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NO. 934282
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL AMES, an individual,

Petitioner,

v.

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

Respondents.

AMICUS BRIEF BY AMICI CURIAE LAW ENFORCEMENT
LABOR UNIONS INCLUDING:

BELLINGHAM POLICE GUILD, LACEY POLICE OFFICERS
GUILD, LACEY POLICE MANGEMENT GUILD, KI'ISAP
COUNTY DEPUTY SHERIFF'S GUILD, PIERCE COUNTY
DEPUTY SHERIFF'S GUILD, TACOMA POLICE UNION
LOCAL 6, AND THE YAKIMA POLICE PARTOLMEN'S
ASSOCIATION

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I. IDENTITY OF AMICI CURIAE

This brief is being filed on behalf of Amici Curiae law enforcement labor unions, including Bellingham Police Guild, Lacey Police Officers Guild, Lacey Police Management Guild, Kitsap County Deputy Sheriff's Guild, Pierce County Deputy Sheriff's Guild, Tacoma Police Union Local 6, and the Yakima Police Patrolmen's Association.

II. STATEMENT OF THE CASE

The facts of this case are aptly set forth in the Ames Petition for Review. This case involves a Complaint¹ that pled allegations that the Pierce County Prosecutor and members of his office engaged in an attack on the Ames culminating in a designation that he was a "Brady Officer."²

The Complaint alleges that the Prosecutor entered this Brady designation without any due process³ and for a retaliatory purpose: principally Ames exposure of wrong-doing within the Prosecutor's Office.⁴ The Complaint alleges that the "Brady" designation is without merit in that Ames has not made false statements that would warrant Brady designation.⁵ Ames Complaint notes that this designation negatively impairs his employment.⁶

¹ CP 1-80.

² CP 2.

³ CP 3.

⁴ CP 6-8.

⁵ CP 9.

⁶ CP 10

III. ARGUMENT

A. Summary of Argument

The Court of Appeals Dissent properly emphasized that Ames appeal arose from a Superior Court dismissal following a CR 12(b)(6) motion. Whether the County *might* ultimately disprove Ames' serious allegations is immaterial. Ames' Complaint presents a plausible legal theory based his asserted events, and his allegations should be heard on the merits.

And those allegations, involving corruption and spiteful retaliation, are serious. The extreme nature of the presented facts demonstrates why due process and name-clearing rights in a Brady process are essential. The Amici unions are asking this Court to grant Ames' Petition because, if this Court of Appeals decision stands, its members would be without effective recourse in the "Brady Officer" designation process, no matter how abusive or absurd.

The law in Washington on due process and name-clearing rights is underdeveloped and needs clarification. The Court of Appeals majority erred by not recognizing Ames' civil right to the restoration of his good name. The majority erred by applying too narrow of a reading of the available legal procedures. This Petition should be granted to allow a fair process for Ames and all Washington law enforcement officers to protect their good name and employability.

The Court of Appeals majority erred in finding a conflict that needed balancing between the civil rights of the accused to a fair trial and Ames' civil right. The accused are properly entitled to full discovery of all

potential exculpatory materials. But as the Dissent properly noted, this does not include materials which are false. The majority erred by ignoring the CR 12(b)(6) posture of the case in holding that the Prosecutor had some discretion to turn over materials which were false in their creation and spiteful in their purpose.

B. The Court should accept Review Because the Case involves an Issue of Substantial Public Interest.

1. This Petition involves the Important Issue of Whether Law Enforcement Officers have Protection from Unfair and Retaliatory Brady classifications which undermine Officer Employability.

*Brady v. Maryland*⁷ created a rule of criminal discovery. *Brady* requires prosecutors to disclose to the defense any favorable material evidence known to any member of the prosecution team, including the police. This duty applies to any exculpatory or impeaching evidence that has a “reasonable probability” of impacting the outcome of the case.⁸ Under this standard, a prosecutor can knowingly fail to disclose evidence that is even favorable to a defendant without violating the *Brady* standard if they determine that the evidence is insufficiently material.⁹

This duty to provide discovery may abut against the interests law enforcement officers have in the content of their personnel files. There has been an increased recognition that these files may contain negative

⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁸ *Strickler v. Greene*, 527 U.S. 263, 28 (1999).

⁹ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

information as to a particular officer which could potentially be exculpatory evidence.¹⁰ In particular, an accused (and his or her counsel) would likely want to know if a witness-officer has had a sustained charge of untruthfulness.

Amici Law Enforcement Unions recognize and accept the right of the accused to have fair access to such information. Amici unions also recognize that, to facilitate the discovery of this potentially exculpatory evidence, prosecutors will maintain lists of designated “Brady officers” whose status and related information must be revealed to the accused.

But amici unions assert that their members should be accorded due process in the Brady designation process. The Amici Unions also urge that other potential abuses of officers by vindictive or unfair prosecutors, such as that alleged by Ames, be prevented.

While there are competing interests between the officers and the accused, ultimately these interests are *not* in genuine conflict. The accused is *only* entitled to truly exculpatory information, *not false information*.

Detective Ames and the law enforcement officers represented by Amici Unions have a profound interest in their good names and a fair process to protect those names. As a recent Stanford Law Review article accurately noted:

[T]he *Brady*-cop designation immediately puts a question mark on the officer's ability to testify, and that question mark has severe employment consequences. An officer who cannot be counted on to testify also cannot be counted on to make

¹⁰ See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743 (2015).

arrests, investigate cases, or carry out any other police functions that might lead to the witness stand. *Brady* cops may thus find themselves fast-tracked for termination and hard-pressed to find future work.¹¹

This employment impact observation is supported by the attached affidavit of the President of the Kitsap Deputy's Guild. This claim was also specifically pled by Detective Ames in his Complaint. Given the stakes, this Court should accept Ames' petition to address civil remedies to be accorded Ames and all law enforcement officers in the State.

2. The Court of Appeals Majority Erred by Not Extending Available Civil Remedies to Detective Ames.

The Supreme Court has recognized that where the government stigmatizes an individual—"attaches 'a badge of infamy' to the citizen"—justice demands notice and an opportunity to be heard.¹² But in *Paul v. Davis*, the Court also held that where an individual cannot show harm beyond that to her reputation, her due process rights are limited: "Reputation alone, apart from some more tangible interests such as employment, is [not]... by itself sufficient to invoke the procedural protection of the Due Process Clause."¹³ The rule in *Paul*, known as the "stigma plus" test, requires plaintiff to show three factors to be entitled to a hearing to clear her name:

- (1) [P]ublic disclosure of a stigmatizing statement by the government,
- (2) the accuracy of which is contested, *plus* (3)

¹¹ *Id.* at 780-81.

¹² *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951), "[T]he right to be heard before being condemned to suffer grievous loss of any kind, *even though it may not involve the stigma and hardships of a criminal conviction*, is a principle basic to our society. [emphasis added]

¹³ *Paul v. Davis*, 424 U.S. 693, 701 (1976).

the denial of ‘some more tangible interest such as employment,’ or the alteration of a right or status recognized by state law.¹⁴

Due to the notoriety that a *Brady* designation leaves,¹⁵ a prosecutor’s *Brady* designation meets the first stigma plus factor. Ames, by contesting the foundation for the *Brady* designation also meets the second factor. And the third factor is satisfied by Ames’ pleadings and argument that his employability is threatened. The threat that *Brady* designations pose to officers’ employability has been echoed by police unions, police advocates, and attorneys.¹⁶

The recent emergence of demands for police personnel records has left the case law underdeveloped as to what process is due. New Hampshire, one of the pioneers in developing formal procedures for access of the accused to these files, has also been the first to clearly define the constitutional due process owed officers. Noting the “notions of fairness” in allowing officers to be removed from *Brady* lists when the initial reasons for their inclusion are unfounded,¹⁷ the New Hampshire Supreme Court requires a “post-placement mechanism” for *Brady* list removal.¹⁸ The court reasoned that “[b]asic fairness demands that courts not invariably defer to the

¹⁴ *Ulrich v. City & Cty. of S.F.*, 308 F.3d 968, 982 (9th Cir. 2002).

¹⁵ See Abel, *supra* note 3, at 780-781.

¹⁶ *Id.* at 780.

¹⁷ *Ganteri v. City of Rochester*, 168 N.H. 640, 651 (2016).

¹⁸ *Id.* at 650.

judgment of prosecutors” as to Brady designation.¹⁹ The Court of Appeals erred in not recognizing these due process rights.

It also erred by not accept Ames’ request for a Declaratory name clearing process. Such a procedure has been *specifically recognized* as appropriate in the Restatement of Torts. The Restatement reasoned that since declaratory actions are permitted, there is no principled basis to disallow it for defamation claims.²⁰ This authority was cited by not adopted by the majority below, which is an error this Court should address. The important rights of officers in their good name can be properly vindicated in a declaratory action, which is what Ames properly sought.²¹

C. The Court should accept Review Because the Case involves a Conflict with Published Cases of this Court and the Court of Appeals.

1. The Court of Appeals Majority Severely Misapplied Clear Precedent Governing CR 12(b)(6) standards as well as the law governing “Brady” disclosures.

The majority below also erred by misapplying both the CR 12(b)(6) standard and the *Brady* rule. In this case, those errors were also interrelated; the Court erred by ignoring the pled facts in concluding that the Prosecutor had an arguable *Brady* duty to release the records. As the dissent noted, such a conclusion *can not* be reached on the facts pled. Judge Bjorgen accurately stated: “Dismissal under that rule should be granted only

¹⁹ *Id.* at 780.

²⁰ RESTATEMENT 2ND OF TORTS, § 623.

²¹ See also “Protecting One’s Reputation – How to Clear a Name in a World Where Name Calling is so Easy,” 4 PHOENIX L.REV. 53 (2010).

“sparingly and with care” and only when it is “beyond doubt” that the plaintiff can prove “no set of facts, consistent with the complaint, which would justify recovery.”²² He then properly concluded:

[O]ne cannot reasonably conclude that Ames can prove no set of facts, consistent with his petition, which would justify a conclusion that these disclosures did not include legitimate potential impeachment evidence. Especially where, as here, the documents that would be truly impeaching were prepared by the prosecutor's office, one may reasonably conceive of hypothetical circumstances under which these disclosures might not be compelled by the case law.²³

The majority faultily reasoned that there might be some arguable duty to release and that prosecutors must “err on the side of disclosure.”²⁴ That conclusion utterly ignores that there is *no duty* and, Amici argue, *no right*, to release contrived and false information, especially information generated for a vindictive purpose. Yet this is exactly what Ames’ Complaint alleged. The Court of Appeals ignored both the requirements of *Brady and CR 12(b)(6)* by *assuming* a legitimate reason existed for releasing the information at issue here.

2. The Court of Appeals Majority applied much too Narrow a Right of Civil Litigants to seek Declaratory Relief and Writs of Prohibition.

The majority erred by applying much too narrow a standard on declaratory and prohibition writ actions. The restrictions applied by the court negatively impact all persons’ ability to pursue civil relief.

²² *Ames v. Pierce County*, 194 Wn.App. 93, 123 (2016)

²³ *Id.* at 125.

²⁴ *Id.* at 109.

Declaratory actions may lie when there exists:

(1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.²⁵

Ames met these standards. The court below misapprehended the nature of the *Brady* designation. Designation of an officer as a “Brady officer” immediately impacts their status and employability. The issue was *not*, as the court incorrectly concluded, whether some future trial court judge might deem the documents admissible. As pled by Ames, he was already being tagged a Brady officer by the Prosecutor and that tagging created the *immediate* interest he sought to vindicate his name.

The court also applied much too narrow a standard as to Writs of Prohibition. At issue is *not* the common law Prohibition Writ that narrowly focuses only on court jurisdiction.²⁶ In codifying the Writ, the legislature allowed an action that was the *inverse* of a Mandamus action: “The writ of prohibition is the counterpart of the writ of mandate.”²⁷ A mandamus action may lie to compel a public officer to perform a legal duty.²⁸

Thus, while unusual in form, it is plausible and appropriate that a criminally accused person seeking exculpatory evidence might compel

²⁵ *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815 (1973).

²⁶ See *Spokane v. AFSCME*, 76 Wn. App. 765, 768 (1995).

²⁷ RCW 7.16.290

²⁸ See RCW 7.16.160.

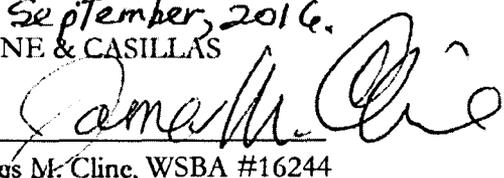
discovery through a mandate. Since the Writ of Prohibition is the “counterpart” to such an action, there is no basis in the law to bar the Writ from an improperly tagged Brady officer challenging the release of intentionally false documents.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Detective Ames’ petition and allow this matter to be heard on the merits.

Dated this 27 day of September, 2016.

CLINE & CASILLAS

By: 

James M. Cline, WSBA #16244

Attorneys for Amici Law Enforcement Unions

CERTIFICATE OF SERVICE

I certify that on September 27, 2016, I caused to be served via electronic mail and U.S. Mail a true and accurate copy of the MOTION FOR LEAVE TO FILE AMICUS BRIEF, DECLARATION OF JAY KENT IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS BRIEF, the foregoing AMICUS BRIEF and this CERTIFICATE OF SERVICE in the above-captioned matter with:

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of September, 2016, at Seattle, Washington.

CLINE & CASILLAS

A handwritten signature in black ink that reads "Robert Cook". The signature is written in a cursive style with a large, looping initial "R".

Robert Cook
Temp Paralegal

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Dear WA Supreme Court Clerk:

Attached please find:

- (1) Motion for Leave to File Amici Curiae Brief in Support of Petition for Review;
- (2) Declaration of Jay Kent in Support of Motion to File Amici Curiae Brief; and
- (3) Amicus Brief by Amici Curiae Law Enforcement Labor Unions.

CASE NAME: Michael Ames vs. Pierce County, Pierce County Prosecutor's Office

CASE NUMBER: No. 934282

ATTORNEY FILING: James M. Cline, WSBA # 16244
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Please let me know if anything further is needed. Thank you.

Respectfully,

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