tell us – tell me – what happened and then we'll go from there.

M That's what I'm here to do.

J I appreciate that.

JM Can we get on the record too – and I did inquire – is this because he's been interviewed and it comes close to his interview or what's prompting this at this time? And I think your response was you're not [inaudible]

J I – I really can't comment on what -- what's going on with other people who could be witnesses in the case but I appreciate [inaudible] – so I'm aware of the situation.

S And this was sent to your County email address, Pierce County Sheriff's Department e-mail?

M Yes, it was. It's still -- yeah. It's in there. That's where it got sent to.

J Who's Glenda Nisson?

M She's a detective that works fraud that had a – had a problem with Mr. Lindquist on a situation.

J What was that?

M I don't think it's – I think Glenda would be the best person to talk to about that. To be honest with you.

J She's a – she's a Sheriff's Department --

M -- detective.

J -- detective who had another issue or run in with Prosecutor Mark Lindquist?

M Correct.

J And she still works for the Sheriff's Department as a detective

M Yes.

J And is it related at all the issue of the Kopachuck Middle School incident or is it related to that at all?

M Hopefully, maybe through this whole investigation, you can determine that.

J But you're not aware of a connection. But you're saying that you think there could be.

M I don't – I don't know 'cause I don't know all the – I don't know the ins and outs of Glenda's deal, OK?

J All right. Is this a copy that I can --?

M You can have that.

J -- have that? Thank you. All right.

So I want to direct you to page 24 of this complaint you filed – I keep saying "filed." – submitted to the Sheriff and Undersheriff. And there's an entry – and it looks like you're just going through a timeline and giving the account of what happened – from your perspective. Right?

M Correct.

J And there's an October 11, 2012 entry at the top of page 24. It says you – you met in your office with Pierce County Sheriff's Department Lt. Russ Wilder who brought in the long range planning of the computer lab. So, just stop me right there. Can you just tell me who Lt. Wilder is?

M Lt. Wilder is – was the newly appointed Lieutenant for the Criminal Investigative Division. He – he came there, I think, probably in September – late September right before we met. And what he – what he did in this instance, was he got a hold of me and said, "Hey, Mike. I'm the new lieutenant. I've never been out to the lab. I'd like to come out and see it and maybe you can go over with me what you do out there and what – you know – what the status of the lab is; what the future – future planning that we could look at maybe regarding the lab workload and that type of deal." So we set up a meeting on that day for him to come out. And he came out to the lab. We spent an hour goin' over what I did in the lab; resources that would be useful. He told me that he'd like to get some part time help out there for me to help with some of the case load. And start to get somebody trained for – in Computer Forensics too. That – just basically that kind of deal.

J And then at the end of the meeting, you were walking him out the elevators and then "pulled aside" it says here, and told you that he, Wilder "had done you a favor." Is that what he said?

M That's correct.

J So, then it goes on to say, you asked him what that was; and he – and he advised you that he had recently attended a meeting the focus of which was to open an official misconduct complaint against me [quoting – meaning "you," Mike Ames] for reporting the Peninsula School District case. Wilder stated that they were officers in the Department who believed that I [Mike Ames] had conspired with the victims' family attorney, Joan Mell, to file the case so she could file a lawsuit against the school district. Wilder also stated that these officers were upset with the fact that I [Mike Ames] had used Attorney Mell on a previous claim against the County. Wilder said the purpose was to discredit me [Mike Ames] and Attorney Mell which in turn would discredit the filing of the case. So is that an accurate account of what occurred in your conversation?

M It's a – it's an accurate consensus. I'm not putting – we'll, I'm not putting word for word quotation when I said he said when we were talking. This is the general nature of what was said. 'Cause I'm firing questions back and forth with him 'cause I'm -- like – "Whoa. What—what are you talkin' about?"

J How long was this conversation [inaudible]?

M It was -- five minutes – maybe five minutes.

J And did you get the sense of that was why he came out to see you? Or that was just a – sort of extra thing he talked about at the end of the meeting?

M I got the sense – when –when he walked away that this had a big reason of why he came out. Russ and I go back a lot of years. I got the feeling he was doing it not just as a lieutenant but that he cared about me.

J So what did you do with this information that he provided you?

M Well, I asked him. I said, "Can you tell me who – who're you talkin' about? – you know – and "I'm not gonna say," he said. "I stopped it from happenin', he said. I'm not gonna say." "I just want you to know I did that," and he said, "Watch your back." He said, "There're some people that basically got it in for ya. So watch your back." And I told him I appreciated that. Went into the lab. Sat down and it was -- like [inaudible] "Heath was in there." And he's like, "What's the matter?" I'm like – "I don't know how to take what Lt. just told me." And so I talked to Heath about it. Told him what he said. So Heath said, "Well, what are you gonna do?" And I said, "Well, just gonna document it – you know -- I'm gonna take Russ's word that he stopped it." And I said, "Sounds like some people have maybe sour grapes." You know – but I'm gonna be the bigger man here. I'm not gonna cause a big stink. I'm just – I'll

document it if something happens. Then – you know –I'll address it then but I said – you know – he's not telling me who it is." So all I've got's him saying this; and I'm not gonna – I don't wanna just go, 'Oh put him on the burner, here, when I don't have any information.'" So just documenting it. [inaudible] I want you to know that this happened. So if somethin' ever comes back, I got a witness that I did tell somebody.

J OK. So you did tell Heath?

M Yeah.

J Right. And then you said you were going to document it. Did you do something to document that?

M I put it in a little notebook, I think. Just jotted down. Where is that notebook now?

M At home.

J Can I get a copy of that?

M Yeah. If I can find it. Sure.

J And I – that was just seems like an interesting or useful item, contemporaneous – or roughly contemporaneous.

M Yeah I can get a copy for you.

J Yeah?

S Yeah. Did he use the words, "watch your back?"

M See – that's why I can't – that's why I'm not putting anything in quotations. It was something – that's the word that sticks in my head. It was something – maybe watch yourself' kinda deal. "Be careful." Something in that – the – in that regard. That's why I don't wanna be tied t quote the exact word 'cause it kinda caught me off guard but is was the just -- it was definitely along the lines of "Hey, watch yourself. Watch your back. There's people that – you know –"

S Was there anybody else present when you had that conversation?

M No.

J Then there's another entry on—for October 30, 2012. I assume that's 2012 'cause it's 2102 –

M Yeah. It's a typo.

J -- It's a typo, right? It says that you were in Det. Ryan Salmon's office. You were working on extraction of some digital media. Ryan and I were sitting on our chairs facing a forensic machine – the door of the office at our backs – Capt. Bomkamp just happened to be walking down the hallway – saw me in the office and took one step inside and leaned against the door. And Ryan and I turned our chairs to face him. Capt. Bomkamp then, without saying a word to either one of us – just starts giving me a big-- what I refer to as a "big, intimidating Cheshire grin," and stared directly at me, purposely stared at me for an extended length of time to the point it became uncomfortable." Then it goes on. Is that an accurate account of this incident with Capt. Bomkamp?

M Yes.

J And how – when you say "extended length of time that he was staring," – like -- how long was this staring [inaudible]?

M 45 seconds. 40-45 seconds directly at me. Just purposely directly --

J 45 seconds.

M -- you know – when somebody's in your face kinda thing, yeah.

J So 40 seconds is your best estimate?

M And I -- a minute -- you know,

J Or even longer. OK.

M I don't – I didn't time it, so -- long enough to where I got to the point where, "OK, now. This is uncomfortable."

J 45 seconds is a really long time, right?

M Mmm, mmm [affirmative]

J So it felt that long to you?

M Sure did.

J And then,

M Could have been 30 seconds.

J Det. Salmon saw the same thing?

M Yep.

J And did you have a conversation with Det. Salmon about this after it occurred?

M We j -- both just kinda stared at each other. And just – scared at each other. I had more of a feeling, probably, where it was coming from – Ryan [inaudible] anything goin' on, so – it was definitely a look of somethin' -- somethin' – somethin's up.

J And then November 8th – this is this when you first got a copy of the press release, is that right?

M Yep.

J Let's go to the next page but I want to ask you in particular, page 25 – I'm looking at that. But I wanna ask you about the Middle School incident and I've seen in some of the things you've written that you viewed this as a mandatory reporting situation – like – the State law requiring reporting of child abuse.

M Yes.

J Can you tell me – like – why you saw it that way?

M Based on the training and experience – being trained and having to conduct and report child abuse investigations.

J And – and just – what – what is your view on – like – what the State law requires? What's considered a reportable event and what's not considered a reportable event?

M Well, go through the department training.

J Well, I mean, if – if I was to show you a video today, for example, some new incident that has to do with a child and – you know – there's something goin' on – like – how would you – what factors would you utilize to determine – like – this is a reportable abuse event or it's not something that needs to be reported?

M Is the child being restrained in any way? Is the child bein' assaulted physically in any way? Does the child have any bruises, marks, anything that would show – that would corroborate statements that are being made regarding – you know – the abuse complaint? Are there witnesses to the complaint? Is there any physical evidence for the complaint? Is there any video taped evidence of what occurred? All those are factors. The age, the age of the child; the size of the child; the – the location of where the incident is occurring at; the – the size of the – if it's an assault situation, the size of the kids who are doing the assaulting in comparison to the individual being assaulted. Is there any other factors [sic]; are there any adults or supervisory or people around who have the ability to stop a situation that's occurring? Do they stop an assault? Do they not? Do they take part in it? All those kind [sic] of a raw based factors I take into consideration. [inaudible]

J Is it true that when you looked at the video of the Middle School incident that you felt that applying those factors that it was a reportable incident?

M Absolutely. I think that what I titled the report, actually, describes what I viewed. Yeah.

J Now at the time that you learned about the incident – that was in July of 2012? Is that correct?

M Correct.

J And how did you first learn about the Middle School incident?

M I got a phone call from Joan Mell on Friday, 27th--

J -- of --?

M -- July.

J And Joan was not your attorney at the time.

M No. No, she was just calling in. She wasn't calling to actually talk to me really. She was calling to ask if I knew where Det.Sgt. Berg was because she had been trying to get a hold of her regarding a child abuse complaint and she had some evidence she wanted to turn over. Joan called me, she said, because the evidence came off a computer and she has some computer media and she wanted it to get in -- submitted into evidence. But she – her – her main concern was she wanted somebody to look at it. And to determine even if it is something that should be reported. She felt it needed to be reported. She wanted somebody from law enforcement to look at it to give their opinion too. And she said if it needed to be reported, then that's what she was trying to do.

J And – and the media of evidence – was that something pulled off the school computer?

M According to what was reported to me, yeah, it was a thumb drive that had files downloaded on it.

J And those files – is it correct – that those originally came from an individual cell phone, cameras, video cameras or something like that?

M That's what I understood, yeah.

J That individual students in the classroom had?

M Correct.

J All right. To your understanding, was there any other adult in the classroom or was it all the kids and then the teacher, John Rossi?

M The only adult I saw in the video was John – John Rossi.

J Alright. Now, when you first got that call from – from Joan (now I understand why you got the call), did you have a conversation with Joan?

[to Joan] I'm sorry I'm asking questions – you're right here. That's what I have to do.] Did you have a conversation with Joan about – like – her views of the incident, or what was going on – or how Joan viewed the matter?

M Yeah, the conversation that I had was basically she had some computer media that she wanted to turn in – evidence was her big concern – holding that evidence. She wanted that – she said she just got it from a client – she wanted it in law enforcement. That's why she was getting – trying to get a hold of Teresa. She said she was trying to get a hold of Teresa so she could put her in touch with the parents of the kid. So they could report what had happened to their son. So it was – it was really – really pretty short. I said, "OK." I said, "Well, I tell you what." I said, "I know Teresa and her unit.' We were slammed with homicides and stuff at that time. So I know Teresa was tied up with a bunch of that. And I said, 'I can – since the computer media is gonna come to me anyway. I'm the only one that's gonna process that – that I can come out and pick up the media – and review it – and if it's somethin' that's reportable, I can take a report and then I can get – I can then – instead of me having to send –Teresa having to send a person out to pick up the evidence, to bring it back, write a report, put it in the Property, tell me, then I gotta go to Property and pick it up. Her office e is 10 minutes from my work on my way in." I said, 'Monday, do you have a secure location to put the media in, secured in a lock – a safe or something? I'll come out Monday morning on my way to work, I'll review what you have. If it qualifies, then I'll take a report. I'll go back; I'll do my work on the media like I would normally do. And I said, "I'll send the whole thing to Teresa so she can assign it out." Joan knew in our conversation that my job was only – was gonna be as far as getting the computer media so I could save some time for myself and other people having to go and pick it up and put it back and do all that where I just get it, deal with it, a thumb drive is real quick to process, so then I can just send it on to Teresa and let her deal with whatever she's gonna do, assign it out or whatever. So that's basically what I did. I said – she didn't – Joan didn't – she didn't really elaborate. She said, "There's some video and it's an incident that occurred in school and it's all on tape and I think it speaks for itself. And I think it qualifies as reporting under child abuse." She also said that based on the information she had from her clients that is was never reported to the school district so she doesn't think law enforcement was ever notified that this incident occurred. And I said, "OK. Well, I'll come out and take a look and then if it's something that, yeah, needs to be reported, I'll report it." It's not – you know – and she said, "If it's something that doesn't qualify as child abuse reporting, then at least she felt comfortable that she at least did her due diligence of having somebody do it. Well, she also said too that she had contacted the prosecutor's Office prior to contacting Teresa and they had informed her to report it to law

enforcement. Which is why she was getting -- trying to get a hold of Teresa. So, basically, that was it.

J Do you know why the School District and the Kenney family didn't report it for – from February until July?

M Other than what's in – what's written in my report – other than the fact that they were dealing with the school district in an internal investigation that ran for three months, that's – whatever they told me is in my report. I spent one day on that case and that was it.

J And your involvement really was just taking that evidence from Joan, securing it, writing the report. And that's it?

M Yeah, I took the evidence from Joan. I went right back to my office. I viewed. I watched all the files in – in their entirety. I viewed some of it in Joan's office – enough to – enough to see– is this gonna qualify that it should be reported based on what I saw. Yeah, this needs to be reported. So I went back to my office. I viewed all the files. I transferred 'em to a – forensically sound manner; transferred 'em to a DVD, wrote my report and submitted my report; got the DVD and some documents – school documents that Joan had turned over that she got from the thumb drive; got all those to Teresa and said, "There you go. Wrote my report. Referred to Teresa for investigation." That was it.

J And was Teresa annoyed in any way that you had done that work?

M No! She said, basically, "Thanks, Mike. I was tryin' to get a hold of – was tryin' to get a hold of -- Joan and now we're playin' phone tag, so yeah, you saved me a trip out, essentially." -- and she didn't seem annoyed at all. She said, "Yeah, I looked at the videos and -- Boy! Doesn't look good. Now I'll take it from here." That was --

J Did you talk to Teresa again about the case while it was under investigation?

M Not at all. No.

J Did you – have you ever seen Teresa Berg's report about the work she did on the case?

M Not til after – not til after – not til –

J The Public Records stuff.

M -- the Public Records stuff. Yeah. And I didn't access the case or nothin'. I wrote it. Sent it on. I had plenty of work to do. I was just –

JM Remember, you did talk to the Kenney family to authenticate it?

M That's what I told him.

J Authenticate the video?

M Oh, I talked to – I took – I took the report from the Kenney family. The evidence portion – this is what bothered me about this whole deal and people getting' all riled up. She had a right to report evidence she's holding. I reported what she gave me. My report – and I told Joan this – was – OK – now I need to talk to the Kenneys. Because they're the ones I need to talk to regarding do they wanna file somethin' later. And she put me on a conference call with them and --

J And your report is based on that interview, correct? All right. But after that – after you were done with this and you wrote that report and you handed over the evidence to Teresa Berg, did you have any more conversations with Teresa after – you know – after that?

M No. During this investigation?

J Right.

M No.

J But then later -- after the Public Records Request was filed --

M I saw her report.

J And -- and the Public Records Request that was filed was the one that Joan filed in October?

M I don't know. I'd have to go back and research where I -- It was in a letter you had sent to – it was attached, I believe, as an attachment to a letter she had sent to all of us in the investigation. It was either Troyer's or Lindquist's. One or the other.

J Attached to one of the letters in November 2012? OK. Well, I have those

M Yeah.

J So, I have seen things you have written -- like – where you say one of the things that you found odd is that Teresa didn't – like – go back and interview all the kids or do additional – or ask additional forensic work with the video tape and other investigative steps that you think could have been taken. Is that fair?

M That's fair.

J And you know – you've known Teresa Berg for a while, is that right?

M Yes.

J And do you know her to be anything other than a dedicated law enforcement officer, detective who works on these cases?

M I like Teresa. We've got along. She's a very competent investigator [interrupted]

J So, just want to make sure you're not making any allegations that she either failed to do her job or was – was told not to do her job or anything like that?

M No, not at all. No way ever second-guess her. I respect her. What I'm referring to there is based on my training in – in conducting child abuse investigations. I worked for Teresa in her unit, And I – had a case like that. I'm referencing my experience there. I never could have took [sic] a case like that – that would have been considered kinda high profile because it occurs in school. And it's caught on video tape. No way could I submit that case to a prosecutor for review without ever having interviewed anybody.

J So, let me ask you about that process. 'Cause you've obviously submitted lots of cases in the Prosecutor's Office – you know – [inaudible] work with the Sheriff's Department. So, you could refer a case to the Prosecutor's Office for prosecution but are there times when you – when you've given information to get their take on something? Or their view of something without – like – doing a full investigation because you're concerned that maybe that'll be a waste of time because they won't take the case. I mean – have you ever done anything like that?

M Yeah – I send – yeah. Numerous times we send cases up for – for review and guidance for further – yeah.

J There – there's gotta be a working relationship between the Sheriff's Department and the Prosecutor's Office when they're back and forth about what's needed in a case. Sometimes they even direct further investigation and sometimes not, right? Is that fair?

M Right. Correct.

J So, I just want to understand the allegation. I'm not judging it. But I just wonder what's wrong with Teresa Berg's sending up the video tape and the reports and saying, "OK. I want your take on this (Prosecutor's Office) to tell us whether we need to go further." 'Cause going further involves – you know – interviewing minors and causing a lot of commotion basically, right?

M Because of discussion she had with me shortly after I sent her, I ran into her downtown shortly after I sent her the stuff. And she told me she reviewed it. She thought it was bad. She was gonna get one of her investigators on it. It's gonna be a mess. They were gonna have to do warrants and stuff. But she was takin' it from there.

J That's what she initially said.

M That's what initially she said. And then come to find out that the case sat for five weeks – not even assigned to anybody. And then it went up – what I read -- like I said – I'm not gonna second guess anybody. I don't know who she talked to or I – I didn't at all. But I'm saying from my perspective of when I – you know – there's nothin' wrong with sending cases up. I just find it bizarre that it -- rarely do we get a case of child abuse where it's on video tape. So that's what's surprising to me -- was – you know – whoa. I mean there's a girl in the video tape clearly says, "OK." Basically, "Enough. Somebody's gotta stop this." OK. Well, it's not all fun. It's -- you got a person in the classroom sayin' -- . I don't want – you know –

J But your – you – like – when you look at that tape – like – reasonable minds could not differ – like -- it's clearly child abuse and there's no other reasonable opinion. Is that -- is that how you see it?

M I see it -- it is clearly cruelty – it's clearly child cruelty and at a minimum child endangerment. Especially when it's occurring in a public classroom in a Reading/Math class. You know – again – takin' the context – where's the situation occurring at?

J So, then Teresa Berg sends it out and in your view not with a complete investigation having been done. Right?

M I don't know the entire. I -- my – I'm questioning why – I'm not sayin' "Oh, she did somethin' wrong." 'Cause Teresa is very competent. I'm talking – my allegation is, "Why? Why five weeks to assign this?" Why, why not interview some of the kids in the room at least?" -- you know – it's on video tape. The school supposedly didn't report. I didn't see anything in her report referencing the non-reporting. So I just had questions that I – and I don't know what she's dealing with on her end. Was she told to send it up then? I don't have any knowledge of that.

J So, but am I right that the allegation you're making is the reason why things were done this way, is because there was effort to protect Ed Troyer's friend, the teacher John Rossi?

M I believe there may be something to that. But again, I'm trying to find out those

J I understand that and I am too. So, I'm – I'm just wondering – like – we know that Ed Troyer went to high school with John Rossi.

JM It's Rossi.

J OK. You would know better than I. John Rossi, right? So we know he went to high school. I think he said that in the latest [inaudible] Other than the fact that John Rossi went to high school with Ed Troyer, what other evidence are you

aware of that there was a – an effort, a conspiracy or call it what you want – to protect Ed Troyer's friend from prosecution.

M All the content – just – what my complaint states it – I think – real clearly. This is what I have. OK? That's it. I mean you're not representing [inaudible] don't take offense to that.

J No. No. No. And then also I can tell you –

M And his – and him going to the Sheriff. 'K? If it's a conflict for Mike Ames to take a mandatory child abuse report, how is it not a conflict for Ed Troyer – in the same – in less than five minutes – to contact the Sheriff and tell 'em – "Look, this guy's my – this guy I know since high school. I know this guy." OK? But it's a conflict for me to take a mandated child abuse report and in the same breath he's sayin' "But, this is my guy." [inaudible]

J Just to understand that. Putting aside whether or not you have a conflict, OK? We'll get to that. In the time we have. But for Ed Troyer, is it a conflict that he's working on the matter in some way as a Public Information Officer and the person is someone he knows from high school? Like – just for example – if I called you up and I said, "Mike, I want to report a crime. There's been a shooting—you know -- on the corner of such and such street. I should also tell you – you know – it's Joe Jones and it turns he went to high school with Joe Jones." Can you take that report?

M Repeat. I – repeat it again.

J If I'm reporting a crime to you – 'K? Let's say it's a shooting. Something serious. And the person who's – who I'm reporting as the suspect is someone you, Michael, went to high school with, hypothetically. Could you take that report or would you have to say, "Well, I went to high school with the person. You need to talk to another detective."

M No. I could take that report. But I sure wouldn't go to the Sheriff and tell him.

J Wouldn't go to the Sheriff and tell 'em what?

M Well, with purpose – why would – why would the Sheriff even care? Why would the Sheriff even contact him?

J So, your -- your point is why is he giving the Sheriff the information that he went to high school with the person?

M Yeah. In the same – in minutes after he tells the Sheriff and Eileen, "Hey, there's a conflict here. Ames took this report." But then he emails the Sheriff immediately after; doesn't cc Eileen, there's a purpose in my opinion why he's making [inaudible]

J And if you go to page 26 of this document, it's Ed who first seems to be the person who raises a question as to whether there's a conflict in the fact that you were represented by Joan Mell. Is that right?

M --on the 26th, yeah.

J So he raises the issue --

M -- is there a conflict?

J Is there a conflict? Right.

M How's he sure she's gonna file a lawsuit? Same deal, you know.

J I'm sure she would file a lawsuit, being Joan.

M Well, yeah, how's he – how's he sure of that? You know –

J I don't know. Then the next page – 27 – it says – this is from Ed to Sheriff Pastor. "This is goin' to jump big. Also, FYI, the teacher in this I know. Went to high school with him. So that's the email you were talking about. And you – you find that odd that Ed Troyer's having to provide – or deciding to provide that information to the Sheriff?

M Kinda.

J And why is that odd?

M It – it – in my reading it – my personal opinion in reading it – raises a red flag. Is he trying to influence – some kind – get some kind of influence here 'cause this is a guy he knows.

J So tryin' to tell that we're his friend.

M Exactly.

J All right. And could it be another explanation of that (and I don't know the answer to this but) -- that it just is a name he's familiar with – it's John Ros – Rossi. And in some way he knows from high school so we decided to say, "Oh, I know this person. I know him from high school."

M It could be. I'm only goin' by what I'm readin.'

J Then there's – if you go to – page 32. All right. On page 32 on the bottom there's an email from Capt. Bomkamp to Chief Masko, copy to Chief Adamson. Do you see that?

M Yes.

J And it says, "Rob, I recall through reviewing the emails related to the Kopachuck case that because of the Undersheriff's comment below, I didn't pursue the issue with Mike writing the report. I agree that it smells because of Mike's attorney/client relationship with Joan Mell. Let's discuss the path forward tomorrow." OK? So you wrote that you "found this extremely disappointing and bullying and retaliation against me." That's what you wrote, right? And you believe that to be true, right?

M Yeah.

J Let's say that they apparently believe that there's something improper about the fact that the case was referred to you by Joan? Rightly or wrongly, right? What – what's – I just wanna understand what the retaliation is. Is the retaliation with the computer review and the press release? Anything else?

M The – the overtime issue.

J Oh, it's retaliation for the overtime issue. So because of that issue, they're retaliating by doing what? By conducting a – a misconduct investigation. Is that right?

M It's what it appears. And also by issuing a – or conspiring with the Prosecutor's Office to issue a press release. Is that the allegation?

M I think it's a – repeat that again 'cause I --

J You know – if you want to take a break – I'm going a long time, so –

M No, just –I've waited two years to get this [inaudible]

J I understand. I think I've asked, like -- the nature of the retaliation. Right? So, I understand the overtime lawsuit where there were accusations against Capt. Bomkamp and Masko.

M And Rob Masko was the investigator of the IA. And so he interviewed Brent Bomkamp. So, this here – that it "smells" – OK? So you got Masko and Bomkamp. What happened to the last IA? What were the results of that? Might want to check into that. Nothing. So – you know – what kind of – they say it smells that I have a relationship with Joan Mell. What would you think that these guys are doing?

J I don't know.

M Well, I think it's just continuing on -- based on this; based on what Russ told me; people conspiring against me.

J So, I don't want to put words in your mouth but I just want to understand it. So, in your view there's no basis for this conflict allegation. So the -- the fact that

they are opening or starting some kind of misconduct investigation is retaliation against you. Is that fair?

M Correct. I don't think there's any reasonable conflict investigation would have taken place here. I have the right as a citizen in the United States to obtain legal service from somebody; hire them for that service; have them successfully resolve my problem in less than 90 days; and go on with my life and take a mandatory report. Didn't matter if she called it; you called it; or a guy arrested three weeks ago. If you had a valid piece of evidence and I'm the one he calls. I've got a document. So – yeah. I don't – I don't see the conflict there. They paid me. Obviously I had a valid complaint. And they paid me quick. 'K? What am I left to assume other than that's a key part [inaudible]

J All right. I understand. And there's the press release, of course, as well.

M Exactly.

J All right. So, we talked about – you know -- the nature of the emails you –so let me ask you about that? Did you consider – what you're considering retaliation is the – the fact of the misconduct investigation. So let's just move from that for a minute and talk about specifically the review of your email. Right?

M 'K.

J And that's page – I guess it's 34, right? We're in the email that starts that.

M Alright.

J Email from Brent Bomkamp to Linda Girelle So is there anything wrong with accessing an employee's email as you understand in the Sheriff's Department?

M If you don't follow proper procedure there is. Absolutely.

J and – and are you saying that there was not proper procedure followed in this case?

M That's exactly what I'm saying.

J What was the procedure supposed to be and what was not followed?

M Their data investigation policy.

J And -- and you're handing me –

M -- the entire policy.

J This is the County policy?

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

MICHAEL AMES, Petitioner, vs. PIERCE COUNTY, Respondent.	NO. 13-2-13551-1 DECLARATION OF DEPUTY PROSECUTOR LORI KOOIMAN

I, Lori Kooiman, declare that I am over the age of 18, have personal knowledge of the matters set forth below, and I am competent to testify to the matters stated herein.

1. I am a Deputy Prosecuting Attorney assigned to the Criminal Division of the Pierce County Prosecutor's Office. I have been a Deputy Prosecutor with the Pierce County Prosecutor's Office for approximately fourteen years. I have tried numerous criminal cases, including sexual assault, murder, robbery, and many other crimes.

2. I, along with Deputy Prosecutor Timothy Lewis, represented the State of Washington in the matter *State of Washington vs. Lynn Dale Dalsing*, Pierce County Superior Court Case No. 10-1-05184-0.

3. In December of 2010, Lynn Dalsing was originally charged with child molestation in the first degree and sexual exploitation of a minor. Based upon the police

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955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160

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reports provided to me, as well as verbal representations by Pierce County Sheriff's Department personnel, I drafted and signed the declaration for determination of probable cause.

4. Gary Clower was the criminal defense attorney who represented Lynn Dalsing in the criminal case. He fails to acknowledge this in his April 23, 2014 declaration.

5. Some of the stock declarations filed in support of the petitioner's motion for reconsideration of the order on attorney fees include the statement, "I understand this case was set in motion when the Prosecutor's Office withheld dispositive exculpatory evidence in a criminal case from the defense." This "understanding" is completely wrong.

6. The declarations fail to specify any "dispositive exculpatory evidence."

7. The declarations fail to specify a criminal case, but appear to be referring to *State v. Lynn Dalsing.*

8. There was no "dispositive exculpatory evidence" in *State v. Lynn Dalsing.*

9. Lynn Dalsing is currently charged with two counts of rape of a child in the first degree (as an accomplice), three counts of child molestation in the first degree (as an accomplice) and three counts of sexual exploitation of a minor. Attached as Exhibit A is a true and accurate copy of the amended and re-filed information and supplemental declaration for determination of probable cause in the same case.

10. All evidence I was aware of, inculpatory and exculpatory, was disclosed to Lynn Dalsing's criminal defense attorney Clower.

11. On or about June 1, 2011, Clower contacted me and told me he believed that the adult woman posing with a child in a pornographic photograph was not his client, and that he was informed that the photograph was part of a known series of child pornography. By this

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date, Clower possessed a copy of the photograph. A police report I reviewed for charging identified the woman in the photograph as Lynn Dalsing.

12. On June 9, 2011, I received an email where Ames mentioned the difficulty of identifying Lynn Dalsing in the pornographic photograph because the face in the photo was not visible. This was apparent from the photograph itself, which Clower already possessed. In this email Ames also stated he had failed to connect Lynn Dalsing to the seized home computers containing child pornography.

13. When I learned that Ames failed to connect Lynn Dalsing to the computers that contained child pornography, I provided that information to Gary Clower. I told him this over the telephone and in person.

14. Lynn Dalsing was never charged with possession of child pornography.

15. After Ames failed to do follow up on the photograph in question, I contacted the Tacoma Police Department and asked them to send the photograph to the National Center for Missing and Exploited Children to determine whether it was from a known series of child pornography.

16. On July 13, 2011, I received notice that the photograph was from a known series of child pornography and therefore did not depict Lynn Dalsing.

17. On July 13, 2011, Deputy Prosecutor Lewis filed a motion to dismiss without prejudice in the Lynn Dalsing criminal case, *pending further investigation by law enforcement.* Attached as Exhibit B is a true and accurate copy of the July 13, 2011 motion and order for dismissal without prejudice in *State of Washington vs. Lynn Dale Dalsing,* Pierce County Superior Court Cause Number 10-1-05184-0.

18. Subsequent to the dismissal, further evidence was developed in the Lynn

Dalsing case, including a report by an expert that connects Lynn Dalsing to seized computers from the Dalsing home.

19. The expert's investigation of Lynn Dalsing's computer completely undermines Ames' prior claim that the seized home computers could not be connected to Lynn Dalsing.

20. Other additional evidence includes a report from a counseling session where Lynn Dalsing's daughter discloses that her mom walked in on her dad [Michael Dalsing] taking pornographic photographs of her. Dalsing's daughter said she knew her mom knew what her dad was doing to her and "she felt sad and betrayed."

21. Michael Dalsing was a convicted sex offender and Lynn Dalsing knew this when she allowed him unsupervised access to her daughter.

22. On July 29, 2011, Michael Dalsing pleaded guilty to three counts of rape of a child in the first degree, child molestation in the first degree, and child molestation in the third degree naming multiple victims.

23. On March 28, 2014, Lynn Dalsing was charged with two counts of rape of a child in the first degree (as an accomplice), three counts of child molestation in the first degree (as an accomplice), and three counts of sexual exploitation of a minor.

24. On April 10, 2014, the court found probable cause for the charges. Attached as Exhibit C is a true and accurate copy of the court's finding of probable cause in the same case.

25. On May 7, 2014, I reviewed a transcript of an interview between Mike Ames and Jeffrey Coopersmith that was recorded on April 1, 2013. During the course of the interview, Mike Ames talks about a meeting he had with me and Deputy Prosecutor Timothy Lewis on June 13, 2011, regarding the *Dalsing* case. During the course of the interview, Ames made many false statements about his interactions with Tim Lewis and me.

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I declare under penalty of perjury of the laws of the State of Washington the foregoing to be true and correct.

EXECUTED this 12th day of May, 2014, at Tacoma, Pierce County, Washington.

MARK LINDQUIST
Prosecuting Attorney

LORI KOOIMAN
State Bar Number 30370
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

MICHAEL AMES, Petitioner, vs. PIERCE COUNTY, Respondent.	NO. 13-2-13551-1 DECLARATION OF DEPUTY PROSECUTOR TIMOTHY LEWIS

I, Timothy Lewis, declare that I am over the age of 18, have personal knowledge of the matters set forth below, and I am competent to testify to the matters stated herein.

1. I am a Deputy Prosecuting Attorney assigned to the Criminal Division of the Pierce County Prosecutor's Office. I currently head the Misdemeanor Unit of the Prosecutor's Office, supervising 34 employees. I have prosecuted many types of crimes, including murder, sexual assault, burglary, and many others. I have been a Deputy Prosecutor with the Pierce County Prosecutor's Office for approximately eleven years.

2. I, along with Deputy Prosecutor Lori Kooiman, represented the State of Washington in the matter *State of Washington vs. Lynn Dalsing*, Pierce County Superior Court Case No. 10-1-05184-0.

3. In December of 2010, Lynn Dalsing was originally charged with child

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955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160

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molestation in the first degree and sexual exploitation of a minor.

4. Gary Clower was the criminal defense attorney who represented Lynn Dalsing in the criminal case. He fails to acknowledge this in his April 23, 2014 declaration.

5. Some of the stock declarations filed in support of the petitioner's motion for reconsideration of the order on attorney fees include the statement, "I understand this case was set in motion when the Prosecutor's Office withheld dispositive exculpatory evidence in a criminal case from the defense." This "understanding" is completely wrong.

6. The declarations fail to specify any "dispositive exculpatory evidence."

7. The declarations fail to specify a criminal case, but appear to be referring to *State v. Lynn Dalsing.*

8. There was no "dispositive exculpatory evidence" in *State v. Lynn Dalsing.*

9. Lynn Dalsing is currently charged with two counts of Rape of a Child in the First Degree (as an accomplice), three counts of Child Molestation in the First Degree (as an accomplice) and three counts of Sexual Exploitation of a Minor. Attached as Exhibit A is a true and accurate copy of the amended and re-filed information and supplemental declaration for determination of probable cause in the same case.

10. All evidence I was aware of, inculpatory and exculpatory, was disclosed to Lynn Dalsing's criminal defense attorney Clower.

11. On or about June 1, 2011, Clower contacted me twice and told me that he did not think that the adult woman posing with a child in a pornographic photograph was his client, and later stated that Michael Dalsing told him that the photograph was part of a preexisting series of child pornography. By this date, Clower possessed a copy of the photograph. A police report identified the woman in the photograph as Lynn Dalsing.

12. On June 9, 2011, I was copied on an email where Ames mentioned the difficulty of identifying Lynn Dalsing in the pornographic photograph because the face in the photo was not visible. In this email Ames also stated he had failed to connect Lynn Dalsing to the seized home computers containing child pornography.

13. Lynn Dalsing was not charged with child pornography.

14. On July 13, 2011, I filed a motion to dismiss without prejudice in the Lynn Dalsing criminal case, *pending further investigation by law enforcement.* Attached as Exhibit B is a true and accurate copy of the July 13, 2011 motion and order for dismissal without prejudice in *State of Washington vs. Lynn Dale Dalsing*, Pierce County Superior Court Cause Number 10-1-05184-0.

15. Subsequent to the dismissal, further evidence was developed in the Lynn Dalsing case, including a report by an expert that connects Lynn Dalsing to seized computers from the Dalsing home.

16. The expert's investigation of Lynn Dalsing's computer completely undermines Ames' prior claim that the seized home computers could not be connected to Lynn Dalsing.

17. Other additional evidence includes a report from a counseling session where Lynn Dalsing's daughter discloses that her mom walked in on her dad [Michael Dalsing] taking pornographic photographs of her. Dalsing's daughter said she knew her mom knew what her dad was doing to her and "she felt sad and betrayed."

18. Michael Dalsing was a convicted sex offender and Lynn Dalsing knew this when she allowed him unsupervised access to her daughter.

19. On July 29, 2011, Michael Dalsing pleaded guilty to three counts of rape of a child in the first degree, child molestation in the first degree, and child molestation in the third

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955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160

degree.

20. On March 28, 2014, Lynn Dalsing was charged with two counts of rape of a child in the first degree (as an accomplice), three counts of child molestation in the first degree (as an accomplice), and three counts of sexual exploitation of a minor.

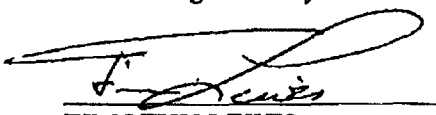
21. On April 10, 2014, the court found probable cause for the charges. Attached as Exhibit C is a true and accurate copy of the court's finding of probable cause in the same case.

22. On May 9, 2014, I reviewed a transcript of an interview between Mike Ames and Jeffrey Coopersmith that was recorded on April 1, 2013. During the course of the interview, Mike Ames talks about a meeting he had with me and Deputy Prosecutor Lori Kooiman on June 13, 2011, regarding the *Dalsing* case. During the course of the interview, Ames made many false statements about his interactions with Lori Kooiman and me.

I declare under penalty of perjury of the laws of the State of Washington the foregoing to be true and correct.

EXECUTED this 12th day of May, 2014, at Tacoma, Pierce County, Washington.

MARK LINDQUIST
Prosecuting Attorney



TIMOTHY LEWIS
State Bar Number 33767
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160

Appendix C - Exculpatory E-mail

From: Mike Ames
Sent: Thursday, October 18, 2012 11:38
To: James Richmond
Subject: FW: Dalsing case #10-2510339

Michael Ames CFCE,CFE
Computer Crimes Unit
Pierce County Sheriff's Dept.
mames1@co.pierce.wa.us
253-377-8438

From: Mike Ames
Sent: Friday, July 20, 2012 10:23 AM
To: Mike Ames
Subject: FW: Dalsing case #10-2510339

Michael Ames CFCE,CFE
Computer Crimes Unit
Pierce County Sheriff's Dept.
mames1@co.pierce.wa.us
253-377-8438

From: Lori Koolman
Sent: Friday, June 10, 2011 1:17 PM
To: Mike Ames; Debbie Heishman
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

We're available at 9:00 on Monday. Meet you at your department. Thanks.

From: Mike Ames
Sent: Friday, June 10, 2011 12:43 PM
To: Lori Koolman; Debbie Heishman
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

I am available Monday at 9 or 1:30 in the afternoon. Tuesday morning til noon. If any of those times work.

Mike

From: Lori Koolman
Sent: Thursday, June 09, 2011 4:19 PM
To: Debbie Heishman; Mike Ames
Cc: Timothy Lewis
Subject: RE: Dalsing case #10-2510339

We will have to meet, all of us, early next week and go through the evidence. I think you're missing the boat to some degree Mike, as he did not plead to any of the child porn, he pled to raping four kids. I do have to provide

your e-mail to defense. I do want to discuss some of your assertions.

Lori

From: Debbie Heishman
Sent: Thursday, June 09, 2011 2:58 PM
To: Lori Koolman
Subject: FW: Dalsing case #10-2510339

This is from Mike ,,,duh
Debbie

From: Mike Ames
Sent: Thursday, June 09, 2011 12:27 PM
To: Debbie Heishman
Subject: RE: Dalsing case #10-2510339

No, it appeared that he was the computer person. There is no way you can get by the defense that she will use which will be it was him and especially now that he is pleading to it. I could easily link him to the child porn but not her. No way do I want to go back into that case to look for something that I cannot prove. Definately no link to her and the child porn other than that one picture but we can't see her so no way to prove that either. I did look hard at the porn that was downloaded from the internet and nothing leads back to her. I did look at that angle too especially after I found that one picture.

Good Job on the case though and am very glad these monsters are going away!

Mike

From: Debbie Heishman
Sent: Thursday, June 09, 2011 11:07 AM
To: Mike Ames
Subject: Dalsing case #10-2510339

Mike,
Howdy you fabulous computer guy... Both the bad men in this case have pled guilty - one will go away for life??!!
The female is not being so smart. Pros. are wondering if you were able to tell if Lynn Dalsing had any type of account or files on the computers so we can charge her with the possession also?
Thanks
Grammy

Detective D. Heishman #205
Pierce County Sheriff
Special Assault Unit
930 Tacoma Ave So
Tacoma, WA 98402
253 798-7713

Appendix D - Richmond 2014 Dec. in Ames

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

MICHAEL AMES, Petitioner, vs. PIERCE COUNTY, Respondent.	NO. 13-2-13551-1 DECLARATION OF JAMES P. RICHMOND

I, James P. Richmond, declare that I am over the age of 18, have personal knowledge of the matters set forth below, and I am competent to testify to the matters stated herein.

1. I am a Deputy Prosecuting Attorney assigned to the Civil Division of the Pierce County Prosecutor's Office. I represent Pierce County in the matter of *Lynn Dalsing v. Pierce County*, King County Superior Court Case No. 12-2-08659-1. I have been an attorney for 32 years.

2. In preparation for the civil case, I met with Michael Ames on October 12, 2012, and discussed the police reports and Ames' computer forensic investigation. There was no discussion at that meeting about the June 9, 2011, email exchange involving Ames, Det. Heishman, and Deputy Prosecutors Lori Kooiman and Tim Lewis in the criminal case. Ames forwarded the June 9, 2011 email exchange to me on October 18, 2012, nearly a week after our meeting. There was no cover memo or other explanation for forwarding this material. I

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

reviewed it, considered it to be attorney work product, and retained it with other materials pertaining to the litigation. Contrary to petitioner's repeated claims in the current case, I have never denied receiving the June 9, 2011, email. Instead, I stated that it was not given to me at the October 12, 2012 meeting.

3. Rather than raising his concerns with me or others in my office about work product objections made at Ames' February 14, 2013, deposition, Ames consulted with attorney Joan Mell, who telephoned me on February 21, 2013, and announced that she was representing Ames and that there was an "unresolved conflict." When asked to explain the unresolved conflict she stated that attorney-client privilege prevented her from discussing the details that gave rise to her claim that there was an unresolved conflict. Ms. Mell cut the call short claiming she had a client appointment, leaving me without an explanation.

4. Then, in an effort to have Pierce County pay attorney fees he owed Mell, Ames filed in the *Dalsing* civil case a 7/13/13 declaration which falsely included the following at paragraph 1.5:

> Mr Richmond told me that the email I turned over to him from Lori Kooiman in October 2012 was "exculpatory" regarding my involvement in this case. He also told me that it would clear me of any wrong doing in the case and he would see to it that it was turned over as part of discovery.

I was astonished to read this as I had never told Ames any such thing.

5. On July 17, 2013, I filed a responsive declaration stating at paragraph 2, "Mr. Ames' reply declaration in support of his motion to compel payment of his attorney's fees and costs contains false assertions made under oath about Mr. Ames' interactions with the Prosecutor's office." This declaration was to become one of the documents which the criminal division of the office later determined was potential impeachment evidence concerning Ames, because it constituted a deputy prosecutor directly challenging the officer's

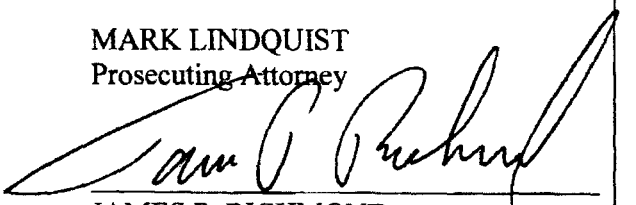
Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

credibility. I discussed Ames' falsehoods in detail in later paragraphs of that declaration. Ames' claim that we discussed the referenced email exchange and that I told him it was "exculpatory" as to him is absolutely untrue.

I declare under penalty of perjury of the laws of the State of Washington the foregoing to be true and correct.

EXECUTED this 12th day of May, 2014, at Tacoma, Pierce County, Washington.

MARK LINDQUIST
Prosecuting Attorney



JAMES P. RICHMOND
State Bar Number 15865
Pierce County Prosecutor / Civil
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402-2160
Ph: 253-798-4265 / Fax: 253-798-6713

Appendix E - New Hampshire Supreme Court

2016 WL 1069042
Supreme Court of New Hampshire.

Officer John Gantert

Gantert v. City of Rochester

Supreme Court of New Hampshire. March 18, 2016 --- A.3d ---- 2016 WL 1069042 41 IER Cases 280 *(Approx. 10 pages)*

City of Rochester & a.

No. 2015–0062
Argued: October 8, 2015
Opinion Issued: March 18, 2016

Synopsis

Background: Police officer brought action against city, police department, and police commission, asserting claims for tortious interference with prospective advantageous business relations, violations of his procedural due process rights, and damage to his reputation. The Superior Court, Rockingham County, Wageling, J., granted summary judgment to defendants, and officer appealed.

Holdings: The Supreme Court, Lynn, J., held that:
1 police officer was provided sufficient due process pursuant to the State Constitution before being placed on county's "Laurie list" of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to State v. Laurie, and
2 no basis existed to remove officer from county's "Laurie list."

Affirmed.

West Headnotes (8)

Change View

Change View

1 **Criminal Law** Particular Types of Information Subject to Disclosure
Criminal Law Information Within Knowledge of Prosecution
Prosecutors have a duty to disclose both exculpatory information and information that may be used to impeach the State's witnesses; this duty extends to information known only to law enforcement agencies, such as information located in police officers' confidential personnel files.

2 **Constitutional Law** Procedural due process in general
The Supreme Court engages in a two-part analysis in addressing procedural due process claims: first, it determines whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, it determines what process is due. N.H. Const. pt. I, art. 15.

3 **Constitutional Law** Fairness in general
The ultimate standard for judging a due process claim is the notion of fundamental fairness; fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play. N.H. Const. pt. I, art. 15.

Secondary Sources

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case

Out of Plan

86 A.L.R.3d 1170 (Originally published in 1978)

...This annotation collects and analyzes the cases in which the courts have discussed or decided whether, or under what circumstances, a defendant in a criminal proceeding is entitled to discovery or insp...

Constitutional duty of federal prosecutor to disclose Brady evidence favorable to accused

Out of Plan

158 A.L.R. Fed. 401 (Originally published in 1999)

...This annotation collects and analyzes those federal court cases that have discussed when the failure of a federal prosecutor to either absolutely or timely disclose Brady evidence favorable to one accu...

S 20.06. PROCEDURAL DUE PROC[illegible] AND THE OPS PROCEDURES.

Out of Plan

12 E. Min. L. Found. § 20.06

...Even though NGPSA and HLPSA do not require formal adjudicatory hearings before civil penalties are assessed, due process may require these procedures. The due process clause protects individuals from t...

See More Secondary Sources

Briefs

Appellee's Brief

2001 WL 34093221
Jewel HARRISON, Petitioner and Appellant, v. Bill LOCKYER, et. al, Respondents and Appellees.
United States Court of Appeals, Ninth Circuit.
May 23, 2001

...This appeal is from the dismissal of a petition for writ of habeas corpus, in which appellant Jewel Harrison claimed a violation of his due process rights under Brady v. Maryland, 373 U.S. 83 (1963). T...

Petition for a Writ of Certiorari

2007 WL 4466874
Kenneth J. GRAHAM, Petitioner, v. UNITED STATES, Respondent.
Supreme Court of the United States
Dec. 17, 2007

...FN* Counsel of Record Petitioner Kenneth J. Graham was a defendant and an appellant below. Kyle Dresbach, represented by separate counsel, was also a defendant and an appellant below. We have been advi...

Brief of Plaintiff/Appellant

Out of Plan

2007 WL 5157629
Elvert S. BRISCOE, Jr.-, Plaintiff/Appellant, v. Tonnesha S. JACKSON, et al.-, Defendant/Appellees.
United States Court of Appeals, Sixth Circuit.
May 14, 2007

...A court of appeals reviews a §1915(e) dismissal denovo. Dotson v. Wilkinson, 329 F3d at 466; McGore v. Wrigglesworth, 114 F3d 604. A pro-se complaint, however inartfully pleaded, is held to less string...

4 **Constitutional Law** er particular proceedings
Privileged Communications and Confidentiality Personnel files
Public Employment Records; Personnel Files
Police officer was provided sufficient due process pursuant to the State Constitution before being placed on county's "Laurie list" of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to *State v. Laurie*; while officer had a privacy interest in his reputation and ability to continue work unimpeded as a police officer, procedures followed by the police department were not unfair, in that officer had the opportunity to meet with police chief before a final decision was made, officer had multiple opportunities to be heard by the investigating officer, the chief, and the police commission, and the government had a great interest in placing on the "Laurie List" officers whose confidential personnel files may contain exculpatory information. N.H. Const. pt. I, art. 15.

5 **Constitutional Law** Factors considered; flexibility and balancing
In considering a challenge to an alleged procedural due process violation, to determine what process is due, the Supreme Court balances three factors: (1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements. N.H. Const. pt. I, art. 15.

6 **Constitutional Law** Factors considered; flexibility and balancing
The requirements of due process are flexible and call for such procedural protections as the particular situation demands. N.H. Const. pt. I, art. 15.

7 **Privileged Communications and Confidentiality** Personnel files
The interest of individual officers in their reputations and careers is such that there must be some post-placement mechanism available to an officer to seek removal from the county's "Laurie list" of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to *State v. Laurie* if the grounds for placement on the list are thereafter shown to be lacking in substance.

8 **Privileged Communications and Confidentiality** Personnel files
No basis existed to remove officer from county's "Laurie list" of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to *State v. Laurie*; even though arbitrator found officer did not intentionally falsify police report, it was clear from officer's own admission that he supplied answers on the report that he had no basis to believe were true, which was enough of a reflection on his general credibility to trigger at least a prosecutor's obligation to disclose such information to a court for in camera review in a case in which the officer would appear as a state witness.

Rockingham

Attorneys and Law Firms

Wilson, Bush, Durkin & Keefe, P.C., of Nashua (Charles J. Keefe on the brief and orally), for the plaintiff.

Terence M. O'Rourke, city attorney, by memorandum of law and orally, for the defendants.

Joseph A. Foster, attorney general (Patrick J. Queenan, assistant attorney general, on the brief and orally), for the State, as amicus curiae.

Opinion

LYNN, J.

*1 The plaintiff, Officer John Gantert, appeals an order of the Superior Court (*Wageling*, J.) granting summary judgment to the defendants, the City of Rochester, the Rochester Police Department, and the Rochester Police Commission, on the plaintiff's claims of tortious interference with prospective advantageous business relations, violations of his procedural due process rights, and damage to his reputation. All of his claims arise out of the defendants' alleged wrongful placement of the plaintiff on a so-called "Laurie List" [1] without affording him sufficient procedural due process. Because we find that the procedures afforded to the plaintiff in this case were adequate, we affirm the trial court's judgment.

I

The trial court found, or the parties agreed to, the following facts. [2] The plaintiff began working as a police officer in Rochester in March 2005. For six years he was viewed as a "good and productive officer" and had no disciplinary actions reflected in his personnel file. Upon beginning his shift on March 24, 2011, the plaintiff was instructed to assist another officer in booking an individual arrested for domestic violence. As part of the department's standard operating procedure in domestic violence cases, an officer interviews the victim and fills out a Lethality Assessment Protocol form (LAP), which assists in gauging the degree of violence and potential danger to the victim.

The LAP consists of a series of questions about past threats or violence committed by the accused, and the accused's access to weapons. The questions can be responded to with yes, no, or not answered. If a certain number of questions are answered "yes," the victim is considered to face a higher risk of lethal violence, and a protocol of assisting the victim is triggered. The LAP is also used to assist the court in determining the amount and conditions of bail.

Before ending his shift, the arresting officer had interviewed the victim, completed the LAP, and sent it to the county attorney. The plaintiff was not aware that the LAP had been completed and incorrectly believed that, pursuant to departmental policy, it was required to be sent to the county attorney with the rest of the arrest paperwork. After unsuccessfully attempting to contact the arresting officer or the victim, the plaintiff watched a videotaped interview of the victim by the arresting officer and completed a second LAP based upon information he learned from the interview. If a question on the LAP could be answered affirmatively based upon the video, he answered "yes"; if a question could not be so answered, he answered "no." The interview, which pertained only to the incident for which the accused had been arrested, did not cover many of the questions on the LAP, which mainly ask about past acts or behaviors.

*2 This resulted in the LAP completed by the plaintiff being materially different from the one completed by the arresting officer. The original LAP, completed with information from the victim, resulted in almost all of the questions being answered "yes," which triggered the protocol; the LAP completed by the plaintiff had almost all "no" answers, which would not trigger the protocol. The plaintiff signed the arresting officer's name and sent the second LAP to the county attorney. At no time did the plaintiff consult with a superior or another employee as to how to proceed in light of the fact that he had no knowledge of the answers to many of the LAP questions.

The county attorney discovered the conflicting LAPs and referred the matter to the Rochester Police Department. Lieutenant Toussaint investigated, conducting interviews with the plaintiff and other officers. According to Toussaint's report, the plaintiff "admitted that the LAP form questions were not answered in the interview" that he reviewed. The plaintiff "stated that he knew" that "none of the LAP questions had been covered" in the recorded interview and "that he made his best guess about the answers based upon the demeanor of the victim in the videotaped statement." When asked why he had put incorrect information on the LAP, the plaintiff stated that "he had no information to work with and that he knew that the LAP form was required to be sent to the County Attorney's Office."

Toussaint found that the plaintiff violated two departmental policies: Standard Operating Procedure 26.1.4, Subsection D.1.d, "Unsatisfactory Job Performance"; and Standard Operating Procedure 26.1.4, Subsection D.3.e, "Falsification of any reports, such as, but not limited to, vouchers, official reports, time records, leave records, or knowingly mak[ing] any false official statements." His report was forwarded to Deputy Police Chief Allen, who agreed with the findings and recommended that the plaintiff's employment be terminated.

This decision was forwarded to Chief Dubois, who concurred and wrote a letter to the plaintiff notifying him that he intended to recommend termination to the police commission. The plaintiff asked the chief if there was another possible resolution to the matter, to which he recalls the chief responding, "Nothing you can say or do will make me change my mind about this." The chief also notified the plaintiff that his actions could be "*Laurie* material" and that he intended to notify the county attorney. The chief scheduled a meeting with the plaintiff to provide him with an opportunity to discuss the chief's intent to notify the county attorney's office of the fact that the plaintiff's personnel file could contain *Laurie* material; citing advice from union counsel, the plaintiff declined to attend. The chief and the union agreed that the chief would not notify the county attorney of the *Laurie* issue until after the police commission made a final decision.

On June 16, 2011, the Rochester Police Commission voted to uphold the chief's decision to terminate the plaintiff's employment. After this decision, the chief sent a letter to the county attorney stating that "the Rochester Police Department has an internal affairs file which could possibly be construed to contain issues relevant to *State v. Laurie*. This file affects [the plaintiff]."

Pursuant to the collective bargaining agreement (CBA) between the city and the police union, the plaintiff challenged his discharge before the New Hampshire Public Employee Labor Relations Board (PELRB), which selected an arbitrator. Following a hearing, the arbitrator found that the Rochester Police Department "had just cause to discipline [the plaintiff] for entering false information [on] the LAP report and not following proper protocol," but that "discharge [was] too great a penalty in this case." The arbitrator found that the plaintiff's actions implicated his honesty and integrity, but he "did not intentionally falsify the LAP form." Given the plaintiff's statements during the investigation, we interpret this to mean that, although the plaintiff had no intent to deceive, he did know that he was providing information that could be incorrect. Although acknowledging that the chief stated that he would not hire an officer on the "Laurie List," the arbitrator stated that *Laurie* does not require the discharge of untruthful officers and noted that the conduct by the officer in *Laurie* was much more severe. These circumstances, coupled with the fact that the submission of the inaccurate LAP was an isolated incident and the plaintiff had no other disciplinary problems in the past, led the arbitrator to reduce the discipline to a suspension without pay from June 16 to November 7, 2011. The arbitrator did not rule on the "Laurie List" issue, stating that "[w]hether [the plaintiff] shall remain Laurie listed is beyond the Arbitrator's authority."

***3** After the arbitrator's decision, the plaintiff requested that both the chief and the county attorney remove his name from the "Laurie List." Both declined.

The plaintiff then brought this suit against the defendants in superior court. He claimed that the defendants placed him on the "Laurie List" without proper procedural due process, and sought damages and injunctive relief to remove his name from the "Laurie List." The defendants objected. The trial court construed the parties' memoranda of law as cross-motions for summary judgment and ruled in favor of the defendants. The court found that the plaintiff had a constitutionally protected interest and was therefore entitled to due process. After balancing the competing interests at stake, however, it found that the plaintiff had received sufficient due process. This appeal followed.

II

1 We have recently explained the background and operation of "Laurie Lists." *See Duchesne v. Hillsborough County Attorney,* 167 N.H. 774, 777–82, 119 A.3d 188 (2015). As relevant here, prosecutors have a duty to disclose "both exculpatory information and information that may be used to impeach the State's witnesses." *Id.* at 777, 119 A.3d 188; *see also Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This duty extends to information known only to law enforcement agencies, such as information located in police officers' confidential personnel files. *Duchesne,* 167 N.H. at 777–78, 781–82, 119 A.3d 188. After we granted a criminal defendant a new trial due to the prosecution's failure to disclose information found in a police officer's employment files and records, *see State v. Laurie,* 139 N.H. 325, 327, 333, 653 A.2d 549 (1995), law enforcement authorities in this state began developing "Laurie Lists" to share information regarding officer conduct between police and prosecutors. *Duchesne,* 167 N.H. at 778–79, 119 A.3d 188.

In 2004, the Attorney General issued a memorandum (Memo) to all county attorneys and law enforcement agencies in the state, which aimed to "develop a standardized method for

identifying and dealing with potential *Laurie* material," including "information contained in confidential police personnel files and internal investigations files." The Memo identified several categories of conduct that should generally be considered potential *Laurie* material:

- any sustained instance where an officer deliberately lied during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigation;
- any sustained instance when an officer falsified records or evidence;
- any sustained instance that an officer committed a theft or fraud;
- any sustained instance that an officer engaged in an egregious dereliction of duty ...;
- any sustained complaint of excessive use of force;
- any instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment.

Pursuant to the Memo, such material "must be retained in the officer's personnel file so that it is available for *in camera* review by a court and possible disclosure to a defendant in a criminal case."

Because police personnel files are generally confidential by statute, *see* RSA 105:13–b (2013), the Attorney General recognized in the Memo that prosecutors must rely upon police departments to identify *Laurie* issues. He advised that law enforcement agencies should notify the county attorney, in writing, "whenever a determination is made that an officer has engaged in conduct that constitutes *Laurie* material." He placed responsibility on county attorneys to compile a confidential, comprehensive list of officers within each county who are subject to possible *Laurie* disclosure—the so-called "Laurie List." The county attorney is also informed if one of these officers leaves his or her law enforcement agency for another position.

***4** The Memo included a sample policy and procedure for police departments to identify and retain *Laurie* material in their files. First, the deputy chief reviews all internal investigation files, including investigations conducted by other police personnel, and determines whether the incident involves any of the categories of conduct identified as potential *Laurie* material. If so, the deputy chief sends a memorandum to the chief, who reviews it and determines whether the incident constitutes a *Laurie* issue. If it does, the chief notifies the officer involved, who may request a meeting with the chief to present facts or evidence. After the chief makes a final decision, the chief notifies the county attorney if the incident is ultimately determined to constitute a *Laurie* issue.

The Rochester Police Department has adopted the procedure outlined in the Memo in its Standard Operating Procedures. The plaintiff acknowledges that the only difference between the procedure provided for in the Memo and the procedure utilized in this case is that he had an additional hearing before the Rochester Police Commission before the chief notified the county attorney that his file contained potential *Laurie* material.

III

On appeal, the plaintiff argues that the trial court erred in finding that: (1) the procedures established by the Attorney General's Memo provide sufficient due process, pursuant to Part I, Article 15 of the New Hampshire Constitution, before an officer is placed on the "Laurie List"; and (2) the plaintiff received sufficient procedural due process in this case. The defendants argue that the process afforded the plaintiff is constitutionally sufficient and that the trial court properly granted summary judgment to the defendants.

As noted above, the plaintiff received the procedures established by the Memo and an additional hearing before the police commission. For this reason, to the extent there is a meaningful difference between the procedure contemplated by the Memo and that which occurred here, the plaintiff received *more* process in this case. We thus need address only the plaintiff's second argument—whether the process he received in this case comports with the requirements of constitutional due process. Because this argument raises a question of constitutional law, our review is *de novo*. *See State v. Veale*, 158 N.H. 632, 636, 972 A.2d 1009 (2009).

2 3 Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject

shall be ... deprived of his property, [illegible]unities, or privileges ... or deprived of his life, liberty, or estate, but by ... the law of the land." N.H. CONST. pt. I, art. 15. We have held that "law of the land" means due process of law. *Veale*, 158 N.H. at 636, 972 A.2d 1009. "We engage in a two-part analysis in addressing procedural due process claims: first, we determine whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, we determine what process is due." *Doe v. State of N.H.*, 167 N.H. 382, 414, 111 A.3d 1077 (2015). "The ultimate standard for judging a due process claim is the notion of fundamental fairness." *Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320, 855 A.2d 1278 (2004). "Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play." *Id.*

4 5 6 Here, the defendants do not dispute that the plaintiff has an interest sufficient to entitle him to due process. The question before us, therefore, is what process is due. To determine what process is due, we balance three factors: (1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements. *Doe*, 167 N.H. at 414, 111 A.3d 1077. "The requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Id.* (quotation omitted).

***5** The private interest affected, as the trial court found, is the plaintiff's "reputation and ability to continue to work unimpeded as a police officer." As we stated in *Duchesne:*

> Although the "Laurie List" is not available to members of the public generally, placement on the list all but guarantees that information about the officers will be disclosed to trial courts and/or defendants or their counsel any time the officers testify in a criminal case, thus potentially affecting their reputations and professional standing with those with whom they work and interact on a regular basis.

Duchesne, 167 N.H. at 783, 119 A.3d 188. We have held that an interest in one's reputation, particularly in one's profession, is significant and that governmental actions affecting it require due process. *See Veale*, 158 N.H. at 638–39, 972 A.2d 1009; *Petition of Bagley*, 128 N.H. 275, 284, 513 A.2d 331 (1986) ("The general rule is that a person's liberty may be impaired when governmental action seriously damages his standing and associations in the community."); *cf. Clark v. Manchester*, 113 N.H. 270, 274, 305 A.2d 668 (1973) (holding that an employee was not entitled to due process, in part, because he failed to show "that the governmental conduct likely will ... seriously damage his standing and associations in this community ... [or] impose a stigma upon the employee that will foreclose future opportunities to practice his chosen profession" (quotation omitted)). Here, we agree that the private interest is significant.

The plaintiff argues that the procedure used "creates a great risk" of erroneous deprivation of his interest because he did not have "a full and fair opportunity to be heard." He contends that, although officers have an opportunity to meet with the chief prior to being placed on the "Laurie List," this occurs only after findings and determinations have been made at other levels of the department, leaving the officer with the task of trying to undo these conclusions. He further argues that officers are never given a hearing before an impartial tribunal. In his case, the plaintiff had a hearing before the Rochester Police Commission, but he argues that the police commission is not neutral given its ties to the police department. The plaintiff contends that a hearing that provides the ability to review evidence offered against him, present evidence of his own, cross-examine witnesses, and be represented by counsel, would be a proper procedure and would be the best method to "reach the truth of a matter" regarding a "Laurie List" issue.

The second factor tasks us to consider "the risk of erroneous deprivation of [the private] interest through the procedure used and the probable value of any additional or substitute procedural safeguards." *Doe*, 167 N.H. at 414, 111 A.3d 1077. The plaintiff has not clearly articulated how or why the procedures followed by the Rochester police were unfair; nor has he shown that there was a true risk of *erroneous* deprivation of his interests.

The plaintiff spoke with the officer conducting the internal investigation and had the opportunity to explain his version of what had occurred. He also had the opportunity to

meet with the chief before a final decision was made. Even accepting the plaintiff's assertion that the chief told him before their scheduled meeting that his mind was already made up—a circumstance that could raise concerns about the fairness of the proceeding—we note that the chief did not have the final word, as the ultimate decision was made by the police commission. Moreover, the chief did not conduct the investigation or make the initial findings, which the plaintiff does not claim were unfair or biased.

*6 To the extent the plaintiff argues that this process is inherently biased against him, we do not find this argument persuasive. The plaintiff had multiple opportunities to be "heard"—by the investigating officer, the chief, and the police commission. His real complaint about the procedure appears to be that he does not agree with the decisions made by these various officials. The procedure he advocates might be more in-depth, but it is not clear that it would add significantly to the accuracy of outcomes versus the procedure already in place. *See Appeal of Silverstein*, 163 N.H. 192, 200, 37 A.3d 382 (2012) (holding that procedure whereby final decision on termination of public school teacher was made by the school board rather than a neutral third party, such as an arbitrator, did not offend due process).

Next we examine the government's interest. *Doe*, 167 N.H. at 414, 111 A.3d 1077. We recognize that "the prosecutorial duty that spawned the creation and use of 'Laurie Lists' is of constitutional magnitude." *Duchesne*, 167 N.H. at 780, 119 A.3d 188. The government has a great interest in placing on the "Laurie List" officers whose confidential personnel files may contain exculpatory information. *See Laurie*, 139 N.H. at 330, 653 A.2d 549 (holding that New Hampshire Constitution affords greater protection to criminal defendants and requires the State to prove beyond a reasonable doubt that the undisclosed exculpatory evidence would not have affected the verdict).

After balancing these interests, we conclude that the plaintiff was afforded sufficient process before he was placed on the "Laurie List." Given the government's strong interest in meeting its constitutional *Brady* obligation, and its interest in not delaying placement of officers on the list, the procedures implemented in this case struck the proper balance. Here, there was an internal investigation—which the plaintiff does not allege was unfairly or improperly conducted—two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission. There is no need for a more formalized hearing or additional process *before* an officer is placed on the "Laurie List."

7 However, as we explained in *Duchesne*, the interest of individual officers in their reputations and careers is such that there must be some *post-placement* mechanism available to an officer to seek removal from the "Laurie List" if the grounds for placement on the list are thereafter shown to be lacking in substance, as was the case in *Duchesne*. In *Duchesne*, we recognized that after an officer is placed on the "Laurie List," he may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis. *Duchesne*, 167 N.H. at 784–85, 119 A.3d 188. In *Duchesne*, the findings by the arbitrator and the attorney general showed that the officers had not engaged in the conduct for which they were placed on the list. *Id.* at 784, 119 A.3d 188. Because the initial decision of the chief of police was reversed, there was no justification for keeping the officers on the "Laurie List." *Id.* at 784–85, 653 A.2d 549.

8 Here, unlike in *Duchesne*, there is a basis for keeping the plaintiff on the list. Although the arbitrator found that the plaintiff did not intentionally falsify the LAP, it is clear from his own admission that he supplied answers on the LAP that he knew he had no basis to believe were true. This is certainly enough of a reflection on the plaintiff's *general credibility* to trigger at least a prosecutor's obligation to disclose such information to a court for *in camera* review in a case in which the plaintiff will appear as a state witness. [3] *See id.* at 783–84, 119 A.3d 188.

*7 The plaintiff suggests that the employment disciplinary process culminating in the arbitration is distinct from the "Laurie List" designation process and, as such, officers should be provided a separate hearing dealing solely with the *Laurie* issue. We find this argument unpersuasive because both the discipline and the "Laurie List" designation were predicated on the same underlying conduct of the plaintiff.

In *Duchesne*, we held that the trial court erred in not ordering the removal of officers from the "Laurie List" because the original allegation of misconduct "ha[d] been determined to be unfounded," so there was "no sustained basis for the petitioners' placement on the 'Laurie List.' " *Id.* at 784–85, 119 A.3d 188. Crucial to our holding was that "the chief's decision was

overturned by an arbitrator, a neutral fact-finder, following a full hearing conducted pursuant to procedures agreed to in the CBA, and "[a]s a result of these determinations, references to the incident [had] been removed from the petitioners' personnel files." *Id.* at 784, 119 A.3d 188. The arbitration in *Duchesne* did not examine the officers' placement on the "Laurie List," but rather whether the city had just cause to take disciplinary action against the officers. *Id.* at 775–76, 119 A.3d 188. The arbitration dealt with the facts of the incident underlying their placement on the list, and we therefore held that the decision affected the *Laurie* issue. *Id.* at 784–85, 119 A.3d 188.

The same is true here. Although the arbitrator in this case noted that he had no authority over the plaintiff's placement on the "Laurie List," and his decision did not focus specifically on the *Laurie* issue, his decision was based upon the same information that led to the plaintiff's placement on the list. Had his findings been different, they could have had the same ramifications as in *Duchesne, i.e.,* providing a basis for removing the plaintiff from the "Laurie List." However, in contrast to *Duchesne,* the arbitrator's decision in this case did not establish that there was no basis for the plaintiff's placement on the "Laurie List." Having an additional hearing to examine the same facts would serve little purpose.

Our decision in *Duchesne* did not prescribe any specific procedures that law enforcement or prosecutorial authorities must follow in connection with the use of "Laurie Lists." Instead, we merely recognized that basic notions of fairness require that an officer must be removed from the list when it is clear that there are no valid grounds for his being on the list, and that, absent other available procedures, the courts can provide a remedy to an aggrieved officer. *Id.* at 784–85, 119 A.3d 188. We are cognizant of the fact that the legislature is currently examining "Laurie List" issues. *See* Laws 2015, ch. 150 ("establishing a commission to study the use of police personnel files as they relate to the Laurie List"). Subject to the constitutional obligations imposed on the State under *Brady* and its progeny, we think that the legislature, rather than this court, is the proper body to regulate the use of "Laurie Lists," including the development of procedures for the placement of police officers on, and their removal from, such lists. In the case before us, it is sufficient to hold that the plaintiff was afforded all the process he was due.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and BASSETT, JJ., concurred.

All Citations

--- A.3d ----, 2016 WL 1069042, 41 IER Cases 280

Footnotes

1 *See State v. Laurie,* 139 N.H. 325, 653 A.2d 549 (1995).

2 The parties submitted an "Agreed Statement of Facts" and accompanying exhibits to the trial court. The court relied upon these facts in its order, and they are part of the record on appeal.

3 The record shows that three judges, after reviewing the plaintiff's personnel records *in camera,* determined that portions of the record contained potentially relevant and/or potentially exculpatory information, and ordered that parts of the file be disclosed to the prosecutor and defense attorney.

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2015 WL 3897798
Supreme Court of New Hampshire.

Jonathan Duchesne & a.

v.

Hillsborough County Attorney

No. 2014–028 Argued: March 5, 2015 Opinion Issued: June 25, 2015

Synopsis

Background: Police officers who successfully challenged the discipline imposed after they were accused of the unnecessary use of force, as a result of which information regarding the underlying incident was removed from their personnel files, brought action against the county attorney seeking, among other things, the removal of their names from county's list of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to *State v. Laurie*, 139 N.H. 325, 653 A.2d 549. The Superior Court, Hillsborough County, Northern Judicial District, Garfunkel, J., denied relief. Officers appealed.

Holding: The Supreme Court, Lynn, J., held that officers were entitled to have their names removed from county's "Laurie list."

Reversed and remanded.

West Headnotes (15)

Change View

Change View

1 **Constitutional Law** Disclosure and Discovery
Constitutional Law Notice; disclosure and discovery
In a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment; this obligation arises from a defendant's constitutional right to due process of law, and aims to ensure that defendants receive fair trials. U.S. Const. Amend. 14; N.H. Const. pt. 1, art. 15.

2 **Criminal Law** Materiality and probable effect of information in general
Criminal Law Impeaching evidence
Criminal Law Request for disclosure; procedure
The State's duty to disclose information favorable to the defendant encompasses both exculpatory information and information that may be used to impeach the State's witnesses, and applies whether or not the defendant requests the information.

3 **Criminal Law** Constitutional obligations regarding disclosure
Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the State's duty to disclose information favorable to the defendant.

4 **Criminal Law** Information Within Knowledge of Prosecution
Criminal Law Responsibility of and for police and other agencies
The duty of disclosure of information favorable to the defendant falls on the prosecution, and is not satisfied merely because the particular prosecutor

assigned to a case is unaware of the existence of the exculpatory information; on the contrary, court imputes knowledge among prosecutors in the same office, and also holds prosecutors responsible for at least the information possessed by certain government agencies, such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution.

5 **Criminal Law** Duty to locate information
Criminal Law Responsibility of and for police and other agencies
Fact that the prosecution's duty to disclose information favorable to the defendant is not satisfied merely because the particular prosecutor is unaware of exculpatory information means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

6 **Criminal Law** Responsibility of and for police and other agencies
Although police may sometimes fail to inform a prosecutor of all they know, prosecutors are not thereby relieved of their duty to disclose information favorable to the defendant, as procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

7 **Constitutional Law** Disclosure and Discovery
Constitutional Law Notice; disclosure and discovery
The prosecutor's due process constitutional duty of disclosure of information favorable to the defendant extends only to information that is material to guilt or to punishment. U.S. Const. Amend. 14; N.H. Const. pt. 1, art. 15.

8 **Criminal Law** Materiality and probable effect of information in general
Favorable evidence is material to a defendant's guilt or punishment under the federal standard for determining whether the prosecution has a duty to disclose the evidence only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

9 **Criminal Law** Materiality and probable effect of information in general
The standard set forth in *State v. Laurie*, 139 N.H. 325, 653 A.2d 549, for determining if information favorable to the defendant must be disclosed, which requires the State to prove beyond a reasonable doubt that any favorable, exculpatory evidence that has been knowingly withheld would not have affected the verdict, does not require that the prosecutor disclose everything that might influence a jury, or that the defendant be permitted a complete discovery of all investigatory work or an examination of the State's complete file.

10 **Constitutional Law** Evidence
Statute governing disclosure of information in a police officer's personnel file cannot limit the defendant's due process constitutional right to obtain all exculpatory evidence. U.S. Const. Amend. 14; N.H. Const. pt. 1, art. 15; N.H. Rev. Stat. Ann. § 105:13-b.

11 **Privileged Communications and Confidentiality** Personnel files
Statute governing disclosure of information in a police officer's personnel file explicitly codifies the distinction between exculpatory evidence that must be disclosed to the defendant under the due process clauses of the state and federal constitutions, and other information contained in a confidential personnel file that may be obtained through the procedure set forth in the statute. U.S. Const. Amend. 14; N.H. Const. pt. 1, art. 15; N.H. Rev. Stat. Ann. § 105:13-b.

12 **Privileged Communications and Confidentiality** Personnel files
Statute governing disclosure of information in a police officer's personnel file prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial judge makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case. N.H. Rev. Stat. Ann. § 105:13-b.

13 **Criminal Law** Records
Privileged Communications and Confidentiality Personnel files
Police officers who successfully challenged the discipline imposed after they were accused of the unnecessary use of force, as a result of which information regarding the underlying incident was removed from their personnel files, were entitled to have their names removed from county's "Laurie list" of officers whose personnel files contained potentially exculpatory evidence required to be disclosed to defendants pursuant to *State v. Laurie*, 139 N.H. 325, 653 A.2d 549; single incident of alleged excessive use of force would not have been admissible to impeach officers' credibility or show their propensity to engage in such conduct, and allegation was determined to be unfounded. N.H. Rev. Stat. Ann. § 105:13-b; N.H. R. Evid. 404(b), 608(b).

14 **Appeal and Error** Injunction
Appeal and Error Provisional remedies
Because the issuance of an injunction is committed to the sound discretion of the trial court, Supreme Court will uphold the court's decision unless it is tainted by error of law, clearly erroneous findings of fact, or an unsustainable exercise of discretion.

15 **Criminal Law** Materiality and probable effect of information in general
The admissibility of evidence at trial does not necessarily mark the bounds of the prosecutor's disclosure obligations under *Brady*.

Hillsborough—northern judicial district

Attorneys and Law Firms

Milner & Krupski, PLLC, of Concord (John S. Krupski on the brief and orally), for the petitioners.

Hillsborough County Legal Counsel, of Goffstown (Carolyn M. Kirby on the brief and orally), for the respondent.

Opinion

LYNN, J.

*1 The petitioners, Jonathan Duchesne, Matthew Jajuga, and Michael Buckley, appeal a decision of the Superior Court (*Garfunkel,* J.) denying their request for a declaratory judgment and an injunction to remove their names from the so-called "Laurie List." [1] We reverse and remand.

I

The trial court found, or the record supports, the following facts. The petitioners are officers of the Manchester Police Department. On March 3, 2010, while off duty, the petitioners were involved in an incident at a bar in Manchester. The incident was widely reported in the media, and the Manchester chief of police ordered a criminal and internal affairs investigation. Following the investigation, the chief found that the petitioners had violated several departmental policies, including a prohibition against the unnecessary use of force, and each officer was suspended for a period of time. On August 2, the chief sent letters to the Hillsborough County Attorney's Office stating that the petitioners had "engaged in conduct (excessive use of force) that may be subject to disclosure under *State v. Laurie*."

Consequently, the county attorney placed the petitioners' names on the "Laurie List," which the trial court described as "an informal list of police officers who have been identified as having potentially exculpatory evidence in their personnel files or otherwise."

Pursuant to the provisions of the collective bargaining agreement (CBA) between the petitioners' union and the City of Manchester, the petitioners filed grievances regarding the discipline imposed by the chief. The CBA provides for final and binding arbitration. After a hearing, an arbitrator found that "the City of Manchester did not have just cause to take disciplinary action against [the petitioners] for actions taken or not taken" during the incident. As a result of this decision, the petitioners were compensated for lost earnings and information regarding the incident was removed from their personnel files.

While this process was occurring, the New Hampshire Attorney General's Office conducted an independent criminal investigation into the incident. Its final report concluded that the petitioners' conduct "was justified under New Hampshire law and no criminal charges are warranted."

On January 31, 2012, after the arbitration decision, the chief wrote to the then Hillsborough County Attorney requesting that, pursuant to the arbitrator's award, the petitioners be removed from the "Laurie List." The county attorney declined, stating that there was an injured party, the chief "reported the incident as excessive force for the purposes of the Laurie list," and there was "a sustained complaint of excessive use of force." The petitioners also asked the attorney general to direct the county attorney to remove the petitioners from the "Laurie List"—a request that the attorney general declined.

The petitioners then filed suit in superior court against the respondent, the Hillsborough County Attorney[2], seeking: (1) a declaratory judgment that the county attorney violated RSA 105:13–b (2013) by refusing to remove their names from the "Laurie List"; (2) an injunction to prohibit the county attorney from designating the incident as a "Laurie Issue"; and (3) a writ of mandamus to compel the county attorney to remove their names from the "Laurie List." The petitioners also argued that the county attorney's refusal to remove them from the "Laurie List" violated their constitutional rights to due process of law, and requested an award of attorney's fees.

***2** After a hearing, the trial court denied the petitioners relief. In its written order, the court stated that the petitioners asked for a prospective determination "that their involvement in [the] incident can never rise to the level of potentially exculpatory evidence." The court found, however, that it could not "prospectively determine if the information may be exculpatory in a case that has not yet been brought." The court reasoned that such a determination would substitute the court's judgment for that of the prosecutor, and would relieve prosecutors of their legal and ethical duty to disclose potentially exculpatory information. The petitioners moved for reconsideration, which was denied, and this appeal followed.

On appeal, the petitioners argue that the trial court erred by deferring to the county attorney and not removing the petitioners from the "Laurie List." They contend that the trial court—not the prosecutor—ultimately reviews personnel files or other officer background information for exculpatory evidence and decides if such records or information must be disclosed to the defendant. They further assert that, with respect to each of them, the arbitrator's decision and the attorney general's report establish that the allegations of excessive use of force were unfounded, and, therefore, inclusion of their names on the "Laurie List" or disclosure of their names to a court or defendant in a future criminal case based upon the incident is unwarranted. The petitioners also argue that the trial court erred by not addressing their request for an injunction and writ of mandamus, their constitutional arguments, or their request for attorney's fees.

The respondent contends that the trial court cannot look ahead to future, hypothetical cases as the petitioners asked it to do. It argues that the responsibility to disclose exculpatory evidence lies with the prosecutor, and that the county attorney's office is not bound by the arbitrator's award or the attorney general's report. The respondent asserts that, depending upon the facts of a particular case, its prosecutors may properly conclude that the petitioners' involvement in the incident should be disclosed to the defendant, or at least may conclude that the incident should be disclosed to the trial judge to determine whether the incident must be disclosed to the defense and/or is admissible at trial. The respondent also argues that RSA 105:13–b is not implicated here inasmuch as the

arbitrator's decision resulted in the removal from the petitioners' personnel files of information pertaining to the incident.

II

1 2 3 Before turning to the specific issues before us, we examine the background of the "Laurie List." The starting point for our analysis is the well-recognized proposition that, in a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This obligation arises from a defendant's constitutional right to due process of law, and aims to ensure that defendants receive fair trials. *United States v. Bagley,* 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *State v. Laurie,* 139 N.H. 325, 329, 653 A.2d 549 (1995); *see also*N.H. CONST. pt. I, art. 15. The duty to disclose encompasses both exculpatory information and information that may be used to impeach the State's witnesses, *Bagley,* 473 U.S. at 676, 105 S.Ct. 3375; *Laurie,* 139 N.H. at 327, 653 A.2d 549, and applies whether or not the defendant requests the information, *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375; *Laurie,* 139 N.H. at 327, 653 A.2d 549. "Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose." *Laurie,* 139 N.H. at 329, 653 A.2d 549 (quotation and brackets omitted).

4 5 6 ***3** The duty of disclosure falls on the prosecution, *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Petition of State of N.H. (State v. Theodosopoulos),* 153 N.H. 318, 320, 893 A.2d 712 (2006); *see also N.H. R. Prof. Conduct* 3.8(d), and is not satisfied merely because the particular prosecutor assigned to a case is unaware of the existence of the exculpatory information. On the contrary, we impute knowledge among prosecutors in the same office, *State v. Etienne,* 163 N.H. 57, 90–91, 35 A.3d 523 (2011), and we also hold prosecutors responsible for at least the information possessed by certain government agencies, such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution, *see Theodosopoulos,* 153 N.H. at 320, 893 A.2d 712. "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Although police may "sometimes fail to inform a prosecutor of all they know," prosecutors are not relieved of their duty as "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Id.* at 438, 115 S.Ct. 1555 (quotation omitted).

7 8 9 The prosecutor's constitutional duty of disclosure extends only to information that is material to guilt or to punishment. *Brady,* 373 U.S. at 87, 83 S.Ct. 1194; *Laurie,* 139 N.H. at 328, 653 A.2d 549. "Favorable evidence is material under the federal standard only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Laurie,* 139 N.H. at 328, 653 A.2d 549 (quotations omitted). We stated in *Laurie* that the New Hampshire Constitution affords defendants greater protection than the federal standard and held that, "[u]pon a showing by the defendant that favorable, exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict." *Id.* at 330, 653 A.2d 549. "This standard does not require that the prosecutor disclose everything that might influence a jury, or that the defendant be permitted a complete discovery of all investigatory work or an examination of the State's complete file." *Id.*

In *Laurie,* we held that the prosecution's failure to disclose exculpatory evidence violated the defendant's due process rights under the New Hampshire Constitution, and we ordered a new trial. *Laurie,* 139 N.H. at 327, 333, 653 A.2d 549. The evidence, which the prosecution possessed prior to trial, consisted of the employment files and records of a Franklin police officer, Detective–Sergeant Laro, who testified at the defendant's trial. *Id.* at 327, 330, 653 A.2d 549. Laro investigated the crime, was the affiant for a number of search warrants, maintained the files and paperwork for the case, and was the sole individual present when the defendant allegedly spontaneously confessed to the crime. *Id.* at 332, 653 A.2d 549. The records disclosed "numerous instances of conduct" during Laro's time at the Franklin Police Department and during his previous employment as a police officer in Massachusetts that "reflect[ed] negatively on Laro's character and credibility." *Id.* at 330,

653 A.2d 549. For example, there was information about numerous letters of complaint that detailed Laro verbally abusing, choking, or threatening to physically harm people. *Id.* Laro also had been suspended both for neglect of duty and for threatening a civilian with a weapon. *Id.* at 330–31, 653 A.2d 549. When he was subjected to a polygraph examination concerning other incidents, it was determined that he was not being truthful in all cases, which "resulted in court cases being tainted." *Id.* at 331, 653 A.2d 549 (quotation omitted). Laro was sent to a psychologist who said that Laro "should not be entrusted with a gun and badge." *Id.* (quotation omitted). There was also evidence that Laro lied about the content of his file and misrepresented his training and schooling. *Id.* During another investigation, while seeking medical records of one of its clients, Laro threatened to close a clinic and arrest its personnel if they did not comply, claiming that his actions were authorized by the chief of police and the county attorney. *Id.* There were reports from co-workers describing Laro as a "liar" and someone "not to be trusted," and reports of incidents of "inappropriate" use of firearms. *Id.* The file also included evidence that the attorney general's office told the Franklin police chief: "If you had a homicide tonight in Franklin, I would instruct you that Sgt. Laro not be involved in the case in any capacity." *Id.* at 331–32, 653 A.2d 549 (quotation omitted). This information bore on Laro's general credibility and could have been used by the defendant to cross-examine and impeach Laro, who was a key witness at trial. *Id.* at 327, 332–33, 653 A.2d 549. The prosecution's failure to disclose any of it, even without the defendant's asking, violated the defendant's rights and necessitated a new trial. *Id.* at 333, 653 A.2d 549.

III

***4** Our decision in *Laurie* demonstrated the need for prosecutors and law enforcement agencies to share information that pertains to police officers who may act as witnesses for the prosecution. Since *Laurie*, prosecutors in New Hampshire have developed "procedures and regulations ... to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555 (quotation omitted). One aspect of these procedures is the creation of so-called "Laurie Lists." It is not entirely clear, based upon the record before us, how "Laurie Lists" actually function in practice, or how different prosecutors' offices use them. Although the respondent argues, and the trial court accepted, that the term "Laurie List" is a misnomer because no comprehensive state-wide "Laurie List" exists, it is clear from the record that at least a county-wide "Laurie List" exists in the Hillsborough County Attorney's Office. That is, it was established that the Hillsborough County Attorney keeps a list, in the form of an Excel spreadsheet, of police officers with potentially exculpatory information in their personnel files or elsewhere. Officers are added to the list when a police chief or another source notifies the county attorney that such information exists. Both at the hearing before the trial court and in its brief to this court, the respondent represented that when an officer is on the "Laurie List," such information is routinely disclosed to the trial court any time that officer appears as a witness. After the court has been given the information, the prosecutor may *then* argue either that the information is not exculpatory or relevant to the particular case and therefore need not be disclosed to the defense, or that, if it is disclosed to the defense, that it should not be admitted as evidence at the trial. Based upon the record before us, we understand that merely being on the "Laurie List" is enough to trigger that preliminary disclosure to the court, even if the prosecution does not believe that the evidence is material or exculpatory and fully intends to argue as much, and even if a court in a prior case has found that the information was not exculpatory or admissible. It also appears that, as the petitioners argue, there is no mechanism for an officer to be removed from the "Laurie List" once placed on it.

10 11 Although the prosecutorial duty that spawned the creation and use of "Laurie Lists" is of constitutional magnitude, the legislature has enacted a statute, RSA 105:13–b, which is designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records. We agree with the respondent's assertion that RSA 105:13–b is not directly at issue in this case, inasmuch as all information related to the incident has been removed from the petitioners' personnel files. Nonetheless, we think it helpful to discuss the statute and its requirements in order to explain how it affects the "Laurie List" as used by prosecutors. RSA 105:13–b provides:

> I. Exculpatory evidence *in a police personnel file* of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph

is an ongoing duty that extends b[illegible]d a finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No *personnel file* of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

(Emphasis added.) "RSA 105:13–b cannot limit the defendant's constitutional right to obtain all exculpatory evidence." *Theodosopoulos,* 153 N.H. at 321, 893 A.2d 712. However, particularly as amended in 2012, [3] the statute explicitly codifies the distinction we have recognized "between exculpatory evidence that must be disclosed to the defendant under the State and Federal Constitutions, and other information contained in a confidential personnel file that may be obtained through the ... procedure set forth in [paragraph III of] RSA 105:13–b."*Id.* at 321, 893 A.2d 712; *compare*RSA 105:13–b, I and II, *with*RSA 105:13–b, III.

***5** The current version of RSA 105:13–b addresses three situations that may exist with respect to police officers who appear as witnesses in criminal cases. First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information be disclosed to the defendant. [4] RSA 105:13–b, I. Next, paragraph II covers situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory. RSA 105:13–b, II. It directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for *in camera* review. *Id.*

12 Finally, paragraph III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness. [5] Consistent with our case law, this paragraph prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial judge makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case. *See State v. Puzzanghera,* 140 N.H. 105, 107, 663 A.2d 94 (1995) ("[I]n order to trigger an *in camera* review of a police officer's personnel file under RSA 105:13–b, the defendant must establish probable cause to believe the file contains evidence relevant to his case...."). If the judge does make such a finding, the judge is then directed to review the file *in camera* and order the release of only those portions of the file which are relevant to the case. RSA 105:13–b, III. The remainder of the file must be treated as confidential and returned to the police department which employs the officer. *Id.*

According to the respondent, because of the confidentiality of police personnel files, when a prosecutor's office is notified by a police chief that there is information in an officer's file that warrants placing the officer on the "Laurie List," the prosecutor frequently does not know the reason for the "Laurie" designation. We infer from this statement that sometimes, when personnel files are submitted to the court in connection with a particular case, the disclosure is made directly to the court by the police department, and that even in cases in which the file passes through the hands of the prosecutor, it often is placed under seal by the police department before delivery. Thus, apparently it is not uncommon for prosecutors either to be unaware of the basis for an officer's inclusion on a "Laurie List," or to have only minimal information as to the basis for the listing. As a result, prosecutors often use the "Laurie List" as the basis for making a threshold determination as to whether there is potentially exculpatory information about an officer that should be submitted to the court for review. The consequence of this paradigm appears to be that, acting out of an abundance of caution and in order to preclude the prospect of being found to have failed in their *Brady* obligations, once an officer's name is placed on the "Laurie List," prosecutors routinely cause the officer's personnel file to be submitted to the court to determine whether it

contains exculpatory information that must be turned over to the defense. Although this practice may be understandable from the prosecutors' perspective, given the respondent's acknowledgment in the trial court that inclusion on the "Laurie List" carries a stigma, police officers have a weighty countervailing interest in insuring that their names are not placed on the list when there are no proper grounds for doing so. As this case demonstrates, in accommodating these competing interests, basic fairness demands that courts not invariably defer to the judgment of prosecutors with respect even to the threshold issue of what kind of adverse information should result in an officer's placement on a "Laurie List."

IV

13 ***6** Turning to the case before us, we must determine whether the petitioners are entitled to the relief they have requested—that is, to be removed from the "Laurie List" maintained by the respondent. The petitioners argue that their placement on the "Laurie List" affects significant constitutional liberty and property interests, inasmuch as a "Laurie" designation can tarnish their reputations and damage their careers. The respondent acknowledged during the hearing before the trial court that "the *Laurie* list is considered a kind of a death list" for the officers on it or "is given that stigma." Although the "Laurie List" is not available to members of the public generally, placement on the list all but guarantees that information about the officers will be disclosed to trial courts and/or defendants or their counsel any time the officers testify in a criminal case, thus potentially affecting their reputations and professional standing with those with whom they work and interact on a regular basis. *Cf. State v. Veale,* 158 N.H. 632, 639, 972 A.2d 1009 (2009).

14 Because the issuance of an injunction is committed to the sound discretion of the trial court, we will uphold the court's decision unless it is tainted by error of law, clearly erroneous findings of fact, or an unsustainable exercise of discretion. *See UniFirst Corp. v. City of Nashua,* 130 N.H. 11, 14, 533 A.2d 372 (1987). Here, we conclude that the trial court unsustainably exercised its discretion and that the petitioners are entitled to be removed from the "Laurie List."

To reach this conclusion, we re-examine, and clarify, our decision in *Laurie.* Perhaps because the totality of the adverse information about Detective Laro that the State knowingly failed to disclose was so egregious, in *Laurie* we did not differentiate among the various types of information contained within his personnel files. Instead, we simply observed that the files at issue "disclose[d] numerous instances of conduct that reflect[ed] negatively on Laro's character and credibility." *Laurie,* 139 N.H. at 330, 653 A.2d 549. In particular, there was no doubt that evidence of Laro's long-demonstrated history of lies, deception, and incompetency "plainly would have been useful to the defendant upon cross-examination of Laro."*Id.* at 331, 653 A.2d 549. In short, the adverse information at issue in *Laurie* was probative of Laro's *general credibility* as a witness, and, as such, would likely have been admissible in *any* case in which Laro testified. *See N.H. R. Ev.* 608(b) (providing that specific instances of the conduct of a witness may be inquired into on cross-examination if probative of untruthfulness); *see alsoState v. Mello,* 137 N.H. 597, 600, 631 A.2d 146 (1993) (distinguishing between evidence used to attack a witness's general credibility and evidence used to impeach specific testimony given by a witness). For an officer such as Laro, being placed on a "Laurie List" and having the adverse information automatically disclosed to the court every time that officer is to be a witness makes sense and upholds the prosecutor's legal and ethical responsibility.

15 The situation with respect to the petitioners is quite different from that presented in *Laurie.* First, unlike Laro's pattern of misconduct and untruthfulness, the only conduct at issue here is the petitioners' involvement in a single incident of alleged excessive use of force, and there is no suggestion that they attempted to lie about or cover up their conduct. Even if the accusation were true, this incident, without something more (such as evidence that the petitioners lied or misrepresented the facts) would not be admissible to impeach the petitioners' general credibility because an instance of excessive use of force is not probative of truthfulness or untruthfulness. *See N.H. R. Ev.* 608(b). Indeed, even if a future case were to arise in which a claim of excessive use of force was made against one of the petitioners, the prior incident would not be admissible simply to show a petitioner's propensity to engage in such conduct. *See N.H. R. Ev.* 404(b). We recognize, of course, that the admissibility of evidence at trial does not necessarily mark the bounds of the prosecutor's disclosure obligations under *Brady. See Laurie,* 139 N.H. at 332, 653 A.2d 549 ("It is sufficient for us to find that the evidence is material to the preparation *or* presentation of the defendant's case."(quotation omitted)). However, the fact that adverse

information regarding a police officer's background is not of the type usually admissible to attack the officer's general credibility, it has a strong bearing on the propriety of maintaining the officer's name on a list that is used as the basis for *automatically* disclosing the information to the trial court or the defendant in any case in which the officer may testify.

*7 Second, and more importantly, although the petitioners were initially disciplined by the police chief for their alleged excessive use of force, the chief's decision was overturned by an arbitrator, a neutral factfinder, following a full hearing conducted pursuant to procedures agreed to in the CBA. After an investigation, the attorney general also concluded that the petitioners' use of force in the incident was justified. As a result of these determinations, references to the incident have now been removed from the petitioners' personnel files. Given that the original allegation of excessive force has been determined to be unfounded, there is no sustained basis for the petitioners' placement on the "Laurie List." It makes no sense that the threshold determination—that something was thought to be *potentially* exculpatory and worthy of an *in camera* review by the court, but has now been shown not to be of that character—should follow the petitioners every time they appear as witnesses.

Therefore, to the extent that the petitioners' names appear on the "Laurie List" maintained by the Hillsborough County Attorney's Office, we hold that the trial court unsustainably exercised its discretion in failing to order that their names be removed from said list. In light of the above ruling, we need not address the other relief requested by the petitioners or further consider their constitutional arguments. For the reasons stated above, we reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

DALIANIS, C.J., and HICKS, CONBOY, and BASSETT, JJ., concurred.

All Citations

--- A.3d ----, 2015 WL 3897798, 203 L.R.R.M. (BNA) 3347

Footnotes

1 *See State v. Laurie*, 139 N.H. 325, 653 A.2d 549 (1995).

2 We refer to the Hillsborough County Attorney using gender-neutral language.

3 Prior to the 2012 amendment of the statute, RSA 105:13–b did not contain the clear distinction between exculpatory information and non-exculpatory (albeit relevant) information that is found in the present version of the statute. *See*RSA 105:13–b (1992).

4 Paragraph I also makes clear that the State's obligation to disclose exculpatory evidence contained in the personnel files of police witnesses is an ongoing duty that does not end with a defendant's conviction.

5 By its terms, paragraph III also covers police officers who serve as prosecutors. As there is no indication from the record that any of the petitioners here have served or will serve as police prosecutors, we have no occasion to consider the application of RSA 105:13–b in such circumstances.

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APPENDIX F - Media Coverage

The News Tribune

Previous Story
Next Story

Bitter fight over child porn evidence pits Pierce County prosecutors against a former detective

By Sean Robinson

Staff writerJune 22, 2014

"We can't see her."

Four little words, yet they carry enough cargo to fill a legal freight train.

Written in June 2011 by Pierce County sheriff's deputy Mike Ames, the four words could be bottled and sold as lawyer bait.

So far, their implications have hooked more than 50 attorneys and four judges in three counties — all players in a vast courtroom drama.

The four words float through a messy criminal case, two contentious lawsuits and multiple appeals to the Washington State Supreme Court filed over the past three years.

"We can't see her."

For Pierce County prosecutors, the four words underscore a thorny child rape case and a grim two-front defense against follow-up lawsuits that accuse their office of malicious prosecution and dishonesty.

For Longbranch resident Lynn Dalsing, the four words represent the difference between innocence and guilt: the gap between freedom and a possible life sentence in prison for sex crimes she says she didn't commit.

The four words refer to an ugly photo: one frame in an infamous series of child pornography images, familiar to those who collect them like baseball cards.

The photo depicts a woman and a young child. The child's face is visible. The woman's is not, according to sworn statements in court records.

For Ames, the recently retired sheriff's deputy, the four words he wrote in 2011 represent his integrity: a promise to tell the truth, whether county prosecutors like it or not, whether he's a difficult guy or not.

Three years later, Ames contends county prosecutor Mark Lindquist and his staff are trying to ruin his reputation and brand him as a dishonest cop to cover up their own mistakes, while tagging Ames with $118,000 in attorney fees for trying to clear his name.

"I serve the citizens of Pierce County, and I believe they deserve to be told the truth about how certain aspects of their criminal justice system is being run," he said in a written statement.

Prosecutors say they're fulfilling a duty they cannot shirk – a duty to disclose information about Ames' credibility, whether he likes it or not.

"The plaintiff (Ames) and his attorney — who have a history of filing meritless complaints — made numerous false allegations against several people," Lindquist said. "This is a rare remedy designed to discourage ill-conceived and irresponsible litigation."

Is Ames a malcontent, a lying deputy, a disgruntled employee with an ax to grind?

If so, he has plenty of allies. Recently, 34 attorneys, including a host of veteran defense lawyers, a respected law professor and two former Pierce County chief deputy prosecutors, filed legal declarations in Ames' defense.

The roiling dispute is the talk of the county courthouse and the local legal community.

But perhaps it's easier to begin at the beginning.

Charged with child rape

On Sept. 8, 2010, following up on a complaint of child sex abuse, sheriff's deputies arrested Michael Dalsing, 53, and his friend William Maes III, 59. Prosecutors charged both men with multiple counts of child rape and child molestation.

The reported victims included Dalsing's granddaughter and his own daughter, then 7 — a product of his marriage with Lynn Dalsing, then 43.

The Dalsings lived in Longbranch; Maes lived in Kent.

Court records, including statements from the children, described sexual abuse by Michael Dalsing and Maes. Dalsing took pains to conceal his acts; charging papers noted that he and Maes orchestrated moments alone with the children, either at Maes' place or at home when Lynn Dalsing was shopping or working.

Ultimately, both men pleaded guilty to the charges against them. They were convicted in 2011. Dalsing's sentence: 25 years minimum. Maes: 15 years minimum. "Minimum," because after the two men serve those terms, the state's Indeterminate Sentence Review Board will decide whether they deserve release or more time, up to a life sentence.

Prosecutors didn't charge Lynn Dalsing at first; she denied knowing what her husband was doing. She said she caught him taking photographs once and tried to stop him. She admitted knowing he had been convicted of a sex offense — indecent liberties — committed in 1983, 20 years before she married him.

Was she complicit? The initial police report from 2010 refers to an interview with her daughter, who reportedly said, "her mother knew what was going on and even saw it happen. She tried to stop it but it didn't work."

Not clear

The case against Michael Dalsing and Maes was a slam dunk – multiple child victims described the assaults. The mother's potential culpability was harder to prove. The child victims said the abuse occurred when she wasn't around.

Sheriff's deputies spent two months looking for links. The investigation included a search of the Dalsings' home computers: systems set up by Michael Dalsing, according to statements in court records.

The computers yielded thousands of images of child porn. That meant an unpleasant assignment for Ames: clicking through a virtual cesspool in a search for evidence.

"This case was the largest child pornography case I've worked in six years in computer forensics. The volume and content of the images that I had to go through was tedious and at times, very horrific."

– Ames deposition, 2-14-13

The cache included various photos of children, and a few of Lynn Dalsing, nude and alone in a bedroom. Ames extracted about 40 images for closer examination: perhaps investigators could identify child victims.

One triggered the legal avalanche: a photo of a woman and an adolescent girl, later found to be part of a series unrelated to Dalsing.

Prosecutors and sheriff's deputies didn't know the origins of the photo at the time. It had a label dating to 2000 and a unique filename with a number. A handful of other photos Ames gathered carried the same metadata.

It wasn't proof; digital photos could be altered. Ames, familiar with such cases, suspected the shot was part of a known series, but he hadn't seen this one before.

The woman's face wasn't visible — only the contours of her body. She was heavyset; so was Lynn Dalsing. She had dark hair; so did Dalsing.

Ames found no correlation between the bedroom in the picture and the crime-scene photos taken during the investigation. Still, the evidence had to be checked.

Detective Debbie Heishman was the county's lead investigator on the case.

Because of the arrests and the criminal investigation, Dalsing's daughter was being held in protective custody. Heishman wanted to keep it that way, and said so in an email sent to Ames on Nov. 5, 2010.

"I have a dependency hearing coming up on this and want to make sure the little girl does not go back to Mom," Heishman wrote.

Prosecutors were interested, too. If Dalsing was the woman in the photo, she could be criminally charged, just like her husband.

Heishman and Ames spoke on the phone about the photo, according to a sheriff's report.

"He (Ames) also told me that there appears to be photographs of Lynn posing naked with a small female child on the bed. This new information confirmed what (the daughter) had disclosed about her mother knowing what her father Michael was doing to her."

– Sheriff's report filed by Heishman, 11-8-10

Here, the stories conflict. In a deposition conducted two years later, Ames gave a different account of the phone call with Heishman.

Question: Did you tell Detective Heishman that there appeared to be photographs of Lynn posing naked with a small naked female child on a bed?

Answer: No.

Q: Are you absolutely sure of that?

A: That's not what I said to her.

Q: Did you say anything to her along that line? ...

A: I told her that I came across a series of photos that appeared to be a child pornography series. ... And I said one of the photos has an obese woman on a bed with a naked child on top of her. I said, I can't match any of the background in that picture to anything in the house. ... I can't see the person's face. I can't make a positive

identification on anybody.

– Ames deposition, 2-14-13

Ames filed a supplemental report recounting his search of the seized computers. His report never identified Dalsing as the woman with the child in the crucial picture.

On Nov. 8, 2010, Heishman and Ames met to discuss the evidence. Heishman filed another report on Nov. 15, referring to the meeting with Ames. The new report flatly said Dalsing was the woman in the crucial photo.

"Lynn Dalsing also appears in several of the photos posing naked and alone and with a small female child."

– Heishman report, 11-15-10

In his deposition, Ames told a different story of the meeting.

Question: Did you ever identify the woman in that photo as Lynn Dalsing?

Answer: No.

Q: Did you ever tell Detective Heishman that it was Lynn Dalsing?

A: Never.

– Ames deposition, 2-14-13

On Dec. 8, 2010, Heishman arrested Dalsing and briefly interviewed her. According to Heishman's report, Dalsing said she remembered taking photos of herself, but not with her daughter.

Prosecutors charged Dalsing with child molestation and sexual exploitation of a minor. The photo was the key. Charging papers described it:

"One photograph depicted the defendant lying on her bed, naked on her back with a pre-pubescent girl ... Det. Heishman has identified the bedroom in which the photos were taken to be the same room as the master bedroom of the residence that was searched."

– Affidavit of probable cause, Pierce County Superior Court, 12-9-10

It wasn't true. Dalsing wasn't the woman in the picture. The picture wasn't taken in her master bedroom.

She spent the next eight months in jail.

A long wait

Gary Clower, Dalsing's defense attorney, demanded to see the evidence against his client. He waited seven months — until June 1, 2011 — before prosecutors provided a copy of the photo.

As soon as he received it, Clower visited his client in jail and showed it to her. Dalsing said the picture wasn't her.

Clower visited Michael Dalsing, the confessed architect of the abuse, also in the jail after entering a guilty plea. Dalsing said the woman in the photo wasn't his wife — the image came from a known series. He named it.

Clower immediately told prosecutors their key piece of evidence was bogus — a picture from a known series that didn't depict his client or her child.

On the county side, a flurry of internal talk led to the four words: "We can't see her."

The photo was the backbone of the criminal case, but prosecutors wondered about amending the charges and adding a count of child porn possession. Perhaps Lynn Dalsing could be connected to the computers.

After a discussion with Deputy Prosecutor Lori Kooiman, Heishman emailed Ames on June 9, 2011.

"Pros (prosecutors) are wondering if you were able to tell if Lynn Dalsing had any type of account or files on the computer so we can charge her with the possession also?"

Ames replied 90 minutes later, in a crucial email that contained the four words.

"No, it appeared that he (Michael Dalsing) was the computer person. ... Definitely no link to her and the child porn other than that one picture, but we can't see her so no way to prove that either."

Heishman shared the email with Kooiman, who replied to both deputies and asked for a meeting with Ames.

"I do have to provide your email to the defense. I do want to discuss some of your assertions."

The back and forth had been quick but momentous. The sheriff's lead (and only) computer forensics examiner had declared in a public record that the evidence against Lynn Dalsing was no good. It was a gift-wrapped present for the defense.

The prosecutor's office officially knew it, and Kooiman had stated she would have to share Ames' email with Dalsing's defense attorney.

Except Kooiman didn't. Clower never saw the email.

The next Monday — June 13, 2011 — Ames met with Kooiman and fellow Deputy Prosecutor Tim Lewis.

What was said at that meeting remains a topic of debate. Ames described the meeting in records referenced in court and in a recent interview.

The News Tribune sought comment from Kooiman for this story. The prosecutor's office spoke for her, saying attorneys from the county's civil division advised her not to comment because her actions are among the disputed issues in Dalsing's ongoing civil case. In sworn declarations filed in a separate case, Kooiman and Lewis said Ames made "many false statements" about their meeting. They offered no specifics.

Ames, describing the 2011 meeting, said he asked about the disputed photo and whether it was the basis for the charges against Lynn Dalsing. If so, it was a mistake.

"I said, 'That picture is not Lynn Dalsing,'" Ames recalled.

Ames said Kooiman told him the trial was coming up in a few weeks, and prosecutors needed his help.

"We don't have anything on Lynn Dalsing, and we need you to find something," he recalled Kooiman saying. (Lewis, interviewed by The News Tribune, said Kooiman made no such statement.)

All parties agree on one point: Ames initially refused to conduct a new search. He didn't want to go back into the cesspool again, to go over the same trash he'd examined months earlier. He'd done a good investigation — it just didn't reach the conclusion everyone hoped for.

Prosecutors insisted, Ames said. The original investigation had focused on Michael Dalsing and Maes — not Lynn Dalsing.

Ames was getting mad. Why hadn't the prosecutors charged Dalsing with possession of child porn to begin

with? He'd spent weeks sorting through filth for nothing, and now they wanted him to do it again.

Prosecutors told him to go through camera equipment and DVDs gathered during the original search and see if something turned up. They wanted him to write a new search warrant. They wanted him to consult with the National Center for Missing and Exploited Children about the crucial photo, to make absolutely sure.

Ames refused to consult the center — he thought his original investigation was good enough — but he finally agreed to examine the cameras and the DVDs. The results, submitted later, yielded nothing.

"It was the worst moment of my career," Ames said of the meeting.

A month later, on July 12, 2011, Kooiman was back in court, arguing to keep Lynn Dalsing in jail and continue the investigation.

Clower, the defense attorney, was hot. He expected a dismissal. A few days earlier in open court, Lewis had said prosecutors couldn't prove the charges against Lynn Dalsing. Now they were backpedaling.

Clower didn't know about Ames' email and the four words, but he had told prosecutors at the beginning of June that Dalsing wasn't the woman in the crucial photo, that it was part of a known series. Six weeks had passed since then, and Dalsing was still in jail. He insisted on his client's release and dismissal of the charges.

Kooiman told Superior Court Judge Ronald Culpepper it was still unclear whether Dalsing was the woman in the photo, according to a transcript of the hearing.

Kooiman said a relative of Dalsing's had said the child in the photo was Dalsing's daughter. She said investigators were still going through thousands of photos.

Clower said prosecutors were flailing, trying to hold his client while they searched for new evidence. It was too late for that.

He showed Culpepper the photo. The judge looked.

"Well, it is, certainly, difficult for me to see the adult in the photo since her face is, apparently, covered," Culpepper said. "The child, the face is, you know, barely distinct."

Clower moved in.

"They have had this for 10 months," he said. "This woman has been locked up for eight months. I got the photograph a month ago."

That was the ballgame. Culpepper denied Kooiman's motion for a continuance, and ordered Dalsing's release.

A day later, the National Center for Missing and Exploited Children responded to a query from county investigators, who recruited a Tacoma police detective to ask for help after Ames refused.

The answer came back within an hour. The center confirmed what Ames had suggested since the previous November: The woman in the photo wasn't Lynn Dalsing. The image was part of a known series. The series had a name — the same name Ames found in the metadata.

Prosecutors promptly dismissed the charges against Dalsing without prejudice — a standard move that allowed them to refile charges later if they acquired new evidence.

The email from Ames with the four words never entered the record. Clower still didn't know it existed. Kooiman, in a declaration filed three years later, said she told Clower verbally that county investigators couldn't connect Lynn Dalsing to the computers. But the email Ames wrote — "we can't see her" — did not surface.

The case appeared to be over. It wasn't — not for Dalsing, or Ames or the county.

The next stage

On Jan. 5, 2012, Ames tangled himself in an unrelated matter, an internal dispute regarding overtime pay at the sheriff's department. He filed a formal complaint, saying comp time was being traded for extra hours in violation of workplace rules. He'd logged 200 hours of OT, and he wasn't getting paid for them.

To back his claim, Ames hired Fircrest attorney Joan Mell, who had clashed publicly with Lindquist in the past.

Ames was right, according to records; payroll policies were violated. The overtime complaint settled swiftly in his favor. He claimed money and got it: $12,000.

Meanwhile, in March 2012, Lynn Dalsing sued Pierce County for false arrest and malicious prosecution. Her attorney, Fred Diamondstone, sought records related to the original criminal investigation, including emails and internal correspondence between deputies and prosecutors. The slow process of civil discovery began.

Ames was still working as the sheriff's lone computer forensics examiner. In late July 2012, he got a call from Mell.

The attorney wanted to make a police report in another case of possible child abuse. Before long, it would light a media firestorm.

The case involved a student at Kopachuck Middle School in Gig Harbor. In February 2012, the eighth-grade boy had been dragged around a classroom and taunted by other students while a teacher watched and occasionally participated. Students filmed the incident on their phones.

Mell represented the parents. They wanted a criminal investigation of what they believed to be bullying. She said she'd been trying to reach another detective to file the report, but hadn't been able to connect and deliver video records of the incident.

Ames agreed to take a look. He watched the videos and took them into evidence. He wrote a summary and forwarded the report to another detective.

On Aug. 29, 2012, The News Tribune published a story that recounted the Kopachuck incident, including video excerpts. The story went viral: CNN, the "Today" show and international news outlets got interested. Emails flooded the sheriff's office, demanding action.

Lindquist issued a statement saying the prosecutor's office was looking into the case.

Behind the scenes, sheriff's spokesman Ed Troyer, surfing the media wave, emailed Sheriff Paul Pastor and Undersheriff Eileen Bisson.

Troyer wondered about the genesis of the original report taken by Ames, and whether the prior relationship with Mell in the overtime dispute created an ethical problem:

"Didn't Mell represent Ames in a matter against county? Is there a conflict here?"

Bisson replied quickly via email.

"She did. I'm not seeing the conflict if this is a county case. Mike won't be the investigator, he just obtains the materials off the electronic items and it would be assigned to a detective."

That settled the question for a few weeks, but another sheriff's commander, Capt. Brent Bomkamp, raised it again on Sept. 25, 2012, referring to the link between Ames and Mell.

"It smells," Bomkamp said in an email.

With approval from operations chief Rick Adamson, Bomkamp requested a search of Ames' county email account to see if it included prior contacts with Mell.

The search, classified as high priority, took place Oct. 1, without Ames' knowledge.

That same day he received his annual performance appraisal, which described him as "the foremost expert on forensic computer analysis on the department," and "a trusted member of this department — his integrity is second to none."

The email search found no correspondence between Ames and Mell, records state.

Bomkamp shared the results with Adamson, his commander. Adamson promptly sent an email to Lindquist, informing him of the results.

"Please don't forward this," Adamson wrote.

Did Lindquist play a role in the search of Ames' email? According to records obtained by The News Tribune, Adamson said he informed Lindquist because the two knew each other socially, and Adamson had mentioned the Ames-Mell connection to Lindquist in an earlier conversation.

According to the same records, Lindquist said he had no input into the requested search and did not direct it. When asked by The News Tribune, he said the same thing.

Ames remained unaware. On Oct. 11, a co-worker tipped him — Ames faced a misconduct investigation for filing a police report in the Kopachuck case.

Ames was alarmed, but he had other things to think about. The lawsuit filed by Lynn Dalsing was gathering steam, and he was one of the witnesses. That meant trial prep. He had to meet with deputy prosecutors to discuss an upcoming deposition.

Preparing for trial

Records indicate the prep meeting took place Oct. 16, 2012. Ames met with deputy prosecutor Jim Richmond and another prosecutor.

Arguments about the meeting and its aftermath rage to this day. Generally, the parties agree that attorneys and Ames discussed deposition preparation for Dalsing's lawsuit.

The News Tribune sought comment from Richmond regarding the meeting and other matters. The prosecutor's office intervened, saying attorneys from the county's civil division advised Richmond not to comment because his actions are among the disputed issues in Dalsing's civil case.

Ames figured his email saying he couldn't identify Lynn Dalsing in the photo — and the four words, "we can't see her," had long since been disclosed in the old criminal case. Kooiman's reply email had said she would have to disclose it.

Ames expected the topic to come up in the prep meeting. It didn't. He left the meeting uneasy. According to a sworn statement he later filed in the civil case, he called Richmond after the meeting to discuss the email and the four words, believing they were important.

According to Ames, Richmond asked for a copy of the email string. Ames sent it on Oct. 18, 2012. A record of the email exchange appears in court files. Ames says Richmond called back, and said the email would have to be disclosed to Dalsing's attorney. Richmond, in a separate sworn statement, denied he said anything of the

kind.

Either way, the email with the four words wasn't disclosed.

No charges

In November 2012, sheriff's deputies and the prosecutor's office reached a decision on the Kopachuck incident. There would be no criminal charges against the teacher seen on the video.

The case had problems: The incident dated to February 2012, but hadn't been reported to law enforcement for six months. The report came from Mell, who had a clear interest in a possible lawsuit if criminal charges were filed.

Lindquist explained the rationale in a news release:

"To complicate matters, the civil attorney reported the matter to a PCSD (Pierce County Sheriff's Department) detective who had been represented by that same civil attorney on an unrelated matter."

Mell fired off a letter to Lindquist, accusing him of downplaying the incident for improper reasons. Ames was equally annoyed. He soon learned more details of the search of his email and that the results were shared with Lindquist.

He filed a furious complaint. He accused the sheriff and the prosecutor of retaliating against him because of his earlier complaint regarding overtime. He accused them of conspiring to dismiss the Kopachuck incident for bad-faith reasons. He wanted a criminal investigation:

"That child and his family turned to the criminal justice system of Pierce County seeking 'justice' for their son. ... Instead I believe they were bullied by the system because certain individuals had personal vendettas against the family's attorney and the detective who took the initial complaint."

– Excerpt of Ames complaint

The sheriff's office sent Ames' complaint through standard channels and assigned it to an outside investigator. Meanwhile, Ames arrived for his deposition in Dalsing's civil suit on Feb. 14, 2013.

Don't answer

Richmond, the lead prosecutor in the civil suit, had prepped Ames before the deposition: if you're told not to answer a question, don't answer it.

It happened a lot. Dalsing's attorney, Fred Diamondstone, was zeroing in on Ames' forensic analysis of the Dalsings' computers and the crucial photo that had been used as the basis for charges of child molestation.

The deposition transcript shows Richmond repeatedly instructed Ames not to answer questions about conversations and correspondence with prosecutors.

Ames realized his email with the four words had never been disclosed: not to the defense in the criminal case, nor now in the civil case.

He was a named party in a lawsuit alleging false arrest. He'd written the four words that led to dismissal of the charges, but the county wouldn't let him say so.

Thinking of his best interests, he hired Mell — again.

Diamondstone, now hot on the trail of what appeared to be vital evidence in his client's lawsuit, pestered the

county for Ames' emails.

The county resisted. Prosecutors argued the emails were work product, protected by attorney-client privilege.

In March, Ames threw a wrench into the county's strategy. He petitioned the court for permission to disclose his email and the four words.

King County Superior Court Judge Beth Andrus was presiding over the increasingly complicated Dalsing civil case and considering Ames' request to disclose his emails.

Prosecutors argued against it, saying the criminal investigation against Dalsing could still be reopened.

Over the county's objections, Andrus ruled in the deputy's favor: the four words — "we can't see her" — and the entire email chain would be disclosed, and they didn't have to be sealed.

"All of the documents submitted to the Court by Detective Michael Ames are discoverable."

That wasn't all. The ruling was tough: Andrus opened the door to a trove of material. Additional records were fair game, and deputies and prosecutors could be questioned about their actions in the criminal case.

By this time, Gary Clower, who had represented Lynn Dalsing in the original criminal case, had seen the Ames email and the four words for the first time. He filed a declaration saying prosecutors had failed to provide it to him two years earlier — against the best interests of Dalsing.

Forced to play defense, county attorneys argued for delay — a stay of the judge's discovery order.

They said they were still investigating possible criminal charges against Dalsing. They were seeking help from the Snohomish County prosecutor's office to avoid conflicts of interest and waiting for a possible charging decision. New information was arriving. One of the victims in the original case — Lynn Dalsing's daughter — might be interviewed again.

Andrus agreed to hear arguments for a stay, but she was perplexed. At a hearing on May 8, 2013, she questioned shifting statements regarding the criminal case from Deputy County Prosecutor Jared Ausserer.

"I feel as if I'm getting different information with each new pleading. And that's a concern to me. ... Mr. Ausserer appears to have made certain representations in prior declarations that now seem inconsistent with what he's saying in his current declaration, and you know from a lawyer's perspective that when you have two inconsistent declarations, it does reflect on someone's credibility. ... Is there really a criminal investigation going on such that continuing the stay of discovery makes imminent sense, or is there something else going on behind the scenes that would explain why I'm getting such different messages from Pierce County's criminal side? That's really what my biggest concern is."

– Superior Court Judge Beth Andrus, transcript of hearing, 5-8-13

Andrus was unhappy, but she granted the county's motion for a 90-day stay of her discovery order. The county had gained a little breathing room. Prosecutors used it to appeal her discovery order to the Washington State Court of Appeals.

While the Dalsing civil case dragged on, the complaint Ames had filed with the sheriff's office regarding the search of his emails concluded. An outside investigator, Jeffrey Coopersmith, found the county did nothing wrong in searching Ames' emails. Accusations of systemic retaliation and conspiracy were unfounded.

The investigator also concluded Ames did nothing wrong when he took the police report from Mell regarding the Kopachuck incident.

No reason to re-interview

Fred Diamondstone, representing Lynn Dalsing in the civil case, wanted to check the legitimacy of Pierce County's claim of a continuing criminal investigation and a possible charging decision from Snohomish County prosecutors.

A Snohomish County deputy prosecutor provided the answer. The office had reviewed the case — but not for a new charging decision. Instead, the office concluded no new information justified interviewing Dalsing's daughter again.

Court records and police reports from this period indicate Pierce County prosecutors sought assistance from Lakewood police to continue the criminal investigation against Lynn Dalsing and did not seek further assistance from Snohomish County.

Deputy Prosecutor Jared Ausserer had taken charge of the criminal case. In a recent interview with The News Tribune, he explained why the county kept pushing.

"We're not going to just not investigate this because they're saying no new information," he said. "At some point somebody's got to make a decision on this case – so instead of playing games with different jurisdictions, we moved forward."

Asked who made the decision to proceed, Ausserer said, "I assume Mark (Lindquist)."

Asked by The News Tribune, Lindquist said he approved the continuing investigation based on recommendations from Ausserer and other prosecutors.

"Our deputy prosecutors in the criminal division were not motivated by anything other than a desire to protect the community and hold both of the Dalsings accountable," he said. "Our prosecutors were doing their jobs and playing by the rules. We shouldn't forget about the young victims in this case who were exploited, molested and raped."

Paying the bills

Ames wanted Pierce County to cover his legal bills in the Dalsing lawsuit.

Total: $4,554. Along with it, he filed a declaration describing his October 2012 discussion with Richmond about the emails.

Ames said he delivered the emails and that Richmond responded.

"Mr. Richmond told me that the email I turned over to him from Lori Kooiman in October 2012 was 'exculpatory' regarding my involvement in this case. He also told me that it would clear me of any wrongdoing in the case and he would see to it that it was turned over as part of discovery."

– Ames declaration, 6-13-13

Many moments in the three-year controversy surrounding Ames and the prosecutor's office could be labeled as firestarters, but this declaration ranked near the top.

Richmond filed a declaration of his own a month later, accusing Ames of lying to the court.

"Mr. Ames falsely states he turned over to me County emails that would 'clear his name and his department.' Mr. Ames did not deliver or discuss emails at that meeting, even though he did later provide me other related records."

– Richmond declaration, 7-17-13

Richmond added that he'd never told Ames the emails were exculpatory or that they would have to be disclosed.

The two statements directly conflicted. Ames said he gave the emails to Richmond. Richmond said he didn't.

Ames filed a heated reply that gave more detail. He described his October 2012 meeting with Richmond and said he'd spoken to him on the phone afterwards about the emails. Richmond had asked for copies, and Ames had delivered them.

"It was after that meeting that I contacted Mr. Richmond and discussed the emails because they had not come up in that meeting. I expressed to Mr. Richmond the importance of the email from Lori Kooiman, and he asked me to email him a copy of it. I emailed him the copy, and he called me after receiving it. Mr. Richmond did advise me it was exculpatory and needed to be disclosed during discovery. ... those conversations ... took place solely over the phone between Mr. Richmond and me."

– Ames declaration, 7-19-13

Court records obtained by The News Tribune include copies of the email Ames delivered to Richmond — the crucial email from 2011 that included the four words. The date of delivery to Richmond was Oct. 18, 2012.

Judge Andrus, refereeing the fight between the county and the deputy, ruled in favor of Ames. The deputy was entitled to his attorney fees.

"Det. Ames sought relief only after he was improperly instructed by Pierce County's counsel not to answer reasonable deposition questions and not to produce legally discoverable documents."

– Andrus ruling, 7-22-13

The county appealed, seeking a reversal of the attorney fee ruling. Ames and Dalsing were racking up wins — but the battle wasn't over.

Still working

While the lawsuits dragged on, Ames continued with his regular duties as a forensics examiner. That included testifying as an expert witness in unrelated criminal cases.

Under the rules of criminal discovery, defendants in criminal cases are entitled to evidence held by prosecutors that could be favorable to the defense. Prosecutors have an affirmative, non-negotiable duty to disclose such evidence. It's known as "Brady" material, and it covers a wide range of evidence – anything from facts that might support a defendant's innocence to information regarding the credibility of witnesses.

The Brady label stems from a famous 1963 U.S. Supreme Court decision called Brady v. Maryland. It holds that prosecutors must disclose "exculpatory" information to the defense. A related 1972 ruling, Giglio v. United States, also requires disclosure of "potential impeachment" information about witnesses.

For cops, the Brady label refers to their actions on the job, and any evidence that could be used by defense attorneys to undercut their credibility. In law enforcement circles, a "Brady cop" means a lying cop. A typical example of Brady material would include findings of misconduct following an internal law enforcement investigation.

In September 2013, as Ames prepared to testify in a criminal case, he received a note from the prosecutor's office. Framed in legalese, the meaning was obvious: The prosecutor was going to label Ames a Brady cop.

The basis was twofold. The first element: Ames' declarations in the Dalsing civil case — his statements saying he had provided his email with the four words to Richmond, and the reply declaration from Richmond, which challenged Ames' version of events.

The second element was the internal complaint Ames had filed with the prosecutor's office after he learned his email account had been searched without his knowledge in the midst of the Kopachuck investigation.

Deputy prosecutor Steve Penner handles Brady material for the office in consultation with a small team of colleagues. He said the law enforcement perception of the Brady label as a scarlet letter that denotes a liar is mistaken; Brady material can include unfounded allegations. It's a matter of making sure defense attorneys can't accuse prosecutors of hiding evidence.

Penner said the decision to disclose the Ames material was a collective recommendation sent to Lindquist, who approved it. The idea was erring on the side of disclosure, he said – dueling declarations between a sheriff's deputy and a prosecutor could become fodder in future cases if defense attorneys asked for it.

To Ames, it made no sense.

He had provided the emails to Richmond. Records proved it. The complaint he filed in the Kopachuck matter concluded the county did nothing wrong when it searched his email — but it also found Ames did nothing wrong when he took a police report of a possible child abuse incident.

As Ames saw it, the prosecutor's office was using those facts to label Ames a liar.

On Oct. 2, 2013, Ames sued the county. He didn't ask for money. He sought a writ of prohibition — a legal order preventing the county from sticking him with the Brady label. He wanted a name-clearing hearing to argue for his reputation.

"As a police officer I have taken an oath to uphold the law, and to be truthful and honest even when doing so may conflict with the wishes of the Prosecuting Attorney. The Dalsing case is one such example. ...

"Being labeled as a Brady cop comes with a stigmatization for an officer that can be a death sentence to his or her career. The stigma that comes with being labeled a Brady cop is dishonesty, untruthfulness and lack of credibility, and as a result an officer's testimony on the stand becomes worthless."

– Ames declaration, 12-12-13

To avoid conflicts, the case was handed to Kevin Hull, a visiting judge from Kitsap County Superior Court. The county hired outside attorneys: Seattle attorney Mike Patterson and former state Supreme Court Justice Phil Talmadge.

The all-star team swiftly moved to dismiss Ames' case. The duty to disclose Brady material was absolute: The point was not the truth – the information simply had to be disclosed to the defense.

Ames and Mell argued that prosecutors were abusing their discretion. They had no duty to disclose false information.

In February, Hull ruled in the county's favor. The prosecutor's duty to disclose trumped, he decided.

Ames and Mell lost. They appealed to the state Supreme Court.

The county followed up with a fastball and moved for attorney fees — more than $118,000 incurred by Patterson and Talmadge.

The argument: Ames knew or should have known he was going to lose. That meant he'd filed a frivolous claim.

For that, he should pay.

Dalsing charged

Pierce County was winning in the Ames case, but losing in another arena. Fred Diamondstone, Dalsing's attorney in the civil case, had been seeking county records for more than a year. On March 25, rulings from the state Court of Appeals denied the county's requests for further discovery delays.

Three days after those rulings, Pierce County charged Lynn Dalsing with two counts of child rape.

In 2010, based on the photo, prosecutors had charged her with two crimes: child molestation and sexual exploitation of a minor, one count each.

Three years later, they stacked eight charges against her. Child rape: two counts. Child molestation: three counts. Sexual exploitation of a minor: three counts. The child rape charge alone carried a possible sentence of life in prison.

In the revised charges, prosecutors described Dalsing as an accomplice, saying she knew of her husband's abuse and failed to stop it or report it.

The charges hinged on an incident described in records: Dalsing walked in on her husband and saw him taking pictures of his daughter and another child. She reportedly walked out without stopping him.

The account came from Dalsing's 7-year-old daughter, who reportedly told detectives she believed her mother did not act "because she was afraid."

The incident is described in other police reports with slightly different details:

• Dalsing said she confronted her husband and told him to stop what he was doing.

• Michael Dalsing said his wife caught him taking pictures; he said she told him to stop and threatened to call police.

Prosecutors also relied on statements from Maes, the co-defendant in the original criminal case. Maes told stories he said he'd heard from Michael Dalsing: that Lynn had participated in abuse of the daughter, and that he'd seen an obscene picture of Lynn with her child. No such photo appears in evidence records. Maes also said he knew Lynn Dalsing was the woman in the picture because he recognized her vagina.

The charging decision came from Ausserer, the deputy prosecutor who had taken charge of the criminal case.

"(Dalsing) knows that she's not allowed to have minors in contact with her husband, who's a sex offender," he said. "She knew it was happening, and facilitated it. I think anybody who reads the probable cause statement can see that."

Dalsing's trial is set for Oct. 23. Defense attorney Donald Winskill is representing her. She's pleading not guilty.

"We certainly do not agree with the charges," Winskill said. "I can tell you she (Dalsing) adamantly denies this stuff. I do not see criminal liability here. I just don't see it. I don't see any evidence that she was an accomplice in anything that her husband or this other individual did."

Ames loses

Shortly after filing new charges against Dalsing, the county won a victory against Ames. Visiting Judge Kevin Hull ruled the county was entitled to attorney fees for defending itself against the deputy — the total exceeded $118,000.

The decision sent a mild tremor through the local legal community. Losing the legal argument was one thing — part of the rough-and-tumble of court battles. Seeking sanctions and fees in such cases was a rare move, and fee awards were rarer.

Lindquist acknowledges the worries of defense attorneys, but he said the decision to seek fees, which he authorized, was appropriate.

In his suit, Ames hadn't asked for money — only a writ and a hearing to clear his name. He had argued from the standpoint of a whistle-blower, seeking a chance to explain his actions.

He wrote the email with the four words and said so. He shared it with county attorneys and said so. A judge had ordered him to disclose the correspondence. He did it.

A prosecutor, Richmond, had accused Ames of lying about sharing the emails. Records established that Ames, in fact, had shared them.

The hunch Ames expressed in the email had been dead accurate. Lynn Dalsing wasn't the woman in the photo cited in the original criminal charges. Federal authorities had confirmed it.

Prosecutors were touting his actions as evidence of dishonesty. His efforts to vindicate himself were being labeled as frivolous.

From Ames' standpoint, prosecutors were lying about him in order to call him a liar. He asked for reconsideration of the fee ruling.

The case was already unusual. The next step made it more so.

More than 30 lawyers filed declarations in support of Ames. As one, they argued against the monetary sanctions, saying they would have a chilling effect on the court system. In effect, a whistle-blower being sanctioned and fined for seeking relief in court would set a dangerous precedent.

Many of the lawyers were veteran defense attorneys — potential beneficiaries of Brady cop information. Two attorneys — Mary Robnett and Barbara Corey — were former deputy prosecutors who had led the prosecutor's criminal division. Corey had sued the county in 2008 for wrongful termination from the prosecutor's office and won a $3 million judgment.

Corey's declaration cited her past experience as a prosecutor (and more recently as a defense attorney.) She said she'd never seen a whistle-blower report used as Brady evidence against a cop. She said the declarations filed by Ames and Richmond in the Dalsing case provided "objective evidence that Det. Ames is telling the truth and Jim Richmond is not."

Corey added that she'd known Ames for many years and always found him credible and cooperative. She described a change in climate and tone at the prosecutor's office since Lindquist had taken charge in 2010. Tensions had grown between the sheriff's office and the prosecutor's office:

"Mr. Lindquist reportedly is more directly involved in controlling the actions of the sheriff's detectives than any prosecutor before him. Detectives within the sheriff's department personally have approached me to discussed [sic] their perceptions, displeasure and concern about this control. It is [sic] seems that Det. Ames is a recipient of disfavor with the prosecutor's office and must have upset the Prosecuting Attorney by exposing facts unfavorable to him and that office."

– Corey declaration, 4-14-14

Robnett left the prosecutor's office in 2012. She now works for the state attorney general's office. She also defended Ames.

"During my years of working with the large, multi-disciplinary team, Detective Ames enjoyed a reputation as a reliable, hard-working and ethical detective. ... He has sought an appropriate remedy to restore his good name, and has done so by requesting a name clearing hearing in a declaratory judgment action. Although I believe his reputation and career have been damaged by the prosecutor's disclosure, this is not a case where Detective Ames is requesting monetary damages from Pierce County."

– Robnett declaration, 5-1-14

Another key declaration came from Seattle University law professor John Strait, a recognized expert on legal ethics. Strait said Ames' effort to seek a hearing to clear his name created "a new litigation problem" that courts had not addressed — but that didn't make it frivolous, and it didn't justify sanctions and attorney fees.

"A Brady cop is entitled to some forum in which to resolve the truth or falsity of the allegations which lead to such a declaration," Strait wrote.

In response, prosecutors again cited their absolute duty to disclose Brady material, also known as potential impeachment evidence, or PIE. Deputy Prosecutor Stephen Penner, who handles Brady disclosures for the prosecutor's office, filed a declaration explaining the duty. He cited Ames' statements in the Dalsing civil case and Ames' complaint tied to the Kopachuck matter.

Penner's declaration noted that providing Brady material didn't necessarily suggest prosecutors were labeling Ames as dishonest. According to the prosecutor's office's adopted PIE policy, the truth didn't matter:

"The PCPAO (Pierce County Prosecuting Attorney's Office) PIE policy specifically states that PIE disclosure may be required 'regardless of whether the PCPAO believes the allegations in the PIE are true, and may be required in cases where the PCPAO believes the allegations are not true."

– Penner declaration, 5-12-14

Richmond, the deputy prosecutor who had clashed with Ames, also filed a declaration.

It was Richmond's July 2013 declaration ("Mr. Ames falsely states he turned over to me County emails...") that became part of the basis for labeling Ames as a Brady cop.

For the first time, Richmond acknowledged in a sworn statement that Ames had given him the crucial emails and the four words — just not on the exact day of their meeting on Oct. 16, 2012.

"Ames forwarded the June 9, 2011 email exchange to me on Oct. 18, 2012, nearly a week after our meeting. ... I have never denied receiving the June 9, 2011 email. Instead, I stated that it was not given to me at that meeting."

– Richmond declaration, 5-14-14

Asked about Richmond's actions and declarations, Lindquist referred questions to Deputy Prosecutor Dan Hamilton, who leads one of the county's civil teams.

Hamilton said Richmond's declarations in response to Ames were appropriate.

"The relevant issue was not did (Richmond) receive the emails," Hamilton said. "The only thing that was relevant at the time was whether Jim had made a promise to disclose the emails. He did not. We only put down in our declaration things that are relevant."

Kooiman, the prosecutor in the initial criminal case against Dalsing, also filed a sworn declaration. It was carefully worded. She said that in 2011 she received Ames' email that contained the four words. She did not say she gave the email to Dalsing's defense attorney, Gary Clower. She said she spoke to Clower on the phone and in person before the original criminal case was dismissed and told him Ames couldn't connect Dalsing to the

computers.

The debate hit full boil on May 19, when the county faced Ames in Judge Hull's courtroom in Port Orchard.

The basic question: Would Hull reconsider his order of sanctions and attorney fees?

Talmadge argued for the county. He was soft-spoken and surgical. He cited procedure and precedent.

The declarations filed by the 34 attorneys were flawed, he said. The first six were untimely. The other 28 were improperly presented. Many were generic: the same verbiage with slightly revised biographical details from individual attorneys.

Above all, Talmadge said, the declarations were irrelevant. No procedure in law existed that would allow a deputy's complaint to overrule a prosecutor's duty to disclose Brady material.

Because that procedure didn't exist, Ames was arguing in bad faith by definition, Talmadge argued. Ames was cherry-picking; he wanted new law, but he said current law allowed a remedy. He wanted a hearing to clear his name, but he couldn't argue that any rules had been violated.

"Counsel's gotta pick which of the arguments she chooses to make," Talmadge said, referring to Mell.

Mell argued for Ames. So did Brett Purtzer, a veteran defense attorney who had signed one of the 34 declarations.

Purtzer said the prosecutor's office couldn't use the Brady process to brand Ames unfairly. Some remedy had to be available. Sanctions and attorney fees were unreasonable.

"The disclosure labels (Ames) as something that he's not," Purtzer said. "You will not find a case that says you can make false information and declare it as Brady."

Hull mulled. This case was headed for an appeal, no matter how he ruled. The attorneys and the judge talked of it openly throughout the hearing.

Hull sided with Ames. The declarations were in. He was willing to reconsider his ruling for fees, and he wanted to hear more argument. He would accept briefs from both sides. If this was about creating new law, he wanted to see the rationale.

Scorecard

The threads of the three cases remain intertwined. All are still active, with more hearings ahead.

The county and Ames are scheduled to meet again July 10 in Hull's courtroom. The judge could preserve his ruling, reverse it or modify it. An appeal is inevitable, regardless of outcome.

The Ames case continues to reverberate at the county courthouse. Team leaders at the prosecutor's office have met with their members and shared copies of the declarations filed on behalf of Ames.

Sources tell The News Tribune that team leaders have provided the declarations to make it clear which defense attorneys filed them. Team leaders reportedly said those attorneys should be treated no differently than any other lawyers involved in local cases.

Lindquist said he approved a recommendation from his chief of staff, Dawn Farina, to disseminate the declarations. The idea was open communication.

Lawyers who filed declarations on Ames' behalf also received letters from Lindquist's office. The letters, penned

by Deputy Prosecutor John Sheeran, reiterate the county's position in the Ames case and suggest that lawyers who filed declarations might be operating with incomplete information. Some attorneys interviewed by The News Tribune saw the letters as veiled threats. Lindquist said his office had no motive beyond transparency.

The next hearing in Dalsing's criminal case is set for Aug. 29. It's an omnibus hearing, a catch-all, catch-up moment, followed by a placeholder trial date of Oct. 23. The case will be entering its fifth year.

Dalsing's false-arrest suit against the county is active, in something of a legal holding pattern. Both sides continue to argue over disclosure of records, and the debate has been sent to the state Supreme Court for consideration.

Ames retires

On Feb. 14, Mike Ames retired from the sheriff's office after 26 years of service. He sent a letter to Sheriff Paul Pastor. It was seven pages long, accusatory, a bullet-point list of grievances.

"The working conditions for me have become intolerably hostile to my good name, reputation and credibility," Ames wrote.

On May 19, the sheriff's office posted a job opening for a computer crimes investigator.

The job description is boilerplate. The detective will investigate computer crimes and analyze electronic media.

"Success in this position is dependent upon an individual's ability to learn the skills necessary for the position and to interact well with varied other units within Pierce County, including but not limited to the Prosecutor's office, other police agencies, and civilian experts."

It's primarily a day shift job, according to the position notice – but it requires night and weekend work.

Sean Robinson: 253-597-8486 sean.robinson@thenewstribune.com @seanrobinsonTNT

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Crime SEPTEMBER 18, 2015

Appeals court wrestles with Pierce deputy's claim of prosecutor falsehoods

BY SEAN ROBINSON
Staff writer

For two years, retired Pierce County sheriff's deputy Mike Ames has argued that Prosecutor Mark Lindquist's office lied about him to brand him as a liar. He wants a hearing to clear his name.

In response, prosecutors have said they're just doing their duty, that Ames has no right to a name-clearing hearing, and that he should pay $118,000 in attorney fees for questioning their authority.

As of Sept. 4, the county has paid $288,530 to outside attorneys to defend the Ames case, according to records from the county's risk management division.

Friday, the two sides clashed again before the state Court of Appeals in Tacoma: the latest twist in a long-running battle over credibility, the limits of prosecutorial discretion and the definition of a so-called "Brady" cop.

A small audience watched, including Ames' white-haired mother, who sat on a bench behind her son.

"Dishonest, unfounded, unsupported accusations of dishonesty are not Brady material," said Joan Mell, the attorney representing Ames.

Phil Talmadge, the outside attorney representing the county, called the suggestion that a prosecutor lied "incredibly offensive," and added that there was no basis in law for the type of hearing Ames was seeking.

The three-judge panel made no decision; that will come later.

Friday's hearing stems from an earlier clash in lower court that led to wins, losses and appeals on both sides. Last year, the county won its argument that Ames didn't deserve a name-clearing hearing. Ames appealed that finding. The county lost its bid for $118,000 in attorney fees, and appealed that finding.

Money didn't come up during Friday's oral arguments. Instead, the appeals judges focused on the legal duties of prosecutors to disclose information to defense attorneys that could be relevant to the credibility of a law-enforcement witness.

That's the so-called Brady label, a piece of legal shorthand viewed by law enforcement officers as a permanent stain on their reputations.

Brady material, named for a 1963 U.S. Supreme Court decision, is meant for defendants. It allows their attorneys to probe the credibility of arresting officers. The duty to disclose it is mandatory, according to prosecutors, and they have wide discretion when it comes to defining it.

The suit from Ames tests the limits of that discretion.

Typically, Brady material includes findings of misconduct from internal law enforcement investigations. The case involving Ames is different; the records used to pin him with the Brady label come from a disagreement with prosecutors.

It's tied to a larger criminal case that ultimately led to a finding of prosecutorial vindictiveness and an active effort to recall Lindquist from office.

In 2011, Ames was the sheriff's computer forensic analyst. He was assigned to review a computer cache of child pornography, including a photo used as the basis to charge Longbranch resident Lynn Dalsing with child molestation.

At the time, Ames reviewed the photo and sent an email to prosecutors, saying Dalsing couldn't be identified in the image. A deputy prosecutor, Lori Kooiman, said Ames' email would have to be disclosed to the defense, but it wasn't.

Ultimately, Ames' instinct was proved to be right; the photo didn't depict Dalsing. Charges against her were dismissed, and she subsequently sued the county for false arrest.

After that, Ames' email became the subject of a discovery battle.

In 2013, he filed a legal motion seeking the right to disclose it. The county opposed that motion and lost. (Ames recently won a pair of related legal victories tied to those efforts; appeals court judges awarded him about $[illegible],000 in attorney fees, over the county's objections.)

Ames filed a sworn declaration, saying he had delivered the key email string to Jim Richmond, a deputy prosecutor defending the county against Dalsing's lawsuit. Ames added that Richmond told him the emails were "exculpatory."

Richmond filed a counter-declaration, saying Ames "falsely" stated he turned over the emails, and that Richmond never described them as exculpatory.

Prosecutors later used Richmond's declaration to label Ames as a Brady cop.

In response, Ames sued. He didn't ask for money but for a name-clearing hearing and a chance to argue he told the truth. He also provided proof he'd sent Richmond the email string. The records appear in court files.

In 2014, almost a year after the dueling claims appeared, Richmond filed a new declaration in the Ames lawsuit, saying he had received the emails from Ames, just not on the exact date Ames mentioned in a previous declaration.

Justice Jill Johanson asked Mell about the nuances of Brady material. Citing past legal rulings, Johanson noted that such records sometimes include false statements from witnesses regarding law enforcement officers, but prosecutors still have to disclose them to the defense.

Mell replied that there was a difference between a false statement from a witness and a false statement from a prosecutor.

"We have very specific materials known in Richmond's case now to be false, that are selectively being disseminated, presumably for for retaliatory reasons," she said.

Justice Thomas Bjorgen ran a scenario by Talmadge — what if Ames was right? Would that mean prosecutors were overstepping their authority?

"I don't think so," Talmadge said. He added that Ames was bending legal process and using "the wrong vehicle" for his grievances. He suggested Ames should sue in federal court instead.

Mell, given the last word, said a name-clearing hearing would prevent the need for a federal suit.

"I don't think it's appropriate to force a detective to limit his remedy to seeking damages from the county when he's seeking a preventive measure," she said.

Sean Robinson: 253-597-8486

sean.robinson@thenewstribune.com

@seanrobinsonTNT

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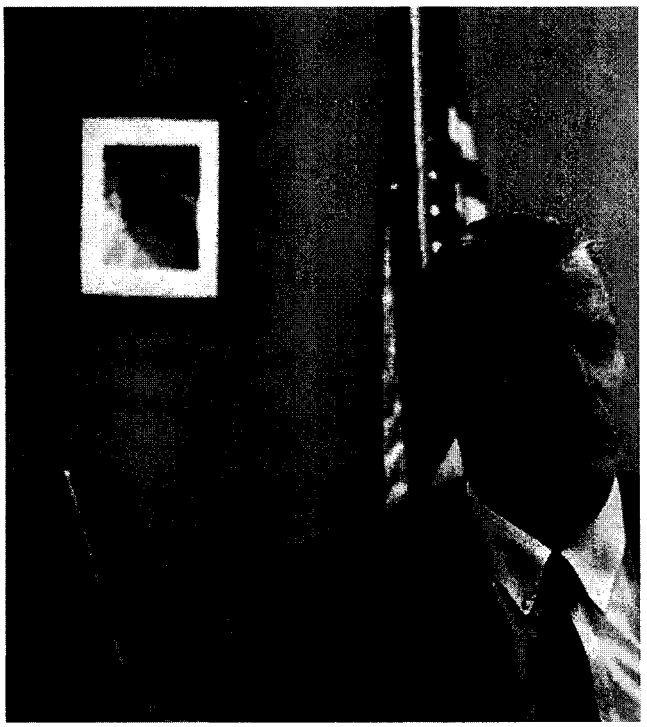
Long-running false-arrest lawsuit ends with victory for county, Lindquist

HIGHLIGHTS

Lynn Dalsing, who twice had sex-crime charges against her dismissed, withdraws lawsuit

Decision means no settlement or public payout; county has spent $531,762 to defend the case

Original criminal case led to findings of prosecutorial vindictiveness and other legal actions, some still active



The decision, a victory for the county and Prosecutor Mark Lindquist, ends four years of grinding, bitter litigation marked by multiple appeals, recriminations, discovery battles and related legal actions that continue to percolate in other venues. **Peter Haley** - phaley@thenewstribune.com

BY SEAN ROBINSON
srobinson@thenewstribune.com

Apart from paper formalities, a long-running false-arrest lawsuit against Pierce County is over, and the plaintiff will walk away with nothing.

Former Longbranch resident Lynn Dalsing, 49, who was charged twice with sex crimes against her daughter and saw both criminal cases dismissed, moved this week to end her suit against the county and its prosecutors.

The decision, a victory for the county and Prosecutor Mark Lindquist, ends four years of grinding, bitter litigation marked by multiple appeals, recriminations, discovery battles and related legal actions that continue to percolate in other venues.

The county has spent $531,762 to defend against the Dalsing suit, according to public records.

THE DECISION, A CLEAR VICTORY FOR THE COUNTY AND PROSECUTOR MARK LINDQUIST, ENDS FOUR YEARS OF GRINDING, BITTER LITIGATION MARKED BY MULTIPLE APPEALS, RECRIMINATIONS, DISCOVERY BATTLES AND RELATED LEGAL ACTIONS THAT CONTINUE TO PERCOLATE IN OTHER VENUES. THE COUNTY HAS SPENT $531,762 TO DEFEND THE DALSING SUIT, ACCORDING TO PUBLIC RECORDS.

Via email, Lindquist praised the outcome.

"We will always fight to protect children, fight to make our community safer and fight for what's right," he said. "As President Lincoln said, truth is the best vindication."

Dalsing's attorney, Fred Diamondstone, said his client chose to withdraw "due to the emotional costs of going forward."

Richard Jolley, one of the private attorneys hired to defend the suit, said the reason for the dismissal was simpler: The county was going to win.

"Diamondstone was going to get creamed," he said. "It would have been an injustice to put a dime in (Dalsing's) pocket."

Jolley provided The News Tribune a pair of documents, not filed with the court, that he said would have damaged Dalsing's lawsuit. One, a letter from Dalsing's daughter, now 13, charged that Dalsing failed to protect the daughter from sexual abuse by her father, Michael Dalsing. Jolley added that the daughter

was willing to testify against her mother.

The other document, a declaration signed by a woman unrelated to the Dalsing family, accused Lynn Dalsing and her husband of sexually abusing her in the past.

Told of Jolley's statements, Diamondstone said his client "chose to drop this case in order to spare everybody this emotional turmoil."

The criminal charges against Dalsing, dismissed in 2011 due to lack of evidence and again in 2015 due to prosecutorial vindictiveness, fueled a recall petition and whistleblower complaints against Lindquist and his staff, as well as a state bar complaint against Lindquist and other prosecutors that is still under investigation.

THE CRIMINAL CHARGES AGAINST DALSING, DISMISSED IN 2011 DUE TO LACK OF EVIDENCE AND AGAIN IN 2015 DUE TO PROSECUTORIAL VINDICTIVENESS, FUELED A RECALL PETITION AND WHISTLEBLOWER COMPLAINTS AGAINST LINDQUIST AND HIS STAFF, AS WELL AS A STATE BAR COMPLAINT AGAINST LINDQUIST AND OTHER PROSECUTORS THAT IS STILL UNDER INVESTIGATION.

The case also sparked a separate suit filed by retired sheriff's deputy Mike Ames, one of several deputies involved in the original criminal investigation. Ames contends that prosecutors tried to destroy his credibility to

gain advantage in the lawsuit. The case is pending.

In 2010, prosecutors charged Michael Dalsing with multiple counts of child rape. The victims were the Dalsings' daughter, then 7, and two of her young friends. Michael Dalsing and an associate, William Maes, pleaded guilty and were convicted in 2011.

After charging Michael Dalsing, prosecutors charged Lynn Dalsing with sex crimes, based on a photo wrongly identified as depicting her. Questions of misidentification were raised internally by Ames and later proved accurate.

Prosecutors dismissed the criminal charges in 2011, after Dalsing spent seven months in jail. She subsequently sued in 2012 for false arrest, initially seeking $5 million.

Following a series of discovery battles that climbed to the Washington State Supreme Court and yielded information about the misidentified photo, prosecutors filed new criminal charges against Dalsing, including child rape. They accused her of knowing about her husband's actions against the children and aiding in their commission.

In 2015, Superior Court Judge Ed Murphy dismissed those charges due to prosecutorial vindictiveness, noting that prosecutors filed them to gain advantage in the long-running false-arrest lawsuit.

Prosecutors initially appealed Murphy's ruling, then withdrew the appeal, meaning Dalsing

could not be charged again.

Those developments allowed Dalsing's lawsuit to move forward. Diamondstone, her attorney, filed a separate suit in federal court against Lindquist and deputy prosecutor Jared Ausserer last year. Recently, on May 11, Diamondstone moved to dismiss the federal suit, again without a settlement.

LAST FALL, THE COUNTY'S LAWYERS AND DIAMONDSTONE APPEARED TO BE ON THE VERGE OF A SETTLEMENT THAT WOULD HAVE PAID DALSING $250,000, ACCORDING TO COURT RECORDS. JOLLEY, LINDQUIST AND DIAMONDSTONE HAD TENTATIVELY AGREED ON THE WORDING OF A SETTLEMENT AGREEMENT AND THE AMOUNT — BUT COUNTY RISK MANAGER MARK MAENHOUT VETOED THE TERMS AND THE POTENTIAL PAYOUT.

Last fall, the county's lawyers and Diamondstone appeared to be on the verge of a settlement that would have paid Dalsing $250,000, according to court records. Jolley, Lindquist and Diamondstone had tentatively agreed on the wording of a settlement agreement and the amount — but county risk manager Mark Maenhout vetoed the terms and the potential payout, preferring to fight in court.

Following the aborted negotiations, both sides vowed to continue the battle, and familiar rhetoric resurfaced: Jolley and county lawyers

said the evidence would show Dalsing was responsible for the abuse her daughter suffered, while Diamondstone said the county's misconduct in the course of prosecution would be be a decisive factor.

Friday, Diamondstone underlined the 2015 finding of prosecutorial vindictiveness.

"Judge Murphy correctly found the new criminal case was vindictive and dismissed the case," he said. "Judge Murphy's ruling closed the door on new charges by Pierce County for this sad chapter."

Diamondstone added that his client "chose to drop this case in order to spare everybody this emotional turmoil."

Jolley insisted that Dalsing walked away because of the statement from her daughter. He added that the public expense of defending the suit was justified, and that the failed settlement negotiations had no bearing on the strength of the county's position.

"Yeah, the county spent money defending it, so that's the right result," he said. "We never had a settlement. We were concerned about cost, not losing."

Sean Robinson: 253-597-8486, @seanrobinsonTNT