45880-2

NO. 89884-7

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL AMES,

Appellant,

v.

PIERCE COUNTY, BY AND THROUGH, PIERCE COUNTY PROSECUTING ATTORNEY MARK LINDQUIST,

Respondent/Cross-Appellant.

APPELLANT MICHAEL AMES' OPENING BRIEF

JOAN K. MELL, WSBA #21319
Attorney for Appellant Michael Ames
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
joan@3brancheslaw.com
253-566-2510 ph
281-664-4643 fx

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases — Page

Legal Articles

Statutes

Codes, Rules and Regulations

Constitution

I. INTRODUCTION

Seeking direct review, Det. Mike Ames' petitions for declaratory relief and a writ of prohibition. He requests a name-clearing hearing. He relies upon his status as a represented civil servant for whom the County extends various due process protections, typically through internal affairs policies and procedures. Pierce County's Prosecutor Mark Lindquist adopted a potential impeachment policy ("PIE") without the equivalent procedural due process promises contained in Sheriff's department policies and procedures. Using the Prosecutor's PIE policy, the Pierce County Prosecutor's Office has labeled Det. Ames a "Brady" officer based on an unfounded whistleblower investigation report involving the Prosecutor and the declaration of a single civil deputy prosecutor who has since revised his testimony in a subsequent declaration.

The prosecutors assembled these materials with a cover letter they give criminal defense attorneys in all cases where Det. Ames may be called to testify. The "Brady" letter characterizes the documents as potential impeachment evidence. These documents are not secret, they are public records derived from a couple different cases. Det. Ames reported his concerns about the Prosecutor abusing the power of the Pierce County Prosecutor's office, which became the subject of a whistleblower investigation report referred to as the Coopersmith Report. At a later date, Det. Ames blew the whistle on deputy prosecutors withholding

exculpatory evidence in related criminal and civil proceedings involving a local citizen, Lynn Dalsing. The "Brady" determination followed in close proximity to Ames revealing this exculpatory evidence in the civil *Dalsing* case over the objections of the prosecutor's office. The exculpatory evidence favored Dalsing, but disfavored certain deputies and exposed the prosecutor's office to civil liability. On a motion in the case, the lead civil deputy declared Ames dishonest in a declaration he offered into the record. Then the prosecutor's office used this deputy's declaration and the Coopersmith report as PIE. The prosecutor's office is conflicted, it wants Ames credible in criminal cases, and it wants to discredit him in *Dalsing* to protect the prosecutors' exposure to civil liability. When the prosecutors compiled these documents together with a cover letter and started disseminating them as PIE, Det. Ames petitioned for relief.

The Prosecutor claims his deputies cannot be challenged over their use of the "Brady" label, notwithstanding the effects that a false label as a "Brady" officer has on a detective's career and reputation. They claim any judicial restraint compromises the rights of criminal defendants, which they now contend are superior to the rights of detectives like Mike Ames. They also say prosecutors have absolute discretion to include knowingly false accusations of dishonesty to disseminate for retaliatory reasons. Their actions offend the very "Brady" obligations they rely upon to deny Ames any relief. While claiming to protect justice for criminal

defendants, they are undermining the criminal justice system by destroying the credibility of a detective simply to discredit the detective who revealed the prosecutor's office's own decision to withhold exculpatory evidence. At the core of the Prosecutor's attack on Ames is the fact that Ames revealed an e-mail from a Pierce County deputy prosecutor that explicitly recognized the duty to turn over exculpatory material, followed by the prosecutors failure to turn that information over for nearly two years. Their hypocrisy is disturbing. This Court's review is needed to restore the balance between the prosecutor's office and the sheriff's department and to clarify "Brady" obligations.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it dismissed Det. Ames' petition on a 12(b)(6) motion to dismiss.

2. The trial court erred when it decided the public participation exception for action brought by a prosecuting attorney was not applicable and that the prosecutor's motion was therefore not frivolous.

3. The trial court erred when it decided the 2010 statute on public participation lawsuits was constitutional.

B. Issues Pertaining to Assignments of Error No. 1 - Order of Dismissal

(Declaratory Action)

1. May a detective clear his good name in a declaratory action?

a. Does Superior Court have jurisdiction to clear a detective's good name in a declaratory action?

b. Did Det. Ames present a justiciable controversy?

c. Did Det. Ames present a claim of public interest where "justiciability" is not needed?

d. Does the prosecutor's PIE policy and practices interfere with Det. Ames free speech rights and the due process he is promised as a represented civil servant?

(i) Does a County Sheriff's Department detective have a property interest in the work he performs or a liberty interest in his good name?

(ii) Does a County Sheriff's detective have the right to report governmental misconduct without fear of reprisal by being labeled a "Brady" officer?

(iii) Does a County Sheriff's detective have the right to seek redress, including independent representation where the County has an apparent conflict without risk of retaliation?

(Writ of Prohibition)

2. Does a prosecutor act outside his discretionary authority when creating a false statement of dishonesty the office then disseminates as "Brady" material?

3. May the prosecutor label an unfounded whistleblower investigator's report "Brady" material?

4. Does a criminal defendant have superior rights to litigate whether documents are exculpatory or impeaching, and material in every case? Or, may a detective ask Superior Court to issue a declaratory order on adjudicated facts that eliminates the risk of inconsistent determinations from a

prosecutor, judge, or jury reaching their own conclusions on a case by case basis?

5. Did the Prosecutor make any other avenue of relief available to Det. Ames?

C. Issues Pertaining to Assignments of Error No. 2 & 3 - Order on Special Motion to Strike

1. Is this action exempt from public participation protection under RCW 4.24.525(3)?

2. Does RCW 4.24.525 violate the constitution, specifically Art. II § 37 because the UDJA and Writs of Prohibition were not cross referenced when enacted?

III. STATEMENT OF CASE

On September 18th, 2013, Det. Ames received a letter from the prosecutor's office labeling him a "Brady" officer under the prosecutor's new PIE policy. CP 141. The letter claims PIE "exists", and generally identifies the PIE as some select declarations from the *Dalsing* case.[1] The letter identifies one other document, a whistleblower investigation report.[2]

Dalsing Declarations Not PIE

The *Dalsing* case involves criminal and civil proceedings that are already before this Court on Pierce County's motion for discretionary review.[3] The News Tribune ran a prolific story explaining the case and its

---

[1] Id. CP 545 - 547 (Ames Dec. 5/14/13), CP 548 - 550 (Ames Dec. 6/13/13), CP 556 - 558 (Ames Dec. 7/2/13) CP 571 - 575 (Ames Dec. 7/19/13), CP 576 - 606 (Richmond Dec). CP 544 to 672 is what the prosecutor's office actually disclosed. There is only one declaration from a DPA, and it is Richmond's declaration from July 17th, 2013. The prosecutors added the orders from the *Dalsing* case at Det Ames' request.

[2] CP 141, CP 635 - 671 (Coopersmith Report).

[3] *Dalsing v. Pierce County*, Supreme Court Case No: 90173-2

correlation to these proceedings. CP 2024 - 2041. The public commented. CP 2059 - 2063. The crux of importance here is that Det. Ames never had probable cause to link Dalsing to the photograph that formed the basis of criminal charges against her. CP 769. He documented this in an e-mail received by the involved prosecutors, who did not immediately release her.[4] CP 82, 118 - 119. The criminal prosecutors never gave Dalsing's criminal defense attorney Ames' e-mail, even after saying the prosecutor was obligated to do so. CP 119, 128. They also delayed producing the key photograph. CP 129.[5] Dalsing remained incarcerated for approximately seven months on charges the prosecutors could not prove, which is the basis for her civil complaint. CP 537 - 542.

The trial court correctly explains the "Dalsing Declarations" in its memorandum opinion, with one exception. CP 769. At line 23, the trial court writes DPA Richmond "disputes" getting the e-mails from Det. Ames. The trial court relied upon Richmond's declaration from

---

[4] "Lead Detective: 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
Det. Ames: 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...." App. 18 at APP56. CP 82 - 84, 119.

[5] A chronology detailing the prosecutor's history of nondisclosures with excerpts from the *Dalsing* record is at CP 1641 - 1943.

Dalsing that declares Richmond did not get the e-mails.[6] After entry of the 12(b)(6) order, DPA Richmond files a new declaration in this case substantially modifying his previous *Dalsing* declaration to now admit he did indeed get the e-mails Det. Ames truthfully said he gave Richmond.[7] CP 1587 - 1589.

Richmond is still adamant that he never told Ames' his e-mail was "exculpatory" or that it would be turned over. CP 299, 1588. What Richmond recalls saying about the exculpatory character of the e-mails does not mean Ames' recollection is dishonest. Many other local attorneys, fearful of the chilling effect of this case, believe the e-mails were "positive exculpatory evidence" or "Brady" material. CP 1405 - 1410. Ironically, the Richmond declaration is not.

Coopersmith Report Not PIE

On February 25th, 2013, five days after Ames' attorney contacted the prosecutor's office about appearing independently for Det. Ames in the *Dalsing* matter, Pierce County started a whistleblower investigation into a

---

[6] "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." CP 13. Richmond Dec. Opposing Fees 07/17/13. The trial court reached the same erroneous conclusion relying on Richmond's Dec. in its order on Pierce County's Motion to Strike: "Ames made a motion for attorney's fees and in his supporting declaration alleged that he provided the emails to Richmond and was told the emails would be disclosed. Richmond disputes this in his own declaration, claiming he never received the emails and never told Ames the emails would be disclosed." CP 740.

[7] 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 the October 12, 2012 meeting." CP 1588.

complaint received from Det. Ames that involved the Prosecuting Attorney. CP 637, 344 - 398. While Det. Ames requested an outside criminal investigation, Pierce County chose to keep Ames' complaint in house and treated it instead as a whistleblower complaint. CP 99 - 100. Det. Ames' report questions the propriety of Lindquist's press release in a declined child abuse case. CP 346, 369. The press release suggests Det. Ames compromised the prosecution by taking video into evidence from counsel who had previously represented him. CP 98, 346, 371. Det. Ames also complained about Lindquist surreptitiously searching his e-mail. CP 346, 361. The County hired Jeff Coopersmith, a Seattle attorney, who prepared an expensive report that the prosecutor's office received on May 29, 2013. CP 635. Coopersmith concluded Lindquist's conduct could be motivated by reasons other than retaliation; and therefore Ames' complaint in his opinion was an unfounded whistleblower retaliation complaint. CP 658. Coopersmith did not conclude Det. Ames was in any way dishonest. In fact, his investigation showed Lindquist did issue a press release with reference to Det. Ames, admittedly not by name; and that Lindquist was involved in a surreptitious examination of Det. Ames' e-mail. CP 371, 1872, 1877. Coopersmith did not identify any wrongdoing by Det. Ames. CP 652. In fact, he found Det. Ames was properly fulfilling his duties.[8]

[8] The Sheriff's Department never initiated any internal affairs investigation against Ames for any misconduct related to these matters. CP 673 - 674.

Det. Ames served successfully for many years as Pierce County's certified criminal forensic computer examiner. CP 1 -2, 114, 493-494. After the trial court dismissed his petition and denied him any avenue of relief, he retired to mitigate against the ongoing retaliation he is experiencing. CP 114, 1113. The prosecutors were limiting his case assignments. The prosecutors quit supporting him in defense interviews. CP 1289 - 1295. The prosecutors scrutinized his reports, looking for any means to damage his favorable reputation. CP 1113. Despite his retirement, he still expects to be called to testify in pending cases with the prosector's office. Id. Det. Ames is in his fifties and has several years left in his career. His reputation as a credible forensic examiner effects his employability outside the office.

Det. Ames believes the prosecutors now consider him a "Brady" officer for retaliatory reasons. CP 81-82. Certain facts show a correlation. For instance, the timing of their decision closely approximates his actions to reveal exculpatory evidence they erroneously withheld in the *Dalsing* case. CP 188, 192 - 197. On August 5th, 2013, the *Dalsing* civil court entered a judgment in Ames' favor against the prosecutor's office for discovery violations. CP 198. The next month, Ames received their "Brady" letter, identifying as PIE select declarations that led to the judgment against the prosecutor's office. CP 141. They also reached back in time and added the County's whistleblower investigation report from

May. Id. and CP 485. This was not a report the prosecutors chose to treat as PIE when they got it. CP 92, 287 - 291. In fact, Ames testified in a criminal case after the report came out and before they declared it PIE. Id. The fact that the prosecutor's office chose to "Brady" list Det. Ames and not the other Pierce County detective accused of wrongdoing in the *Dalsing* case also appears suspicious. CP 4, 590 - 595.

The Prosecutor's "Brady" letter and the actions the prosecutor's office promises to take to discredit Det. Ames led him to seek a judicial remedy to clear his name. Det. Ames hoped to have an opportunity for meaningful discovery, and a name clearing hearing to show the deceptive and retaliatory nature of the prosecutor's PIE materials. The trial court denied him this opportunity when it dismissed his case on the pleadings.

Det. Ames' does not omit any necessary elements to declaratory relief or to a writ in his petition. CP 1-11. The trial court's opinion order shows the trial court had no trouble identifying the necessary elements. CP 768 - 775. The trial court dismissed on the pleadings, deciding there was "no justiciable controversy and no major public concern with regard to the disclosure of potential impeachment evidence...." CP 766. The trial court decided "declaratory relief here would do nothing to help Ames". CP 766. Det. Ames disagrees with the trial court's opinion, and requests reversal.

IV. ARGUMENT

A. De Novo Review - Facts in Complaint and Hypothetical Facts Outside the Record Presumed True

Appellate review of a declaratory judgment action follows customary principles. *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013). The court reviews the trial court's order of dismissal under 12(b)(6) de novo. *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 309 P.3d 555 (2013).

A complaint may not be dismissed when any facts consistent with the complaint would entitle the plaintiff to relief. Id. at 866. The allegations pled in the complaint must be considered true. The trial court disregarded this standard when, among other concerns, it reasoned in this case of first impression that the prosecutor and Det. Ames had common interests in Det. Ames' credibility. CP at 774 L 8 - 11. The distinct problem here concerns the prosecutor's office retaliating against a detective, who is speaking out against the prosecutor. The facts here are contrary to what typically appears as mutual interests in criminal matters, presenting instead as genuine opposing interests between the parties needed for the declaratory relief requested. "Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Even hypothetical

situations not a part of the formal record may be introduced to "assist the court in establishing the "conceptual backdrop" against which the challenge to the legal sufficiency of the claim is considered." Id. at 750.

Here the trial court erred when it failed to assume the prosecutor is retaliating and interfering with Det. Ames rights as a represented civil servant. Det. Ames' good name and reputation are at stake. The prosecutor is abusing his power, specifically his obligations under "Brady," for retaliatory reasons by allowing his office to make up false accusations of dishonesty. The prosecutor's abuse requires judicial intervention to arrest the miscarriage of justice.

With regard to the writ of prohibition, writs of prohibition are reviewed for abuse of discretion when actually considered. *In re King County Hearing Examiner*, 135 Wn. App. 312, 144 P.3d 345 (2006). The trial court did not consider the writ; thus, the standard of review is the de novo standard applicable to dismissal on the pleadings.

De novo review similarly applies to the legal issues Det. Ames raises regarding the prosecutor's special motion to strike. *City of Longview*, 174 Wn. App. at 776. Whether the Legislature violated the constitution when adopting the statute without setting forth in full the existing statutory remedies subject to amendment is a legal issue requiring interpretation and application of Wash. Const. art. II § 37. Whether the statute specifically exempts cases involving the prosecutor enforcing laws

aimed at public protection is a straightforward application of common law principles governing statutory construction. The Court applies a de novo standard of review in this case.

B. Fact Development Needed to Correctly Ascertain the Rights of the Parties and the Propriety of the Relief Requested

CR 12(b)(6) motions are disfavored and are to be granted only "sparingly and with care." *Bravo v. Dolsen Companies*, 125 Wn. 2d 745, 750, 888 P.2d 147 (1995). Summary dismissal on the pleadings is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Id. The court must be able to say that, no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief. *Haberman v. WPPSS*, 109 Wn. 2d 107, 744 P.2d 1032 (1987).

The trial court did not legitimately make this requisite determination because to do so, the trial court must find criminal defendants have a superior right to false accusations of dishonesty than a civil servant's rights to clear his good name. This case presents precisely the balancing of competing interests declaratory relief was designed to address; thus it is the exact remedy that Det. Ames should be using to stop the misconduct before further harm results. The risks at stake are the discrediting of a valued well experienced public servant as well as the harm of disjointed and inconsistent determinations discrediting Det. Ames

on a case by case basis. The criminal courts have no opportunity for fact finding on this important collateral issue and varying results raises questions of fairness or equal protection.

The prosecutor's office moved to dismiss on the pleadings without conceding for purposes of the motion that DPA Richmond's declaration contains false accusations of dishonesty; and without conceding the Coopersmith Report contains no accusation of dishonesty by Det. Ames. CP 733. With these facts properly assumed, the prosecutor's motion should have been denied. Det. Ames should have some avenue for relief from false statements made about him and erroneously disseminated as "Brady" material. CP 1347 - 1402, 2056 - 2058. When the Court asked about alternative forms of relief, the prosecutor loosely referred to the tort claim of defamation and a federal statutory cause of action under 42 U.S.C. § 1983. RP 10 - 11 (1/17/14), 31 - 32 (3/19/14), 38 - 41 (7/10/14), CP 2068. The prosecutor gave this answer without conceding the validity of these claims and without briefing these suggested theories.[9] The prosecutor never explained how either proposed tort remedy would achieve anything other than a possible damage award. Det. Ames was not seeking a damage award. Review of case law outside Washington does not support the prosecutor, which the trial court recognized when denying

[9] Two other meritless suggestions included a recall petition or a grievance under collective bargaining. RP 9 - 10 (1/17/14), 40 (7/10/14).

sanctions. CP 2068. The cases require Det. Ames to pursue available state law remedy, to include an extraordinary writ.

In 2000, the Federal Eleventh Circuit decided a writ of mandate is an adequate state law remedy to protect the due process rights of an employee who is seeking a name clearing hearing, precluding relief under 42 U.S.C. § 1983. *Cotton v. Jackson*, 216 F.3d 1328, 1332-33 (11th Cir. 2000). The Supreme Court of Georgia cited to this ruling, and similarly held that a writ of mandamus is a procedural remedy that cures defendants' failure to provide plaintiff with a name-clearing hearing. *Joiner v. Gless*, 288 Ga. 208, 209-10, 702 S.E. 2nd 194, 196 (2010).

The prosecutor's office argues a writ may not be used here because the prosecutor is merely exercising his discretion. However, Det. Ames argues the prosecutor is abusing his discretion, and further that he has no discretion to disseminate false information. The Eleventh Circuit reached this very issue in its analysis of § 1983 liability in the *Cotton* case. In *Cotton*, the court explained that state law allows for an extraordinary writ when a government official is abusing his discretion. *Cotton*, 216 F.3d at 1332. Ordinarily writs may not be available in discretionary matters, but the general rule does not apply where the plaintiff accuses the defendant of abuse of power. Det. Ames asks this Court to decide like the court in *Cotton* that an extraordinary writ may be used to reign in a prosecutor's

abuse of the limited discretion afforded him under "Brady" and its progeny.

The prosecutor failed to identify any alternative remedy to stop the bad behavior of his office. Without some form of relief, DPA Richmond escapes further scrutiny and is bolstered to continue attacking the credibility of any officer who challenges his direction or steps out of line with the prosecutor's self serving strategies. Other involved DPAs are further emboldened to use whistleblower investigation reports to retaliate against county employees who report misconduct in the prosecutor's office. The ruling endorses the dissemination of the Coopersmith report as evidence of false statement when it is not. Det. Ames simply wants the retaliatory misconduct to stop, and that was his purpose for seeking declaratory relief together with a writ. He was not looking for an opportunity to profit from his misfortune. He wants to restore the balance of power between the Prosecutor's Office and the Sheriff's Department.

The fact that this case presents questions of first impression provides further justification for denying dismissal on the pleadings alone. *Bravo*, 125 Wn.2d at 751, citing to *Haberman* at 120 "When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion." In *Bravo*, the Supreme Court reversed the trial court and the appellate court's decisions to dismiss a case brought by employees against their

employer to ascertain their rights to engage in "concerted activities for the purpose of collective bargaining" without the employer's interference. The courts had not previously engaged in the requisite statutory construction to resolve the important issues presented affecting employee rights. Similarly here, Det. Ames seeks to ascertain his rights as a represented civil servant.

Washington courts have not yet been presented with the opportunity to weigh a prosecutor's "Brady" duties against a detective's right to his reputation. Det. Ames seeks protection from retaliatory interference by the prosecutor's office with his whistleblowing activities. Whistleblowing activity is worthy of protection. *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989), *Farnam v. CRISTA Ministries*, 116 Wn. 2d 659, 807 P.2d 830 (1991). Det. Ames wants to protect his good name and reputation that are valuable to the justice system. Dismissal on the pleadings was not warranted, and is in error.

C. A Proper Remedy For Name Clearing Is A Declaratory Action

Det. Ames requests due process, in particular a name clearing hearing that he is entitled to as a represented civil servant. This action is intended to articulate his rights and afford him the opportunity to prove the prosecutor's false statement and to establish his credibility. Superior courts have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. RCW 7.24.010. Any

person who has a interest in a written contract, or other writings constituting a contract may have the court determine questions of construction or validity. RCW 7.24.020. Det. Ames asks the court to decide what his rights and remedies are under his employment contract. He seeks to ascertain whether the prosecutor's PIE policy infringes on his employment contract or his civil service protections because the prosecutor is acting outside established internal affairs processes or collective bargaining procedures. The prosecutor's PIE policy is an "other writing" with contractual implications. A person whose rights, status or other legal relations are affected by a contract or franchise may ascertain his legal relations under the contract or franchise from the court. RCW 7.24.020. Det. Ames wants to know specifically whether he can insist upon meaningful due process to save his reputation developed over years of public service. He further asserts he has rights as a whistleblower to report prosecutorial misconduct without the threat of retaliation via the prosecutor labeling him a "Brady" cop. He seeks a determination that use of a DPA's declaration that accuses him of dishonesty for disclosing "Brady" material is retaliatory and that using an unfounded whistleblower investigation report is also retaliatory. These are questions he appropriately asks the court to consider.

The Restatement 2nd of Torts contains a "Special Note on Remedies for Defamation Other Than Damages." Rest. 2nd Torts 5 27 SP

NT (1977). CP 699. The note acknowledges use of a declaratory action to prove false statements. "In a question where declaratory relief is available as a general remedy and statutory provisions do not preclude it, resort may be had to a suit for a declaratory judgment that the defamatory statement is untrue. This Special Note is discussed in a Phoenix Law Review article entitled "Protecting One's Reputation - How to Clear a Name in A World Where Name Calling Is So Easy." 2010 Phoenix Law Review; Karig J. Marton, Nikki Wilk, Lara Rogal. CP 705. The scholars describe a declaratory judgment as a new tool that can have the same effect of a defamation lawsuit; only without the need to prove damages: "under a declaratory judgment, the plaintiff likely does not have to prove all the necessary - and often difficult to prove - elements of a defamation suit." Id at 15. CP 709. This remedy seems particularly appropriate here where Det. Ames filed to stop the damage.

Another scholarly journal cited by Det. Ames concludes "making a declaratory judgment remedy available to all plaintiffs recognizes that both public and private individuals have a strong interest in vindicating their reputation and simplifies the courts' task of adjudicating libel disputes." "allowing plaintiffs to select either a declaratory judgment action or a damage suit insures that those who have suffered economic harm can regain their losses and serves to deter defendants who intentionally or unintentionally issue defamatory statements" at 24.

Geoffery C. Cook, *"Reconciling the First Amendment with the Individuals Reputation: The Declaratory Judgment as an Option for Libel Suits."* 93 Dick L. Rev. 265 (1989).

Det. Ames referenced two cases outside of Washington where plaintiffs sought declaratory relief for purposes of name clearing. *Lally v. Johnson City Cent. School Distr.*, 105 A.D. 3d 1129, 962 N.Y.S. 2d 508 (2013); *Johnson v. Lally*, 118 N.M. 795, 887 P.2d 1262 (1994). The New Mexico case analyzes declaratory relief extensively and ultimately concludes that the case did not present an actual controversy because the case involved exclusively "past wrongs." Declaratory relief requires continuing illegal actions or continuing consequences to the plaintiff. Id. at 798. The ongoing controversy requirement exists here, and there is no similar barrier to the requested relief.

Det. Ames suffers the continuing harm of damage to his reputation each time the prosecutor's office disseminates its false information about him. Every time he is called to testify in a case, he suffers unwarranted challenges to his credibility. Declaratory relief is appropriate. A jury may decide the facts in controversy and may weigh the credibility of both sides. RCW 7.24.090.

The trial court questioned the binding effect of a declaratory order, suggesting a declaratory order would merely amount to a judicial opinion, not binding on another court. RP 17 (1/17/14). By statute, a declaratory

order has the force and effect of a final judgment or decree. RCW 7.24.010. Like a jury verdict, it is merely an opinion, but an opinion nonetheless that is given special legal standing because it comes after an adjudication of the facts on the merits. *Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 95 P.3d 394 (2004). A single adjudication on the merits has the advantage of uniformity on the questions presented, and the benefit of judicial economy in eliminating duplicative challenges to the truthfulness of Det. Ames' declarations in multiple criminal matters. The general powers conferred in the UDJA allows Superior Court to remove this type of uncertainty for Det. Ames. RCW 7.24.050. The Legislature expressly authorized liberal construction and administration of its provisions. RCW 7.24.120. Dismissal on the pleadings was in error and should be reversed.

D. Criminal Defendants Rights Not Paramount - Criminal Defendants Are Not Necessary and Indispensable Parties

A petitioner requesting declaratory relief must make all persons a party when a person has an interest that would be affected by the declaration. RCW 7.24.110. A declaration shall not prejudice the rights of persons not parties to the proceedings. Id. A party is necessary to a proceeding if a complete determination of a controversy cannot be had without the party present. *Treyz v. Pierce County*, 118 Wn. App. 458, 76 P. 3d 292 (2003). A necessary party is one whose ability to protect its

interest in the subject matter of the litigation would be impeded by a judgment. Id. While the general public and criminal defendants in particular care about the integrity of the prosecutor's office and its witnesses, these general interests are not specific enough to require naming individual defendants as opposed to the County as the representative local government. Any interest in the truthfulness of Det. Ames depends upon an initial determination that he has been dishonest.

Nonparty interests that are merely speculative and secondary to the issue at hand in a declaratory judgment action are insufficient to warrant dismissal under the UDJA. *Freestone Capital partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 230 P.3d 625 (2010). The interests of all criminal defendants are indeed speculative and secondary to the issues at hand here. The public does not have a right to false or suspicious information impugning the credibility of a public servant. *Bellevue John Does 1 -11 v. Bellevue School Dist. #405*, 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). The same is true of criminal defendants. Nothing in *Brady* entitles criminal defendants to false statements of dishonesty that erroneously discredit a detective. Criminal defendants have a right to the presentation of credible, truthful information. *Bauer v. State*, 295 Mont. 306, 983, P.2d 955 (1999).

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), SCOTUS held that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or punishment, irrespective of the good faith or bad faith of the prosecution." False accusations of dishonesty would never be material. Id. Evidence must be material to amount to a "Brady" violation. *United States v. Olsen*, 704 F. 3d 1172 (9th Cir. 2013); *Gentry v. Sinclair*, 693 F.3d 867, 887 (9th Cir 2012). Unless and until the accusations of the prosecutor's office are proven truthful; the rights of any criminal defendant are not implicated. Criminal defendants do not have the right to prove a detective dishonest in collateral proceedings; they have the right to challenge the credibility of a detective who has a history of dishonesty through cross examination.

Where the County appears and defends, the County is advocating sufficiently for the interests of all its citizens, to include criminal defendants. *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 951 P.2d 805 (1998). Here Det. Ames named the County, acting by and through the Prosecuting Attorney, and put the Department of Assigned Counsel on notice of the action. DAC did not make any appearance independently in this case despite actual receipt of the petition. DAC likely recognizes Det. Ames is not seeking to suppress evidence. The records at issue here are public records. Any defendants may access the materials and attempt to

use them for purposes of cross examination. The relief requested would preclude the prosecutor's office from knowingly disseminating information found to be false (like the Richmond declaration) or found to be outside the prosecutor's duties under "Brady" because its decision to disseminate the information (such as the Coopersmith report) is purely retaliatory. The rights of criminal defendants do not preclude the relief requested by Det. Ames and it was error for the trial court to prioritize the rights of criminal defendants without hearing the case.

E. Det. Ames Presents A Justiciable Controversy

A justiciable controversy exists where the petitioner presents an actual, immediate dispute in which the petitioner has a direct and substantial interest. *To-Ro Trade Shows v. Collins*, 144 Wn. 2d 403, 27 P. 3d 1149 (2001). Justiciability has four characteristics: 1) the parties must have existing and genuine rights or interests; 2) these rights or interests must be direct and substantial; 3) the determination will be a final judgment that extinguishes the dispute; and 4) the proceeding must be genuinely adversarial in character. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn. 2d 173, 157 P.3d 847 (2007).

1. Parties Existing and Genuine Rights and Interests

This element may be used to dispense with declaratory relief where a party asks the court to rule on a hypothetical, rather than an actual dispute. Possible or potential disputes are not ripe for any judicial remedy.

Seattle First Nat. Bank v. Crosby, 42 Wn.2d 234, 254 P.2d 732 (1953). Det. Ames and the prosecutor's office have an actual bona fide disagreement about the use of certain materials as PIE. This dispute is actual and real. The trial court conceded the parties disagree about the disclosure of the materials. CP 774.

However, the trial court considered this dispute hypothetical because Det. Ames did not "provide case law or legal authority in which someone has been definitively determined to be truthful in a declaration." CP 774. Det. Ames pointed out in his petition and in argument that the UDJA contemplates fact finding the same as any other civil action. CP 10, RP 16 - 17 (1/17/14). When a declaratory judgment action involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. RCW 7.24.090. Issues of fact in civil proceedings are adjudicated by a judge or a jury. Det. Ames requested both, keeping his options open for later determination following discovery.

Declaratory statements are provably false. A statement can be proven false because it is falsely attributed to a person who did not make it, or because it falsely describes an act, condition, or event that comprises its subject matter. *Schmalenberg v. Tacoma New, Inc.*, 87 Wn. App. 579, 943 P.2d 350 (1997); *Valdez-Zontek v. Eastmont School Dist.*, 154 Wn. App. 147, 225 P.3d 339 (2010).

The Richmond declaration is provably false. Richmond says he did not get e-mails from Ames. CP 577 at l. 7. Ames has his e-mail to Richmond and the metadata to verify receipt. CP 118. DPA Richmond proved his own declaration false, when he filing a new declaration after the trial court dismissed the petition. CP 1587 - 1589. This time, Richmond admits he did receive the e-mails from Ames exactly as Ames asserted. Richmond's declaration is provably false, and Ames' declaration is truthful.

As to other statements in Richmond's declaration, their veracity may be tested through discovery and ultimately cross examination. The essential purpose of confrontation of a witness by an accused is to give opportunity for cross-examination. *Pettit v. Rhay*, 62 Wn.2d 515, 383 P.2d 889 (1963). The theory of cross-examination is that on direct examination a witness discloses only a part of the necessary facts and the remaining and qualifying circumstances as known to the witness and the facts that diminish his personal trustworthiness stand suppressed or undeveloped before cross-examination. *State v. Robideau,* 70 Wn.2d 994, 425 P.2d 880 (1967).

Dismissal on the pleadings prevented Det. Ames from utilizing these fundamental opportunities to clear his name and discredit his accusers so that he can stop the dissemination of false accusations of dishonesty about him. The Prosecutor's Office provides him no

opportunity to clear his name and restore his credibility. Instead, the prosecutors ask Ames to trust that they will advocate for him on a case by case basis, knowing they will never put Richmond on the stand and that a criminal court would never give Ames standing to do so, either.

Ames' truthful statement cannot be potential impeachment evidence because truthful statements do not impugn his credibility. The only purpose of impeaching evidence is to aid the jury in evaluating a witness' credibility. *State v. Alexis*, 95 Wn.2d 15, 621 P.2d 1269 (1980). Formal impeachment is the discrediting of a witness's testimony by confronting the witness with his or her specific untruthful acts, prior convictions, prior inconsistent statements, or the like. Black's Law Dictionary (9th ed. 2009). Where there is no dishonesty, there is no possibility of impeachment.

Similarly, the Coopersmith Report has no potential impeachment value either. The report does not contain any false statement by Ames. Coopersmith does not anywhere accuse Ames of any false statement. The Coopersmith report offers the opinions of the investigator. Coopersmith opines about the motives of the prosecutor and he offers legal opinions about the elements of a whistleblower complaint. He does not say that Ames was not credible. Like Richmond, Coopersmith may be cross examined to test the true meaning of his written statements contained in

his report. This opportunity may clarify his impressions to establish unambiguously that his report is not "Brady" material.

Det. Ames would find an adjudication valuable to his credibility. The prosecutor's office should similarly think such a determination valuable because the office could rely upon it to justify nondisclosure. They would not have to revisit the issues in each and every case, and there would be no risk of inconsistent rulings. This does not mean criminal defendants would be precluded from arguing the underlying documents material in some unforeseen context. Such determinations could be made as needed, but would necessarily be streamlined because the adjudication would bring clarity to the underlying circumstances.

2. Parties Rights Direct and Substantial - Genuine and Opposing Interests

The trial court reasoned it was "questionable" as to whether the parties have genuine opposing interests. CP 774. The court explained the potential impeachment evidence pertains to a witness for the prosecution, who the state would naturally want to be credible. Id. The trial court points out the correct theoretical posture of the parties in criminal matters only, not the actual posture of the parties under the facts of this case. The trial court failed to recognize the divergent interests within the prosecutor's office that arose when the *Dalsing* case became a civil case that the office did not assign out to an independent firm. The prosecutor's

office admittedly has a conflict. CP 1169. While it wants Ames credible in criminal prosecutions, it wants to discredit him in *Dalsing* to avoid civil liability against the office.

When the trial court thought the parties interests were "questionably" opposing, the trial court should have assumed for purposes of the motion on the pleadings that the interests were in fact opposing and denied the motion.

3. Determination Final and Will Extinguish Dispute

Det. Ames pleads in his petition the requisites for finality of the relief requested to survive summary dismissal on the pleadings. The petition specifically provides as follows:

> "A judgment or decree in this matter will terminate the controversy and remove uncertainty about 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, specifically whether James Richmond has made false statements about Det. Ames sharing exculpatory communications to him for disclosure in the Dalsing matter..." CP 9.

The trial court disagreed, thinking a declaratory order would "invade the rights of other judges, the prosecutor, and criminal defendants to use their own judgment in determining the admissibility and credibility of Ames in each case." CP 774. This logic assumes the prosecutor's office has rightfully questioned Det. Ames' credibility. Det. Ames alleges it has not rightfully questioned his credibility.

The prosecutors did more than designate the "Brady" materials. Their underlying creation and selection of the so called "Brady" material is also at issue. The prosecutor's office steps outside its discretionary role, and acts beyond its limited duty to disclose when it actually formulates the content of the so called "Brady" material. The prosecutor's office cannot use its "Brady" powers as a shield to impugn the credibility of officers in disfavor with the office with immunity. Prosecutors should be accountable for generating their own "Brady" materials that are dishonest or leave a false impression. *See, Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005), citing to *Herron v. King Broadcasting Co.*, 112 Wn.2d 762, 776 P. 2d 98 (1989)("Where a report contains a mixture of true and false statements, a false statement affects the "sting" of a report only when "significantly greater opprobrium" results from the report containing the falsehood than would result from the report without the falsehood.") The "sting" of the Richmond declaration is his false statement that Det. Ames did not give him the exculpatory e-mails.

Whatever other differences there are between the two accounts of their contacts with one another cannot without more be considered "Brady" material. Eyewitnesses have differing accounts of the same events all the time, but it does mean one or the other is lying. *See, State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003); and *State v. Johnson*, 49 Wn. App. 432, 743 P.2d 290 (1987). If the prosecutor's office actually

believes differing accounts qualify as "Brady" material, the prosecutors should have labeled Det. Heischman a "Brady" officer at the same time it labeled Det. Ames. They have two entirely distinct reports about the key photograph in Dalsing, and the prosecutors know Det. Ames' reported it correctly. Lynn Dalsing is not the woman who cannot be seen in the photograph. Ames is not the "Brady" officer, and a declaratory order should reflect that.

The UDJA is instructive as to the effect to be given such an order: "The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." RCW 7.24.010. Final judgments or decrees "are conclusive on all the world." *Krohn v. Hirsch*, 81 Wash. 222, 142 P. 647 (1914). The finality element is met in this case, and the trial court erred in holding otherwise. The trial court's decision should be reversed.

4. Proceedings Adversarial

The record in this matter indisputably evidences adversarial proceedings. The clerk's papers post dismissal contain declarations from more than thirty attorneys who testify that Det. Ames should have access to the court without risk of sanctions or penalties.[10] These declarants include criminal defense attorneys who ordinarily would not be siding

[10] Declarations of Lindsay, Robnett, Ray, Miller, Kram, Clower, Steinmetz, Bliss, Sulkosky, Meikle, Cain, Schwartz, Powell, Gormly, Meske, Kelley, Dille, O'Connor, Duenhoelter, Anderson, Cutter, Benjamin, Landry, Trujillo, Arbenz, Olbertz, Hester, Fricke, Strait, Cline, Nast, Corey, Boerner, Bird & Hershman. CP 1411-1498, CP 1289 -1295, CP 2056 - 2058.

with law enforcement, and two well-recognized legal scholars (Strait and Boerner) with considerable experience on both sides of the criminal justice system. The unusual circumstances of this case show attorneys on both sides value a law enforcement officer who will speak the truth, and who will disclose evidence unfavorable to the prosecution.

F. Det. Ames Presents a Case of Public Interest Where Justiciability Not Needed

This Court has employed a "broad overriding public import" test for justiciability to reach the merits of a case where the defense contends the controversy is not justiciable. *Walker v. Munro*, 124 Wn.2d 402, 879 P. 2d 920 (1994). Issues of great public importance overcome the general requirement of a justiciable controversy. *Kitsap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008)(Applicability of privacy laws are of great public importance). Public interest is typically present where local government employees and officials are involved. Id. and *Osborn v. Grant County By and Through Grant County Com'rs*, 130 Wn.2d 615, 926 P.2d 911 (1996)(County clerk sought declaration of her right to hire whomever she wanted as a temporary clerk), citing to *Smith v. Board of Walla Walla County Comm'rs*, 48 Wn. App. 303, 306, 738 P.2d 1076 (1987)(Agreeing to hear the appeal in a county auditor's case against the board even though the auditor was voted out of office after the superior court's judgment). The courts look to the public interest which is

represented by the subject matter of the challenged interest, and the extent to which public interest would be enhanced by reviewing the case. *Kitsap County*, 143 Wn. App. at 908.

The Supreme Court recently held speech by citizens on matters of public concern lie at the heart of the First Amendment, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Lane v. Franks*, 134 S. Ct. 2369 (2014). The Court was addressing whistleblower speech and explained that protecting the speech of public employees is of great public concern:

> "there is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For "government employees are often in the best position to know what ails the agencies for which they work." *citations omitted* "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." Id. at 2377.

The *Lane* court provides various criteria for determining whether speech involves matters of public concern. Id. at 2380. Speech is of public concern when it can be "fairly considered as relating to any matter of political, social, or other concern to the community,' or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id.

The underlying issues in this case concern the integrity of the criminal justice system, which is of great public concern. At the most

recent hearing held in this case, the defense conceded this case presents issues of public concern, specifically the rights of criminal defendants to "Brady" materials. RP 33 (7/10/14), CP 44, 46.

Det. Ames points out this case garnered notable press coverage, with public comment. CP 2019 - 2055. Local attorneys and legal scholars have weighed in. CP 1296 - 1299. Pierce County's Guild has offered testimony. Id. This case also concerns whistleblowing activity to include the very important issue of whether law enforcement can report misconduct in the prosecutor's office free from retaliation to include freedom from an unfounded investigation report being used to label the reporting officer dishonest or a "Brady" officer. Corruption in a public office or program like the Prosecutor's implementation of his PIE policy is a matter of significant public concern. If the prosecutors powers are absolute, they control all the testimony making the system inherently unfair and unbalanced. This controversy warrants consideration on the merits. Declaratory relief should be granted.

G. Prosecutor's PIE Policy and Practice Implicate Due Process and Free Speech

1. Name Clearing Hearings Protect Procedural Due Process

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.

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). Failure to provide a "name-clearing" hearing in such circumstances is a violation of the Fourteenth Amendment's due process clause. Id. and see also, *Cox v. Roskelley*, 359 F.3d 1105, 1110 (9th Cir. 2004)(where public employer placed stigmatizing information in employee's personnel file, "the lack of an opportunity for a name-clearing hearing violated his due process rights.")

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). "The Fourteenth Amendment protects against the deprivation of property or liberty without procedural due process." *Brady v. Gebbie,* 859 F.2d 1543, 1547 (9th cir. 1988), citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978). An individual "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." *Brady v. Gebbie*, 859 F.2d 1543, 1547, citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Law enforcement officers vested with their union and with the county's civil service have protected property interests in their job. *Danielson v. City of Seattle,* 108 Wn. 2d 788, 742 P.2d 717 (1987)("While the legislature may elect not to confer a

property interest in {public} employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."; compared to *State ex rel. Swartout v. Civil Service Commission of City of Spokane,* 25 Wn. App. 174, 605 P.2d 796 (1980). Det. Ames is a fully vested law enforcement officer with protected property interests in his name and in his case assignments. In his position, he was the only certified criminal forensic computer examiner working for Pierce County Sheriff's Department.

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." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). The liberty interest is invoked when an employee's termination threatens his or her "good name, reputation, or integrity." "The stigma caused by publicly disclosed reasons for discharge must seriously damage a person's reputation or significantly foreclose her freedom to take other employment opportunities." Any public statement that questions a professional's diligence or competence implicates the professional's liberty interests and triggers due process. *Ritter v. Board of Com'rs of Adams County Public Hospital Dist. No. 1,* 96 Wn.2d 503, 510, 637 P.2d 940 (1961). A government official may not fabricate a situation that sets in motion adverse activity without implicating procedural due process. *Jones v.*

State, Dept. of Health, 170 Wn.2d 338, 242 P.3d 825 (2010). Det. Ames complains here that Richmond intentionally set in motion the prosecutor's "Brady" obligations by his false declaration.

"While governmental damage to reputation alone is not sufficient to establish a 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 due process protections." *Paul v. Davis*, 424 U.S. 693, 701 (1976). "This has come to be known as the 'stigma plus' requirement." *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). 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." Counties have argued they have an affirmative duty to terminate officers who are untruthful. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 237 P.3d 316 (2010); *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 219 P.3d 675 (2009). These cases hold that the "Brady" rule does not provide an explicit or well defined policy against reinstating an officer found to be untruthful. "Brady" in and of itself does not provide guidance on what level of dishonesty would prohibit reinstatement; thus,

due process in the form of a name clearing hearing is needed to ascertain the merits of any accusation of dishonesty to preclude an unwarranted termination recommendation, as well as justification for reducing his caseload. RP 27 (1/17/14), CP 1103 - 1148.

While the prosecutor's office has been disseminating materials mischaracterized as PIE, the prosecutor's office has been simultaneously reassigning his duties and responsibilities to other detectives. They have been taking away meaningful work assignments, and reconstructing their cases to eliminate the need to call him to testify. Det. Ames' value derives in part from his success as a state's witness. His reputation is seriously diminished if the prosecutors preclude him from testifying. He has no other forum to perform his duties other than in conjunction and cooperation with the prosecutor's office. He loses valuable experience and connection to cases that matter. These limitations affect his ability to work successfully for other employers who also need forensic examiners with a reputation for honesty.

Under the Due Process Clause, 'reasonable notice' must include disclosure of the 'specific issues [the party] must meet,' *In re Gault*, 387 U.S. 1, 33-34 (1967), and appraisal of 'the factual material on which the agency relies for decision so that he may rebut it," *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n. 4 (1974). The prosecutor's office has not provided Det. Ames any

opportunity to contest the content of the information it is generating and producing as PIE. He does not have an unbiased audience when addressing them because they are the ones promulgating the materials. The situation is inherently unfair. A judicial forum is the proper venue to resolve this dilemma of the prosecutor's making.

2. Declaratory Relief Warranted to Protect Free Speech

In addition to procedural due process, the factual circumstances of this case implicate Det. Ames' free speech rights to include his rights to seek redress. The UDJA was designed to resolve questions of a constitutional nature where the interests of the parties are conflicting. RCW 7.24.010 and .020. Here, there are competing constitutional interests in play that warrant examination on the merits, rather than dismissal on the pleadings. Whether the prosecutor's retaliatory use of the "Brady" label implicates Det. Ames' free speech rights turns in part on a factual examination of Det. Ames' protected activities.

Under the *Noerr-Pennington* doctrine, "[those who petition government for redress are generally immune from ... liability." *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092(9th Cir. 2000)(Protecting Sec. 1983 claims "based on the petitioning of public authorities"). "The doctrine immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." Id. "The *Noerr-Pennington* doctrine ensures

that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." *White v. Lee*, 227 F.3d 1214, 1232(9th Cir. 2000); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005).

Det. Ames was engaged in protected speech when he sought redress from Judge Andrus in the *Dalsing* matter. He was attempting to fulfill his duties under "Brady". He encountered resistance because of the conflicted interests of the prosecutor's office. The conflict should have disqualified the prosecutor's office from continued representation. RCW 36.27.030 and *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994). However they refused to address the conflict, and then proceeded to act with an apparent retaliatory animus by filing a statement declaring Det. Ames dishonest. The filing of the Richmond declaration was offensive; however, the triggering event for this action was the decision to use that declaration as "Brady" material by putting a cover letter on it and disseminating it as such to criminal defendants and their attorneys. When Det. Ames petitioned for relief, the prosecutor's office pursued sanctions as punishment. The actions of the prosecutor's office invade Det. Ames' rights to seek redress, and subject him to liability where he should be immune. The trial court erred in dismissing this case without balancing these competing interests.

H. Extraordinary Writ A Proper Remedy

1. Prosecutors Do Not Have the Discretion to Disseminate Knowingly False Information - Abuse of Discretion Actionable

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 applies where it appears an official is "about to act in excess of his or her jurisdiction." *County of Spokane v. Local No. 1553*, 76 Wn. App. 765, 888 P.2d 735 (1995)("A strike by the employees would not enlarge the power of their positions.") A court's powers under the statutory writ are broader than under the common law writ, and apply to any acts of an official outside the official's jurisdiction. Id. The historical purpose of the writ was to prevent the encroachment of jurisdiction. Id.

A writ of prohibition is the counterpart of the writ of mandate. Id. All of the provisions applicable to a writ of mandate apply to a writ of prohibition. RCW 7.16.320. Factual disputes may be decided by a jury the same as with a declaratory judgment action. RCW 7.16.210. Det. Ames pointed this out arguing for positive or negative relief: either compel dissemination of a name clearing declaratory order or prohibit the dissemination of false statements and non-impeachment materials. RP 23, 25 (1/17/14). He was denied both when the trial court focused on the

prosecutors' duties to disseminate PIE, rather than the underlying conduct that produced the alleged PIE. The trial court relied primarily upon the *Kyles* case, explaining prosecutors have the responsibility to decide what is PIE. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). CP 772. *Kyles* discusses the more traditional dilemma for prosecutors who do not disclose because the information is not necessarily known to them. The information may be known only to police investigators. Id. at 438. That is a significant distinction from this situation where the prosecutors participated in the creation of the materials that concern them.

Washington does not have any "Brady" cases directly on point with the issues presented here. The cases found outside Washington are not "Brady" cases, but there are writ cases that show a writ is the proper state law remedy to seek a name clearing hearing. *Cotton v. Jackson*, 216 F.3d 1328, 1332-33 (11th Cir. 2000) and *Joiner v. Gless*, 288 Ga. 208, 209-10, 702 S.E. 2nd 194, 196 (2010). In *Cotton*, a professor accused of sexual harassment brought a § 1983 action against the state college president and board of regents for procedural due process violations for failing to provide him a name clearing hearing. In *Joiner*, a former chief of police filed a case against the city mayor, members of the city council, and the city manager for violating his liberty interests because he was denied a name-clearing hearing after he was terminated a chief of police. In both cases the courts held a writ of mandamus was a procedural remedy

available to cure the absence of a name-clearing hearing. The fact that a writ ordinarily does not exist where the official has discretionary authority did not apply because the allegations were that the officials were acting outside their authority by making an error in judgment, their error was terminating without opportunity for name clearing. *Cotton*, 216 F. 3d at 1332. Here the prosecutors are doing more than denying a name clearing, they are disseminating knowingly false information and characterizing an unfounded whistleblower investigation report as evidence of dishonesty. They are improperly commenting on the evidence to be heard in criminal proceedings.

2. Criminal Defendants Have No Right To False Statements of Dishonesty

When making representations to the court, prosecutors have substantive duties and ethical obligations to make truthful representations: "Anyone who testifies in court bears an obligation to the court and society at large to tell the truth." *Lane v. Franks*, 573 U.S. __, 134 S. Ct. 2369, 2379 (2014). The proper functioning of modern trials depends upon a spirit of cooperation and forthrightness. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P. 2d 1054 (1993). Public officers may not knowingly make any false or misleading statement in any official report or statement. RCW 42.20.040. No one can making a false statement to a public servant. RCW 9A.76.175.

Washington's Rules of Professional Conduct require candor with toward the tribunal, which precludes making a false statement of fact or offering evidence the lawyer knows to be false. RPC 3.3(a)(4), CP 1347 - 1402. At the national level, prosecuting attorney associations foster the same commitment to candor.[11]

These ethical duties correspond with the influence and power of the office. Prosecutors must exercise restraint, and refrain from interjecting their personal beliefs as to the credibility of a witness. *State v. Warren,* 165 Wn. 2d 17, 195 P.3d 940 (2008). It is prosecutorial misconduct for a prosecutor to state a personal belief as to the credibility of a witness. Id. citing to *State v. Brett*, 126 Wn. 2d 136, 175, 892 P.2d 29 (1995); *State v. Jackson*, 150 Wn. App. 877, 209 P.3d 553 (2009). Disseminating Richmond's declaration as PIE, conflicts with the prosecutors' duties to not comment on the credibility of a witness. A writ relieves the prosecutors from any ethical dilemma, because an independent tribunal can decide after an adjudication on the merits whether Richmond's statements are even credible. If not, his personal opinions are simply prejudicial comments on Det. Ames' credibility. The American Bar Association's Rule 3.8(d), Special Responsibilities of A Prosecutor indicate prosecutors may be relieved of their "Brady" duties by court

[11] http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf; http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_110b.authcheckdam.pdf

order: "make timely disclosure, ... except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." A writ is the proper way to address the issues here where there is credible evidence that Richmond's declaratory statements are false.

In *Maryland*, the court protected the confidentiality of IA materials on officers where there were no findings of wrongdoing by the officers, noting "mistaken or even deliberately false reports and accusations are made against members of the department," and that, "in some instances, the most conscientious and hardworking members will be the subject of such reports." *Montgomery County Maryland v. Shropshire*, 420 Md. 362, 23 A.3d 205 (2011). Washington has similarly grappled with the right to access to information that is not substantiated focusing the analysis on whether or not the information is true or false: "One factor bearing on whether information is of legitimate concern to the public is whether the information is true or false." *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 217, 189 P.3d 139 (2008). Generally, "the public as a rule has no legitimate interest in finding out the names of people who have been falsely accused." Id. Law enforcement officers falsely accused of wrongdoing have a recognized privacy interest in their identity. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 259 P.3d 190 (2011). Similarly here, Det. Ames has a protected privacy interest in not being associated with the prosecutors false

accusations of dishonesty. If a prosecutor can invade that privacy by disseminating false information about the officer under the guise of "Brady" then prosecutors have enlarged their powers beyond what the courts ordinarily allow, and a writ is the proper means to restore the balance.

3. Unfounded Whistleblower Complaints Cannot Be "Brady" Material

Pierce County prohibits retaliation against employees who blow the whistle on abuse of office. PCC 3.14.030. Retaliatory action means any unwarranted adverse change in a County employee's employment status. PCC 3.14.010(B). The refusal to assign meaningful work is a retaliatory action. Id. Retaliatory conduct also includes unwarranted criticism and "any 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). The Legislature expressly encourages employees to disclose improper governmental actions, and when so doing intended to protect the rights of employees who choose to make such disclosures. RCW 42.40.010. Whistleblowing activity is worthy of protection, because it encourages governmental accountability. *Dicomes v. State*, 113 Wn. 2d 612, 782 P.2d 1002 (1989). Speech by public employees on subject matter related to their employment holds special value precisely because a public employee gains knowledge of

public interest through their employment. *Lane*, 134 S.Ct. at 2379. It is an essential public interest that government employees be free to speak out without fear of retaliation. Id. Public employees should not be placed in the impossible position of being torn between the obligation to testify truthfully and the desire to avoid retaliation to keep their jobs. Id.

The prosecutor's use of an unfounded whistleblower complaint as "Brady" material equates to prohibited and unlawful retaliation. Allowing such use would deter valued disclosures to the public's detriment.

4. Det. Ames Has No Other Forum For Relief

The defense has not credibly disputed this element in this case. The Prosecutor has not offered him any relief in any other forum. The trial court recognized this and did not err as to this element. CP 2069. The second and final requisite element for a writ is met. Det. Ames' petition should be reinstated, allowing the trial court to grant his writ.

I. Prosecutor Exempt from Public Participation

1. RCW 4.24.525(3) Exemption Applies

The Prosecutor has no anti-SLAPP protection under RCW 4.24.525 because the statute includes an exemption for prosecutors.[12] A special motion to strike does not apply to all "action." The Legislature limited special motions to strike to "any claim." RCW 4.24.525(4)(a).

[12] "This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection." RCW 4.24.525(3).

"Claim" is a defined term. RCW 4.24.525(1)(a). A "claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." Id. The exemption is not limited to criminal prosecutions. If it was, then the Legislature would have used the word "claim" instead of "action." Any "action" exempts the special motion practice from this case that involves action by the prosecutor for purposes of public protection. The trial court erred when it ruled the exemption inapplicable, and therefore it erred when it denied Det. Ames a penalty and fees. The motion was frivolous because it violated the statute.

J. The 2010 Amendments Violate the Constitution

Wash. Const. art. II § 37 provides that "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." This section is intended to protect the Legislature and the public from fraud and deception, and to avoid confusion, ambiguity, and uncertainty. *State v. Tessema*, 139 Wn. App. 483, 488-489, 162 P.3d 420 (2007). Art. II § 37 sought to remedy the practice of amending or revising law by additions or alterations which, without the presence of the original law, were usually unintelligible. To qualify as an exception to art. II § 37, the act must be complete and independent, standing alone on its subject area. *State ex.rel. Living Servs., Inc.*, 95 Wn.2d 753756, 630 P.2d 925 (1981).

There are two express purposes of art. II § 37; one is to disclose the effect of the new legislation and secondly, to disclose the act's impact on existing laws.

Washington Ass'n of Neighborhood Stores v. State, 149 Wn.2d 359, 372-373, 70 P. 3d 920 (2003). The result of compliance with art. II § 37 should be that no other search will be required to determine which sections are amended. Id. Citizens or legislators must not be required to search out amended statutes to know the law on the subject treated in a new statute. *Id.* Under art. II § 37, a new statute must explicitly show how it relates the statutes it amends. *Washington Ass'n*, 149 Wn. 2d. 359. Stated more succinctly, this purpose is to disclose the effect of the new legislation. *State v. Thorne,* 129 Wn.2d 736, 753, 921 P.2d 514 (1996). If followed, the potential for uncertainty and confusion regarding the act's meaning and effect is greatly reduced. *Weyerhauser Co. v. King Cnty*, 91 Wn. 2d 721, 732, 592 P.2d 1108, 1114-15 (1979).

The court may make two inquiries when ascertaining a constitutional violation under art. II § 37: Is the new enactment such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment? and Would a straightforward determination of the scope of rights or duties under the existing statutes be rendered erroneous by the new enactment? *Naccarato*, 46 Wn. 2d 67 and *Weyerhauser*, 91 Wn.2d 721. The mischief to be avoided is an uniformed legislative body and public - a deception leading to confusion. *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76,78, 109 P.316 (1910).

SB 6395 purports to amend RCW 4.24 by creating new sections and prescribing penalties. These new sections and penalties are not cross referenced

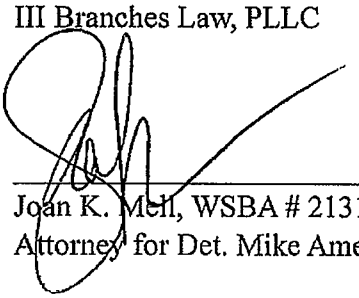
in other statutory remedies such as RCW 4.24.510 or extraordinary writs at RCW 7.16 or the UDJA at RCW 7.24. Of particular concern, the 2010 changes allow for government to seek a penalty where existing remedies did not. *See Henne v. City of Yakima*, 177 Wn. App. 583, 313 P.3d 1188 (2013). This distinctly impairs Det. Ames' rights, effectively banning his access to the courts. The statutory remedies under UDJA and Writs do not allow for fee or cost shifting. RCW 7.24.100, and RCW 7.16. There are no penalties for seeking redress under these acts. The 2010 anti-SLAPP violates art. II § 37 because it amends the availability of other statutory remedies without proper cross reference.

V. CONCLUSION

Det. Ames requests reversal of the 12(b)(6) order dismissing his petition. Secondarily, he requests an order affirming the anti-SLAPP special motion to strike exemption for prosecutors applies. Their motion was frivolous and the office should pay fees, costs, and the statutory penalty. Finally, an order voiding the special motion to strike statute as unconstitutional.

RESPECTFULLY SUBMITTED this 4th day of August, 2014 at Fircrest, Washington.

III Branches Law, PLLC



Joan K. Mell, WSBA # 21319
Attorney for Det. Mike Ames

CERTIFICATE OF SERVICE

I, Tess Hernandez, certify as follows:

I am over the age of eighteen, a resident of Pierce County, and not a party to the above action. On August 4, 2014, I caused to be served true and correct copies of the above document and this Certificate of Service by e-mail as follows:

Mike Patterson
Jason Harrington
2112 Third Avenue, Suite 500
Seattle, WA 98121
map@pattersonbuchanan.com
jah@pattersonbuchanan.com
sah@pattersonbuchanan.com
cdl@pattersonbuchanan.com

Philip Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Pkwy
Tukwila, WA 98188
phil@tal-fitzlaw.com

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

Dated this 4th day of August, 2014, at Fircrest, WA.

Tess Hernandez, Paralegal

Bausch, Lisa

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, August 04, 2014 4:36 PM
To: Bausch, Lisa
Subject: FW: Ames v. Pierce county

Received 8-4-2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Tess Hernandez [mailto:tess@3brancheslaw.com]
Sent: Monday, August 04, 2014 4:31 PM
To: Jason A. Harrington; Mr. Mike Patterson; Stacy A. Hughes; Phil Talmadge; cdl@pattersonbuchanan.com
Cc: OFFICE RECEPTIONIST, CLERK
Subject: Ames v. Pierce county

Attached for filing is a brief in case no. 89884-7, Ames v. Pierce County.

Tess Hernandez
Paralegal to Joan K. Mell
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
tess@3brancheslaw.com