No. 93428-2

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL AMES,

Petitioner,

v.

PIERCE COUNTY, By and Through, PIERCE COUNTY PROSECUTING ATTORNEY MARK LINDQUIST,

Respondent,

MICHAEL AMES' ANSWER TO AMICI BRIEF

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I. STATEMENT OF THE FACTS

Pierce County Sheriff's Department Detective ("Det.") Michael Ames petitioned for declaratory relief to clear his good name.[1] He sought a writ to stop the dissemination of certain documents if the court were to find in a name clearing hearing that the documents were not credible potential impeachment evidence.[2]

Ames alleged four declarations from deputy prosecuting attorneys ("DPA") falsely accused him of dishonesty.[3] The first Richmond declaration stated that Ames did not give DPA Richmond e-mails to disclose in the *Dalsing* case, and other comments about disclosure of these e-mails.[4] Richmond later testified Ames did give him the e-mails.[5] The Lewis and Kooiman declarations state Ames "made many false statements" when speaking to whistleblower investigator Coopersmith about a conversation Ames had with the two DPA's on the *Dalsing* case.[6]

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[1] Op. at 5.

[2] *Id.*

[3] Op. at 7.

[4] Op. at 7; CP 2312 (Richmond Dec. at App. B to Ames' Pet); CP 118-119 (E-mails at App. C)

[5] CP 1587, Ames' Pet. at App. D.

[6] Kooiman Dec. at CP 1620: "During the course of the interview, Ames made many false statements about his interactions with Tim Lewis and me." Lewis Dec. at CP 1597: "During the course of the interview, Ames made many false statements about his interactions with Lori Kooiman and me."

Kooiman and Lewis did not identify what Ames said that was false.[7] The text of the Ames' transcript describes a meeting where Kooiman and Lewis directed Ames to examine the Dalsing computer evidence when Ames did not agree that there was probable cause to reexamine the computers.[8] Ames said the DPAs urged him to comply, claiming they would report back to the Prosecutor who would speak to the Sheriff about Ames being uncooperative.[9]

Coopersmith did not report any findings specific to *Dalsing,* explaining the matter to be beyond his scope.[10] Coopersmith did investigate other allegations from Ames' complaint that involved the prosecutor's office.[11] Coopersmith provided his opinion that there was

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[7] *Id.*

[8] *See also,* Ames' Pet. App. B at 18 to 24, excerpted as follows: "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, "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" .... "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 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." (Coopersmith transcript of Ames' Statement)

[9] *Id.*

[10] CP 485, Ames' Pet. at Ex. B (Coopersmith Report at page 37).

[11] *Id.*

"no merit" to the retaliation allegations, while also finding "no evidence that Det. Ames acted in anything other than good faith".[12]

The prosecutor's office then used these DPA declarations from Richmond, Kooiman and Lewis, and the Coopersmith report as potential impeachment evidence to label Ames a dishonest detective.[13] The Pierce County Prosecuting Attorney's Office utilized a potential impeachment policy ("PIE Policy") that has not been approved nor accepted by any law enforcement Guild.[14] The policy does not provide for actual notice and an opportunity to be heard on the veracity of the documentation.[15] In addition, the Pierce County "PIE" policy does not follow the Washington Association of Sheriffs & Police Chiefs Model Policy For Law Enforcement Agencies Regarding Brady Evidence And Law Enforcement Witnesses Who Are Employees/Officers.[16] The policy accepted by leaders in law enforcement contain the following provisions that recognize

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[12] Op. at 8 - 9.

[13] CP 141 - 142, Ames' Pet. App. B (Pie Letters)

[14] CP 247 - 252. (PIE Policy)

[15] *Id.* and Pierce County's Answer to Pet. at 5 ftnt. 7.

[16] CP 486 - 491.

unsubstantiated accusations should not be disseminated as "Brady" material.[17]

Ames left the department without a name clearing hearing, and has not yet obtained access to the courts for relief. The Sheriff's Department never investigated whether the prosecutor's accusations could be substantiated through any internal affairs investigatory processes.[18] Of concern to the amici, Division II concludes law enforcement officers have no right nor access to the courts to clear their names of false accusations of dishonesty. Amici recognize this case is about fundamental due process for law enforcement officers, specifically basic fairness and the right to a name clearing hearing before placement on a "Brady" list. They do not seek to invade a prosecutor's duties to disclose "Brady" material that is credible. They, like Ames, want the opportunity to test the validity of the content, particularly where the prosecutor generates the materials in question outside the protections traditionally afforded law enforcement through internal affairs protocols and there is evidence of improper

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[17] "Unsubstantiated Finding. There is no requirement that law enforcement provide prosecutors with information concerning unsubstantiated findings about an employee" CP 489. "What is Not *Brady* Information. Allegations that are not substantiated, are not credible, without merit, false or have been determined to be unfounded are not *Brady* information." CP at 490.

[18] CP 81 - 116 (Ames' Dec.)

motives. The petition should be granted to afford law enforcement officers like Ames a proper remedy.

II. ARGUMENT

A. Det. Ames States A Case of Major Public Importance

Amici concur with the dissenting opinion that the Ames case raises issues of major public importance.[19] The present opinion remains untenable because law enforcement officers must contend with empowered prosecutors who may choose to discredit the officer using questionable materials, and the officer will have no recourse. The absence of a name-clearing opportunity places all officers and cases at risk because a decision to testify truthfully may compromise their reputation and likely, as with Ames, will end their jobs. Pierce County's Answer does not recognize the substantive question here concerns the fabrication of "Brady" material used to discredit the Ames' testimony, not just its dissemination.

Other jurisdictions recognize what the majority chose to acknowledge in a footnote, specifically that a "name-clearing hearing" protects against the deprivation of a federal liberty interest in a person's

[19] Op. at 33.

reputation.[20] In *Cotton*, the court held that the former Director of Continuing Education at a state college had an adequate state remedy via a state writ to obtain a name-clearing hearing.[21] Unfortunately, Division II chose not to recognize a name-clearing hearing proceeding exists in Washington for Ames.[22] Yet, name clearing proceedings are a recognized right in Washington for law enforcement officers and other civil servants.[23]

The right to name clearing opportunities specific to placement on a "Brady" list is well established in New Hampshire for law enforcement based on recent common law, not on any legislation as suggested by Pierce County.[24] New Hampshire uses the term "*Laurie*" instead of "*Brady*" because "*Laurie*" was the prevailing state criminal case in New Hampshire where the court reversed a conviction because the prosecutor did not disclose an officer's personnel files that contained "numerous instances of conduct reflecting negatively" on the officer's character and

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[20] Op. at 12, citing to *Cotton v. Jackson*, 216 F.3d 1328, 1333 (11th Cir. 2000).

[21] *Id.*

[22] Op. at 12 ftnt. 4: "A name-clearing hearing" is not a proceeding explicitly recognized in Washington law."

[23] RCW 41.14.120, *McConnell v. City of Seattle*, 44 Wn. App. 316, 722 P.2d 121 (1986); *Fuller v. Employment Security Department*, 52 Wn. App. 603, 762 P.2d 367 (1988).

[24] *Duchesne v. Hillsborough County Attorney*, 119 A.3d 188, 193-194 (N.H. 2015); *Gantert v. City of Rochester*, 135 A.3d 112 (N.H. 2016); Pierce County's Answer at 17 ftnt. 29.

credibility.[25] The *Laurie* case led to legislation that established a commission to study local procedures, but the legislation did not mandate name clearing opportunities, New Hampshire's Supreme Court established these requirements.[26] An officer who is afforded two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission receives adequate due process before the officer is placed on the list.[27] Further, an officer who is erroneously placed on the list based upon unsupportable allegations may via a declaratory judgment have the officer's name removed from the list.[28] New Hampshire adopted a statute to ensure in camera review of an officer's confidential personnel file to assess the materiality of its content in criminal cases, which is not what is at issue here.[29] Ames, like the Amici, want the opportunity to challenge the veracity of information via a declaratory action when the information is promulgated outside internal affairs or other civil service protocols.

Pierce County incorrectly asserts Washington does not have "anything resembling "*Laurie* lists." However, County prosecutors do

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[25] *State v. Laurie*, 139 N.H. 325, 653 A.2d 549 (N.H. 1995).

[26] *Gantert*, 135 A. 3d at 119.

[27] *Id.*

[28] *Duchesne*, 119 A.3d at 198.

[29] N.H. Rev. Stat. § 105:13-b Confidentiality of Personnel Files.

indeed maintain lists of "Brady" officers.[30] And, the personnel records of law enforcement officers have been considered potential "Brady" material for years.[31] Any substantiated findings against law enforcement are publicly available in Washington, whereas New Hampshire had a statute to protect law enforcement officers personnel files as confidential.[32] Pierce County's PIE policy contemplates the mandatory disclosure of documents held in an officer's personnel file even where there are no findings to support disciplinary action.[33] There is no statutory nor procedural authority to distinguish Washington from New Hampshire when affording law enforcement officers due process protections like a name clearing hearing prior to placement on a "Brady" list. Washington should in this case clearly establish a law enforcement officer's right to a name clearing hearing prior to placement on a "*Brady*" list.

B. Det. Ames' States a "Justiciable" Claim to Clear His Name

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[30] http://www.kingcounty.gov/depts/prosecutor/profiles-new/clark.aspx citing to King County Prosecuting Attorney's Office *Brady* Committee Protocol. The County in Duchense also argued that there are no actual statewide "lists", but the court knew the county prosecutor's office had an Excell spreadsheet, which Pierce County must similarly possess to keep track of the information disclosed on Ames and other officers.

[31] *State v. Blackwell*, 120 Wn. 2d 822, 845 P.2d 1017 (1993).

[32] *City of Fife v. Hicks*, 186 Wn. App. 122, 345 P.3d 1 (2015); *Cowles Pub. Co. v. State Patrol*, 109 Wn. 2d 712, 748 P.2d 597 (1988).

[33] CP 250.

Ames states a "justiciable" controversy where he has been denied any name clearing opportunities, regardless of whether the State calls him again as a witness in any criminal case. His professional reputation continues to suffer compromise where he is denied the right to confront those who have accused him of dishonesty. Courts recognize the right to post-deprivation name clearing opportunities to restore one's professional reputation, particularly where the person's reputation has been impugned based upon fabricated facts.[34] Ames has standing, and his claims are not moot because he still should be afforded the opportunity to clear his name. Ames and other law enforcement officers need to know they may testify truthfully even where doing so implicates the prosecutor's office. The Division II opinion fails to restore the requisite balance needed between the prosecutor's office and law enforcement.

III. CONCLUSION

Amici correctly request this Court grant Ames' Petition for Review. Dishonest information should not be used to discredit a law enforcement officer for self serving reasons. A prosecuting attorney who exceeds his "Brady" authority in this manner corrupts the criminal justice

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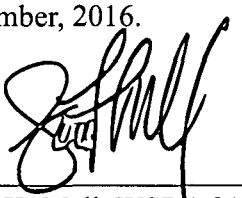
[34] *Jones v. State, Dept. of Health*, 170 Wn. 2d 338, 242 P.3d 825 (2010) *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013).

system. Law enforcement officers must have an available remedy, including notice and a name clearing opportunity, to protect the truth. Access to the courts ensures a fair and balanced criminal justice system free from undue political influence over state witness testimony. Other law enforcement officers, not just Michael Ames, share a common interest in reversing the lower court's opinion. A wrongfully accused law enforcement officer should be able to validate the veracity of potential impeachment evidence generated by a prosecutor's office. A remedy via declaratory relief ensures prosecutor accountability and protects law enforcement officers from the dissemination of false information fabricated for the wrong reasons. Where law enforcement officers like Ames have no remedy, there exists an ongoing and systemic threat of wrongful prosecution or, equally detrimental, the loss of honest civil servants who risk their job to disclose exculpatory information, which is the issue of public importance in this case.

Dated this 14th day of November, 2016.



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