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IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

FISHER BROADCASTING-SEATTLE TV L.L.C. dba KOMO 4,

Appellant,

v.

CITY OF SEATTLE, a local agency and the SEATTLE POLICE  
DEPARTMENT, a local agency,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENDER  
ASSOCIATION AND THE DEFENDER ASSOCIATION

BY RONALD R. CARPENTER  
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SUPREME COURT  
STATE OF WASHINGTON

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**TABLE OF AUTHORITIES**

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U.S. Dep’t of Justice, Civil Div., U.S. Attorney’s Office, W. Dist. of Wash., *Investigation of the Seattle Police Department*, (Dec. 16, 2011) *available at*  
[http://www.justice.gov/crt/about/spl/documents/spd\\_findletter\\_12-16-11.pdf](http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf) ..... 10

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### INTERESTS OF AMICUS CURIAE

The interests of the amicus are within the motion to file amicus curiae memorandum.

### ISSUE TO BE ADDRESSED

The parties' debate regarding the public's right to access Seattle Police Department ("SPD") dash-cam videos implicates important Sixth and Fourteenth Amendment concerns about a defendant's right to due process and a fair trial. The gravity of these important constitutional rights should inform the discussion and decision by this Court as to whether SPD's policy to withhold access to dash-cam videos for three years, except when requested by a lawyer who has filed claims and by people in the videos, should be enforced.

### STATEMENT OF THE CASE

This memorandum relies on the appellant's statement of the case.

### ARGUMENT

The SPD's restriction on access to dash-cam videos impacts the right of a criminal defendant to a fair trial. In crafting a remedy in this case, the court must consider how this policy impacts the important constitutional rights of a criminal defendant. SPD's policy to withhold access to dash-cam videos for three years, except when requested by a

lawyer who has filed claims or by people in the videos, violates due process principles, especially the right to be provided with potentially exculpatory evidence.

*Brady v. Maryland* established the right of a criminal defendant to be provided with potentially exculpatory evidence in the state's possession. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* defined a broad rule of disclosure, restricting the state's ability to assert a blanket policy to suppress police records without specific consideration of a defendant's right to access favorable and material evidence. A policy that restricts a defendant's access to evidence material to his guilt or punishment violates important constitutional due process and fair trial rights. Further, *Brady* establishes the duty of the state to discover all favorable and material evidence in the possession of its agents, including the police. This mandate of disclosure ensures confidence in the trial verdict and permits a critical inquiry into the integrity and quality of police conduct and their investigations which is essential to a defendant's fair trial rights.

A defendant's right to a fair trial under the Sixth Amendment also requires protection against undue, pretrial public prejudice, such as a biased jury. Disclosure rules must balance the needs of a defendant with the needs and rights of the public. To do so, SPD's policy should reflect

this Court's holding in *Seattle Times Co. v Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010), requiring exemptions to disclosure in specific circumstances reflecting a case-by-case and record-by-record determination of unfairness or prejudicial impact.

**I. SPD's broad policy of suppressing dash-cam video records potentially violates the *Brady* rule.**

*Brady v. Maryland* established that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. The heart of the *Brady* rule—its guiding principle—is that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.” *In re Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286 (2012); *Brady*, 373 U.S. at 87. Hence, “[a] prosecution that withholds evidence on demand of an accused which, if made available, *would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant*. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice....” *Brady*, 373 U.S. at 87-88 (emphasis added). The duty to disclose potentially exculpatory evidence has been extended to exist even when there has been

no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and includes impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

A *Brady* violation occurs when: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence is suppressed by the state (either willfully or inadvertently); and (3) prejudice results from the suppression. *Stenson*, 174 Wn.2d at 486-87; *see also*, *United States v. Price*, 566 F.3d 900, 911 n. 12 (9th Cir. 2009).

All evidence that is favorable to the accused is material. *Kyles v. Whitley*, 514 U.S. 419, 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The materiality of evidence under *Brady* does not require demonstration by a preponderance of the evidence that disclosure would have resulted (or will result) ultimately in a defendant's acquittal. *Stenson*, 174 Wn.2d at 487. The question of materiality is whether in the absence of disclosure a defendant receives a fair trial "*understood as a trial resulting in a verdict worthy of confidence.*" *Id.* (emphasis added). *Brady* necessitates application of a "reasonable probability" standard finding that disclosure would result in a different proceeding and that the "*evidentiary suppression 'undermines confidence in the outcome of the trial.'*" *Id.*

(emphasis added); *see also Kyles*, 514 U.S. at 434. The only burden upon a defendant requesting access to state records—such as police dash-cam videos—is to demonstrate that the “evidence could reasonably be taken to put the whole case in a different light.” *Stenson*, 174 Wn.2d at 487. This includes both exculpatory evidence and evidence that may be used to impeach testifying witnesses, such as police personnel “by showing bias or interest.” *Bagley*, 473 U.S. at 676.

The state’s obligation to disclose “turns on the cumulative effect of all suppressed evidence” and should “be considered collectively, not item by item” in order to determine favorable impact. *Kyles*, 514 U.S. at 420; *Stenson*, 174 Wn.2d at 487; *Bagley*, 473 U.S. at 668. Because materiality requires a cumulative perspective, the requirement of disclosure of favorable evidence is a “sufficiently flexible” standard and necessarily covers a broad range of evidence in light of its impact on the presentation or preparation of a defendant’s case. *Bagley*, 473 U.S. at 668.

The scope of the state’s duty to disclose under *Brady* includes the “duty to learn of any favorable evidence known to the others acting on the government’s behalf... *including the police.*” *Stenson*, 174 Wn.2d at 486 (emphasis added). This duty to disclose is “inescapable” and serves to establish public trust that the prosecutor, as the representative of the state,

serves in the interest of justice and not just winning a case. *Kyles*, 514 U.S. at 438-39.

In determining prejudicial impact of suppression, this Court's ruling in *Stenson* serves as a model. In *Stenson* a man sentenced to death after being found guilty for the murder of his business partner and wife raised a due process claim for alleged *Brady* violations after evidence regarding the FBI's improper handling of a pair of pants containing gunshot residue—one of the few key pieces of evidence in his conviction—was withheld by the prosecution. *Stenson*, 174 Wn.2d at 476-77. This Court found that had the suppressed evidence been provided to the defense “the integrity and quality of the State's entire investigation, [including] evidence handling procedures and case presentation would have been called into question.” *Id.* at 491. Full disclosure, therefore, can have a broad impact because evidence of misconduct may be significant in questioning the reliability of all the evidence presented by the prosecution.

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One of the arguments that may be made in this case is that the state is not obligated to turn over dash-cam video records because they are in the police department's possession. This argument should be rejected for

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<sup>1</sup> See, e.g., *Stenson* stating “[t]he mishandling of the pants would serve as a prime example of why the state's evidence, witnesses, and arguments should all be viewed with extreme skepticism.” *Stenson*, 174 Wn.2d at 492.

two reasons. Under *Brady* the state's duty to disclose includes all records in the state's possession, including the police as its law enforcement agents. *Stenson*, 174 Wn.2d at 486.

Another argument that may be made is that dash-cam videos that do not involve the defendant charged with a crime are too remote to be considered potentially exculpatory. Instead, the court should find that a criminal defendant's right to access all dash-cam videos retained by the SPD is necessary to ensure that the defendant have the opportunity to review and challenge the integrity and quality of police conduct. This extends the scope of relevant inquiry beyond the individual dash-cam video in which a particular criminal defendant appears. Under *Stenson*, broad access is particularly important when a defendant raises claims regarding police misconduct or deficiencies in the investigation process. *See, e.g., Stenson*, 174 Wn.2d 492 (stating "indications of conscientious police work will enhance probative force and slovenly work will diminish it."). SPD's broad policy to restrict a defendant's access to dash-cam videos in which that defendant appears threatens to exclude a defendant from accessing possible favorable and material evidence. This violates the *Brady* rule.

A claim of misconduct is not a theoretical question for the SPD. Recent investigations by the United States Department of Justice ("DOJ")

of SPD conduct found “a pattern or practice of constitutional violations regarding the use of force” and “serious concerns about biased policing.” U.S. Dep’t of Justice, Civil Div., U.S. Attorney’s Office, W. Dist. of Wash., *Investigation of the Seattle Police Department*, (Dec. 16, 2011) *available at* [http://www.justice.gov/crt/about/spl/documents/spd\\_findletter\\_12-16-11.pdf](http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf) at 2 (“DOJ Report”). This finding makes disclosure not only critical to ensuring adequate public oversight, but demonstrates that claims by criminal defendants to have access to dash-cam videos beyond the individual event in question may result in powerful evidence critical to a jury’s evaluation of facts. Access should be permitted to guarantee the right to a fair trial and ensure important review of the quality and integrity of particular officers.

In its investigation, the DOJ also found that structural problems causing SPD’s consistent constitutional violations resulted, in part, from its policy of handling dash-cam videos. DOJ Report at 3, 7, Appendix D at 8. SPD’s failure to retain and review its own video records has resulted in a systemic failure to address allegations of biased policing. DOJ Report at 6, 27. For example, the egregious display of an SPD officer’s racial epithet when he threatened to “beat the f’ing Mexican piss” out of a suspect—as caught on a SPD video recording—went unreported by any of the

surrounding officers or supervising officers until a third-party video of the incident was publicly posted. *Id.* at 27. The DOJ’s analysis explicitly highlights the necessity for review of these videos, recommending that SPD at least “ensure all in car video recordings are made available to supervisors for review.” *Id.* at 39, Appendix D at 8. These findings are consistent with the argument that SPD’s dash-cam videos will reveal police conduct relevant to a defendant’s right to review and evaluation potentially exculpatory evidence.

SPD’s broad policy of suppressing dash-cam video recordings ignores the importance of the *Brady* rule. A defendant must be provided all records in the state’s possession—including police records—favorable to his defense. This includes records which may lead to exculpatory evidence, which is why the SPD policy does not meet constitutional standards. Suppressing state records from the access of the defendant can only happen after careful consideration of the material and cumulative impact disclosure may have on the determination of a defendant’s guilt or punishment. A policy that provides no such mechanism for defendant-specific consideration or records analysis violates a defendant’s due process rights, particularly when a defendant raises claims of police integrity and the quality of a police investigation is in question. This Court should find that SPD’s policy is unenforceable as it is unconstitutional.

**II. SPD's policy to withhold dash-cam video records must protect a defendant's Sixth Amendment right to a fair trial by preventing undue pretrial prejudice while providing public access to information.**

The Sixth Amendment establishes the right of a defendant “to a speedy and public trial, by an impartial jury.” *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 379, 99 S.Ct. 2898, 61 L.Ed.2d 608; U.S. Const. amend. VI. Courts have an affirmative duty to “minimize the effects of prejudicial pretrial publicity” in order to ensure a defendant receive a fair trial. *Gannett*, 443 U.S. at 377. Public disclosure requires a balance of interests between the rights of the public to receive public records and the rights of a defendant to a fair trial. *See, e.g., Serko*, 170 Wn.2d at 595 (establishing that a court evaluate the probability of unfairness or prejudice resulting from pretrial publicity and the availability of alternatives to withholding records for purposes of public access).

In *Seattle Times Co. v. Serko*, news publishers petitioned for a writ of mandamus vacating an order to withhold police investigative records related to the shooting of four police officers and the subsequent fatal shooting of the gunman. *Serko*, 170 Wn.2d at 588. An order suppressing the police records was made after a defendant in a related proceeding claimed that disclosure of the records to the media could influence a future

jury pool. *Id.* at 588, 595. This Court held that suppression of the requested records was not permitted because the procedural mechanism to enjoin release must be *specific* to the records and a decision to suppress must identify with particularity to each document requested the unfairness or prejudice that would result from public disclosure in violation of a defendant's Sixth Amendment right to a fair trial. *Id.* at 596.

SPD has created a blanket policy to suppress dash-cam video records. Certainly, this raises due concern about the public's need and right to access public information. But the importance of safeguarding a defendant's right to a fair trial by preventing prejudicial pretrial impact should be of critical consideration in framing the scope of the public's right to access police records. In light of these competing and substantial interests, this Court should find that the power to make determinations of when and what to withhold should be enforced on a case-by-case basis, as held in *Serko*. This will ensure a well-reasoned policy that is mindful of the compelling need for public access to police records and a defendant's right to a fair trial free from pretrial prejudice.

#### CONCLUSION

The SPD's policy restricting access to dash-cam video records impacts the constitutional rights of a criminal defendant to due process and a fair trial protected under the Sixth and Fourteenth Amendments.

SPD's policy of disclosure should be modified to reflect the *Brady* rule establishing a defendant's right to access favorable evidence material to his guilt or punishment. The state's duty to discover and disclose all favorable and material evidence in the possession of its agents potentially includes police dash-cam videos. A policy of disclosure that reflects a defendant's right to access possibly exculpatory evidence ensures confidence in the trial verdict and permits a critical inquiry into the integrity and quality of police conduct and their investigations which is essential to a defendant's fair trial rights.

A defendant's right to a fair trial under the Sixth Amendment also requires protection against pretrial public prejudice. SPD's policy of disclosing dash-cam video records must balance the needs of a defendant with the needs and rights of the public to access public records and hold state agents accountable. To do so, SPD's policy of what and when to disclose should require exemption to disclosure that is specific in nature—rather than a blanket policy of exemption—requiring a case-by-case and record-by-record determination of unfairness or prejudicial impact.

DATED this 12<sup>th</sup> day of April, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Dear Supreme Court Clerk:

Attached please find the Amicus Motion and Amicus Brief of the Defender Association and the Washington Defender Association *FISHER BROADCASTING-SEATTLE TV L.L.C. dba KOMO 4 v. CITY OF SEATTLE and the SEATTLE POLICE DEPARTMENT*, No. 87271-6

Counsel for the parties are copied on this message and an affidavit of service is also attached, which is contained within the Motion. This acts as service for all parties but the City of Seattle, who have had a copy mailed to them.

Please let me know if there are any difficulties with this filing.

Regards,

Travis Stearns

**Travis Stearns**  
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