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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 74459-3-I)

MICHAEL MOCKOVAK,

Petitioner,

v.

KING COUNTY and the KING COUNTY
PROSECUTING ATTORNEY'S OFFICE,

Respondents.

AMICUS CURIAE BRIEF OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

I. ISSUE OF CONCERN TO AMICUS CURIAE 1

II. INTEREST OF AMICUS CURIAE.. 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 2

V. CONCLUSION.. 10

TABLE OF CASES, STATUTES & OTHER AUTHORITIES

WASHINGTON CASES

Cowles Publ'g Co. v. Spokane Police Dep't, 139 Wn.2d 472, 987 P.2d 620 (1999) 7

Gendler v. Batiste, 174 Wn.2d 244, 263, 274 P.3d 346 (2012) 9

In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992) 9

Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 714, 261 P.3d 119 (2011) 2

Nissen v. Pierce Co., 183 Wn.2d 863, 874-75, 357 P.3d 45 (2015) 4

Sargent v. Seattle Police Dept., 179 Wn.2d 376, 314 P.3d 1093 (2013) 7

Seattle Times Co. v. Serko, 170 Wn.2d 581, 243 P.3d 919 (2010) 7

State v. Asaeli, 150 Wn. App. 543, 552, 208 P.3d 1136 (2009) 6

State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993) 3

State v. Casarez-Gastelum, 48 Wn. App. 112, 113, 738 P.2d 303 (1987) 5

State v. Clark, 170 Wn. App. 166, 175, 283 P.3d 1116 (2012) 6

State v. Garbaccio, 151 Wn. App. 716, 214 P.3d 168 (2009) 6

State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407 (1986) 3

State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) 2

State v. Sherman, 59 Wn. App. 763, 768, 801 P.2d 274 (1990) 10

Worthington v. WestNET, 182 Wn.2d 500, 503, 341 P.3d 995 (2015) ... 8

FEDERAL CASES

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

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ... 2

United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951); 28 CFR, Part 16, et seq. ... 8

STATUTES

23 U.S.C. 409 ... 9

RCW 13.60.110(3) ... 6

RCW 39.34.030(1) ... 7

RCW 42.56 ... 1

RCW 42.56.030 ... 4

RCW 42.56.550(3) ... 4

RULES

28 CFR 16.21(c) ... 8

28 CFR 16.22(a) ... 8

CrR 4.7(a)(3) ... 3

CrR 7.8(b)(2) ... 10

CrR 8.3(b) ... 10

RAP 13.4(b)(3) ... 5, 10

RAP 13.4(b)(4) ... 5, 10

RAP 16.11 ... 9

RAP 16.12 ... 9

OTHER AUTHORITIES

Brady Noncompliance – An American Injustice, The Champion, National Association of Criminal Defense Lawyers (May 2013) ... 3

I. ISSUE OF CONCERN TO AMICUS CURIAE

Washington's Public Records Act (PRA), RCW 42.56, has been construed to mandate broad disclosure of criminal investigation records possessed by an agency after referral of an investigation to a prosecutor for a charging decision, unless the agency shows a proper exemption. In response to a PRA request for records of a joint task force composed of state and federal law enforcement officers after referral of a criminal investigation to a county prosecutor and the filing of charges in state court, an agency withheld and redacted responsive records at the direction of a local federal official. Does a local federal official have the power to prohibit a city police officer who is a task force member from producing records he created and used in the joint task force investigation that led to state charges? Does a state agency violate to the PRA by withholding and redacting those records?

II. INTEREST OF AMICUS CURIAE

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1,100 lawyers practicing criminal defense law in Washington State. WACDL is committed to advancing and protecting the legal rights of accused

individuals in the criminal justice system and frequently submits amicus curiae briefs in this Court relevant to those rights.

III. STATEMENT OF THE CASE

Amicus WADCL accepts the statements of the case made by the Petitioner and Respondent.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The PRA "is a strongly worded mandate for broad disclosure of public records"[1] that provides criminal defense lawyers practicing in Washington a statutory means to independently obtain information important to the diligent representation and effective assistance of their clients. A defense lawyer may request public records compiled and generated by state agencies, including county prosecutors, to advance and protect a client's liberty interests in numerous ways. For example, a PRA request may generate exculpatory[2] or impeachment[3] evidence for use in court proceedings, including suppression hearings, trials, and for post-conviction matters; or public records may illuminate any failure by a

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[1] *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011).

[2] *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011 (prosecutor's *Brady* obligations include "not only evidence in the prosecutor's file but also evidence in the possession of the police and others working on the State's behalf").

[3] *See Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

prosecutor to fulfill discovery obligations material to constitutional trial rights of the accused[4]; or such records may enable a defense lawyer to develop mitigation arguments for a client at sentencing.

The PRA facilitates equal access to factual information and evidence by defense lawyers and promotes the fair and just adjudication of state criminal cases and post-conviction proceedings consistent individual protections under Washington's constitution. Without vigorous enforcement of the PRA's broad mandate of disclosure by the courts, however, this effective check and balance within the state criminal justice system is illusory.

"The definitions of 'agency' and 'public record' are each comprehensive on their own and, when taken together, mean the PRA subjects 'virtually any record related to the conduct of government' to public disclosure. This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government." *Nissen v. Pierce Co.*,

[4] A prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. *See* CrR 4.7(a)(3). Generally, the violation of this duty also violates the accused's constitutional right to a fair trial. *State v. Mak*, 105 Wn.2d 692, 704, 718 P.2d 407 (1986); *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). For an exposé on prevalence and impact of such violations, see generally, *Brady Noncompliance – An American Injustice*, The Champion, National Association of Criminal Defense Lawyers (May 2013).

183 Wn.2d 863, 874-75, 357 P.3d 45 (2015) (internal citation and footnote omitted). Thus, "agency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant PRA request. Employees must produce any public records (e-mails, text messages, and any other type of data) to the employer agency. The agency then proceeds just as it would when responding to a request for public records . . ." *Id.* at 886

When a requestor sues an agency over withheld or redacted records, courts "shall take into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3). The PRA "shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 42.56.030.

The December 19, 2016 decision of the Court of Appeals, which relates to the public records practices of Washington's largest municipal police force, the Seattle Police Department (SPD), Washington's most populace county, and Washington's

largest county prosecutor's office, threatens to frustrate the PRA's directives by deterring disclosure of joint task force records at the direction of local federal officials who may seek strategic prosecution advantages in the forum of state court while suppressing PRA compliance by state task force investigators. Contrary to the opinion, the dispositive issue of "consent," may well be the consent of federal agents and federal officials to controlling Washington law regarding the PRA obligations of joint task forces whose investigations result in state criminal prosecutions. Thus, the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The petition also raises significant questions of federal and state constitutional law in relation to principles of dual sovereignty and federalism, considerations that warrant review under RAP 13.4(b)(3).

Washington defense lawyers have faced a proliferation of joint task force investigations involving state and federal agencies over the past two decades. *See, e.g., State v. Casarez-Gastelum*, 48 Wn. App. 112, 113, 738 P.2d 303 (1987) (state drug conspiracy conviction resulting from undercover operation by "a special task force of the federal Drug Enforcement Administration . . . Yakima County Sheriff's Office, Yakima Police Department, and the

Washington State Patrol"); *State v. Asaeli*, 150 Wn. App. 543, 552, 208 P.3d 1136 (2009) (state murder convictions based in part on expert testimony on gang culture from detective "of the Tacoma Police Department and the Federal Bureau of Investigation Violent Crimes Task Force operating in Pierce County"); *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009) (state child pornography conviction resulted from task force investigation involving SPD detective and special agent of the U.S. Bureau of Immigration and Customs Enforcement); *State v. Clark*, 170 Wn. App. 166, 175, 283 P.3d 1116 (2012) (state conviction for human trafficking and promoting prostitution offenses based on task force investigation involving SPD and Federal Bureau of Investigation: "The SPD Vice Unit works with the Federal Task Force and [FBI] to combat juvenile prostitution").

Washington statutes also anticipate the growth of federal and state, or local, task force investigations that may result in state criminal cases. *See* RCW 13.60.110(3) (authorizing the Washington State Patrol's Missing and Exploited Children Task Force: "To maximize the efficiency and effectiveness of state resources and to improve interagency cooperation, the task force shall, where feasible, use existing facilities, systems, and staff

made available by the state patrol and other local, state, interstate, and federal law enforcement and social service agencies"); RCW 39.34.030(1) (cooperation between state and federal agencies).

Given the increase of state criminal cases based on joint federal and state task forces, it often is important for lawyers to make PRA requests for investigation records after referral to a prosecutor for a charging decision to investigate defenses and weigh the conduct of law enforcement officials against constitutional standards. Controlling PRA decisions repeatedly have required law enforcement agencies to broadly produce such criminal investigation records. *See Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 987 P.2d 620 (1999); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010); *Sargent v. Seattle Police Dept.*, 179 Wn.2d 376, 314 P.3d 1093 (2013).

The PRA contains no express provision authorizing a local federal official to veto production of joint task force records or to impose a categorical gag-order after criminal charges have been referred to a state prosecutor for charging decision. To the contrary, this Court has held that local police departments may not rely on joint task force membership to avoid PRA obligations. *See Worthington v. WestNET*, 182 Wn.2d 500, 503, 341 P.3d 995

(2015). The PRA request in *WestNet* involved a "multiagency, multijurisdictional drug task force formed by an 'Interlocal Drug Task Force Agreement' (Agreement) executed in June 2009 among several Washington State municipalities and the federal Naval Criminal Investigation Service (NCIS)." *Id.* The PRA obligations of local and federal *WestNet* task force members appear sufficiently analogous to those of SPD and FBI members of the Puget Sound Safe Streets Violent Crimes Task Force in the case at bar.

In addition to important issues raised in the petition under the Tenth Amendment and regarding the definition of a federal "employee" under 28 CFR 16.22(a), the decision by the Court of Appeals contains novel holdings that may fail to weigh fundamental legal considerations, including whether the *Touhy*[5] regulations apply to records already obtained by a state investigator. *See* 28 CFR 16.21(c) ("Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies"); *see also Gendler v. Batiste*, 174 Wn.2d 244, 263, 274 P.3d 346

[5] *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 28 CFR, Part 16, et seq.

(2012) (Washington State Patrol not entitled under PRA to federal privilege under 23 U.S.C. 409 to withhold accident reports containing data compiled for federal hazard elimination program).

An exhaustive list of state criminal defense matters that may be negatively impacted by a misreading in the opinion by the Court of Appeals of PRA disclosure obligations of state agencies involved in joint task forces is beyond the page limit for amicus briefing. The investigation of evidentiary grounds for post-conviction relief by defense lawyers (or pro se defendants), however, provides one compelling example. To obtain a reference hearing under RAP 16.11 and 16.12 for a personal restraint petition based on matters outside the record, a petitioner "must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence." *See In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). A PRA request seeking such "corroborative evidence" in joint task force records not produced in discovery or part of the record may be the only viable means to corroborate an imprisoned client's allegations. Likewise, a lawyer's PRA request to

investigate the existence and viability of newly discovered evidence for post-conviction motion for relief from judgment under CrR 7.8(b)(2) may provide information not produced in discovery and that could not have been obtained in time to move for a new trial.

State prosecutions may turn on whether the records of federal agencies are produced pursuant to discovery obligations under the Criminal Rules. *See, e.g., State v. Sherman*, 59 Wn. App. 763, 768, 801 P.2d 274 (1990) ("The State's failure to produce IRS records, in and of itself, is a sufficient ground on which to affirm dismissal" under CrR 8.3(b)). When joint task force records of an investigation leading to a state criminal prosecution fall outside those parameters, however, the PRA provides an important means for a defense lawyer to have access to information and evidence relevant to effective trial advocacy and post-conviction relief.

V. CONCLUSION

The issues raised by Mr. Mockovak's petition pose significant questions of law under RAP 13.4(b)(3) that also affect substantial public interest under RAP 13.4(b)(4) and should be reviewed by this Court to clarify the PRA obligations of joint federal-state task forces after investigations lead to state prosecutions.

DATED this 10th day of April, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at McKay Chadwell, PLLC, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of Amicus Curiae Brief of the Washington Association of Criminal Defense Lawyers (WACDL) in Support of Petition for Review on the below-listed attorney(s) of record by the method(s) noted:

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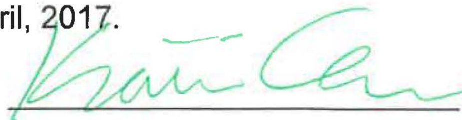
DATED this 10th day of April, 2017.



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