NO. 74459-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Appellant,

v.

KING COUNTY,

Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Theresa Doyle

BRIEF OF APPELLANT

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I. INTRODUCTION

This Public Records Act ("PRA") case presents the question of whether the federal government can prevent a city police officer from testifying in a state court case by asserting that the police officer's participation on a joint state/federal task force transformed the officer into a federal employee who cannot testify in a state court proceeding without the approval of the federal agency. The case also presents several questions concerning the scope of the work-product privilege where documents are created and exchanged by both state and federal prosecutors, but only the state prosecutors are anticipating litigation.

Two law enforcement officers, Seattle Police Department ("SPD") Detective Leonard Carver, and FBI Agent Larry Carr, worked together as members of a joint SPD/FBI Task Force to investigate Michael Mockovak. CP 1206. Carver and Carr utilized Daniel Kultin an undercover informant, and Kultin surreptitiously recorded his conversations with Mockovak. CP 431, 433-437. Eventually, Mockovak was arrested, charged, and convicted of Solicitation of Murder 1 and Attempted Murder 1 for taking a substantial step toward killing his business partner Joseph King. CP 410, 437.[1] *See State v. Mockovak*, King

[1] Mockovak was also tried on a second count of Solicitation of Murder 1 for allegedly asking Kultin to kill Bradley Klock, but he was acquitted of that charge. CP 437.

County Cause No. 09-1-07237-6 SEA. Kultin, a Russian immigrant, was the prosecution's chief witness in the state court criminal trial.

The conviction was based upon Mockovak's "agreement" with Kultin, an employee working for Drs. Mockovak and King as the Director of Information Technologies at their eye clinic. CP 428. Unbeknownst to Mockovak, Kultin had agreed to work for the FBI as a confidential informant. CP 428. After roughly six months of conversations, Kultin eventually persuaded Mockovak to authorize him to hire some Russian Mafia hit men to kill King. CP 428. In actuality, there were no hit men, but Kultin eventually persuaded Mockovak to give him money to be used to hire them. CP 436. Mockovak was arrested on November 12, 2009. CP 437. The trial took place in January and February of 2011; the jury returned its verdicts on February 3, 2011. Both FBI Agent Lawrence Carr and SPD Detective Leonard Carver testified in the state court trial.

Kultin's credibility was critical to the outcome of the trial. Mockovak's defense was that Kultin entrapped him into making an agreement that he was not otherwise predisposed to make by eventually persuading him to hire Russian Mafia hit men (who did not actually exist) to carry out a hit. CP 429.[2] In closing argument, defense counsel argued

[2] To establish entrapment a defendant has to prove that the idea for the crime "originated in the mind" of a law enforcement agent. RCW 9A.16.070. Mockovak *(Footnote continued next page)*

at length that Kultin was a liar who had lied to everyone he came in contact with.[3] The prosecutor sharply disputed defense counsel's portrayal of Kultin and argued that he "didn't lie" and he "wasn't lying." RP 2/1/11, at 38. If Mockovak had had additional evidence with which to impeach Kultin's credibility, he might easily have been acquitted of the attempted murder charge.

During the 14 month time period following his arrest and prior to the start of his criminal trial, Mockovak's defense attorneys repeatedly tried without success to get information about Kultin's immigration status and any pending application for U.S. citizenship. CP 560, 566-67, 573, 577-78, 582-86, 593. After his conviction had been affirmed by this Court, on November 20, 2013 Mockovak made a PRA request. Suspecting that *Brady*[4] information that could have been used to impeach

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argued that the idea for the crime originated with informant Kultin. The State, based on Kultin's testimony, said that the idea for the crime originated with Mockovak.

[3] "Daniel Kultin began lying when he first came into this case, from the first time he went to the FBI in Portland and told a lie about how somebody found out about Brad Klock's travel plans. And we'll go over that lie in just a bit. [¶] From that first lie he continued to lie. He lied to agent Carr when he looked him in the eye and said in June of 2009, "I'm making $80,000 at Clearly Lasik." . . . [¶] "He walked into this courtroom, and then he looked you in the eye and *he lied to you again and again and again. . . .*" RP1/31/11, at 114-15 (italics added).

"*This man lied to the FBI about these contacts, he lied to Ms. Storey, he lied to Ms. Barbosa, he lied to agent Carr, and he would have lied to you*, except he got confronted in January, and so he had to come out with it." RP 1/31/11, at 134-35 (italics added).

"If that's true, then *what he told the FBI is a lie, and if he's lying about the origination of who brought this plot to who, are you willing to trust him*?" RP 1/31/11, at 139 (italics added).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

Kultin had not been disclosed to him, Mockovak made a PRA request for records pertaining to Kultin's immigration and citizenship status. CP 2, 38, 44-48. When the King County Prosecuting Attorney ("KCPA") failed to respond in a timely manner, Mockovak filed suit, and many records were then produced, including emails between county prosecutors, FBI agents, U.S. Attorneys, and Detective Carver. Many of these records were significantly redacted and Mockovak challenged some of the redactions.

Mockovak also deposed informant Kultin and sought to question him about his initial immigration status as an asylee, and his prior INS arrest, but Kultin asserted the Fifth Amendment privilege against self-incrimination and refused to answer questions on these topics. CP 486-89. Mockovak then attempted to depose Detective Leonard Carver. Although Carver was initially willing to be deposed, the U.S. Attorney's Office took the position that he could not be deposed without the consent of the federal government. Counsel for the FBI suggested that if Mockovak formally requested such FBI approval, the FBI would probably give its consent to Carver's deposition. Accordingly, Mockovak sent such a request to the FBI, and simultaneously asked the Superior Court to delay its consideration of pending summary judgment motions so as to give Mockovak the opportunity to depose Carver.

The Superior Court granted Mockovak's request to continue

consideration of the summary judgment motions so that Mockovak would be able to depose Carver, but then the FBI and the U.S. Attorney decided *not* to approve the deposition request, and Carver failed to appear for his deposition. Mockovak asked the Superior Court to compel him to submit to a deposition, but ultimately the Court denied that request.

At the hearing on the parties' motions for summary judgment, the Superior Court questioned the parties about the relevance of the D.C. Circuit's decision in *Roth v. Department of Justice*, 642 F.3d 1161 (D.C. Cir. 2011), a federal Freedom of Information Act ("FOIA") case involving a clash between a defendant's due process right to disclosures under *Brady* and the privacy exemption to FOIA. After the hearing, the Superior Court sent the parties an e-mail request for additional materials that would assist the court in weighing "the interests underlying the asserted work-product exception" against "the public interests" in revealing potential *Brady* violations. CP 1393. The parties filed the requested additional materials, and two weeks later the Superior Court granted the KCPA's motion for summary judgment and denied Mockovak's cross-motion for summary judgment, ruling that all the redactions in the produced public records were properly made pursuant to the work product exemption to the PRA.

II. ASSIGNMENTS OF ERROR

Appellant Mockovak assigns error to:

1. The trial's court's refusal to compel Detective Carver to submit to deposition by Mockovak.

2. The trial court's decision to grant the defendants' motion for summary judgment.

3. The trial court's decision to deny Mockovak's cross-motion for summary judgment.

4. The trial court's determinations that all the record redactions made by the defendants were properly made because the redacted information was protected by the work-product privilege.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. 5 U.S.C. §301 authorizes federal agencies like the Department of Justice ("DOJ") to make regulations governing the conduct of "its employees." Does this statute authorize the DOJ to issue a regulation governing the conduct of a detective employed by the Seattle Police Department who was assigned to a joint task force where he worked cooperatively with an FBI Agent?

2. Does a federal regulation that prohibits a city police officer from being deposed in a state court proceeding without first obtaining the approval of a federal official violate the Tenth Amendment?

3. Given the constitutional problems that would be raised by an interpretation of 28 C.F.R. 16.21 that construed a municipal police officer assigned to a joint state/federal task force as an "employee" of the Justice Department, must a court apply the rule of constitutional avoidance by rejecting this construction and holding that the regulation is inapplicable to this officer?

4. Failing to realize a prosecutor's constitutional duty under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), to disclose favorable evidence to a defendant *always* overrides the work-product privilege, did the Superior court err by "weighing" the interests underlying the

work-product privilege against Mockovak's due process *Brady* right to disclosures?

5. Since the work-product doctrine applies only to documents created in anticipation of litigation, is the work-product privilege inapplicable to documents created by federal attorneys *after* the federal prosecutors had decided *not* to prosecute Mockovak and to leave criminal prosecution to state court prosecutors?

6. By sending documents which they authored to federal attorneys, did the state court prosecutors waive any work-product privilege that might have previously existed by voluntarily disclosing the documents to a third party?

7. Assuming that the e-mails to witness Kultin contained some information which would have been protected by the work-product privilege if they had not been sent to Kultin, did the state court prosecutors waive any work-product privilege that might have previously existed by voluntarily disclosing the information to a witness?

8. Did Mockovak demonstrate that any of the redacted information which is actually covered by the work-product privilege must give way because Mockovak made the requisite showing that (1) he has a substantial need for the redacted information, and (2) he is unable to obtain the information he seeks elsewhere without undue hardship?

9. Did the KCPA's voluntary disclosure of the information contained within the NCIC Criminal History record for informant Daniel Kultin waive any privilege that might otherwise have covered that document?

IV. STATEMENT OF THE CASE

A. Mockovak's unsuccessful attempts to obtain discovery in the criminal case regarding Kultin's immigration status.

Kultin immigrated to this country from Russia. CP 410, 429. Apparently law enforcement was initially confused about his

immigration/citizenship status. Five days after his arrest, Agent Carr wrote a memo in which he mistakenly described Kultin as "a permanent US citizen who emigrated from Ulyanovsk, Russia, at age 18 . . . ." CP 410, 421. Similarly, in his Certificate for Determination of Probable Cause filed on November 17, 2009, Detective Carver stated that Kultin was a U.S. citizen. CP 411, 464.

But Kultin was *not* a U.S. citizen when charges were filed in November of 2009. As a result of this Public Records Act lawsuit, FBI documents came to light which show that (1) as of April 2009 Kultin was not a citizen but *he had a citizenship application pending*; and (2) as of late November 2010 Kultin *still was not yet a citizen.* Moreover, four years later, when Kultin was deposed in this PRA case, he confirmed that he was *not* a U.S. citizen in January of 2011 when he testified at Mockovak's trial. CP 411, 510-11, 522-23.

Having been misinformed that he was a U.S. citizen, Mockovak's defense attorneys sought to find out whether Kultin had received any assistance in obtaining citizenship from law enforcement. In their *Second Request for Discovery* (2/18/10), they asked the prosecution to disclose:

> [a]ny information . . . regarding promises of immunity, leniency, preferential treatment or other inducements made to [Kultin], . . . in exchange for [his] cooperation, including . . . assisting in matters of sentencing or deportation, ***assisting in helping the witness obtain Naturalization, any contacts with INS on behalf of the cooperating witness*** . . . .

CP 560 (emphasis added).

On April 30, 2010, defense attorney Collette Tvedt wrote to Senior Deputy Prosecuting Attorney ("SDPA") Storey to "follow up on [Mockovak's] Second Request for Discovery" stating "[w]e have not yet received responses to several of our specific requests." CP 566. Tvedt acknowledged that the KCPA probably did not have possession of the FBI's investigative file, but Tvedt specifically asked Storey to obtain it from the FBI and to provide it to the defense. CP 566. Tvedt reiterated that the defense was seeking information regarding immigration or citizenship assistance provided to Kultin. CP 566-67. In a letter dated May 10, 2010, Storey replied:

> Mr. Kultin was apparently the subject to [sic] an INS investigation, which was quickly resolved. ***The FBI has denied our requests for further information.***

CP 570 (emphasis added). Storey did not mention the fact that the INS had actually *arrested* Kultin during this investigation.

Since the state prosecutors said they had no control over the documents and information in possession of the federal authorities, Mockovak's defense attorneys contacted the FBI. On August 24, 2010, attorney Joe Campagna wrote directly to Bruce Bennett, Associate Division Counsel for the FBI and requested:

Any records relating to compensation or benefits offered or given

> to Daniel Kultin in return for participating in the investigation of Michael Mockovak, including but not limited to any offers or payments of money, or ***any offers of or discussion about assistance with Daniel Kultin's immigration status.***
>
> . . . Most importantly, Daniel Kultin – a paid FBI informant – is the chief witness against Dr. Mockovak. Under *Giglio v. United States*, 405 U.S. 150, withholding of evidence that tends to impeach the testimony of a key government witness would infringe Dr. Mockovak's due process rights. . . .

CP 572-73 (emphasis added).

On September 7, 2010, Assistant United States Attorney ("AUSA") Phil Lynch wrote back and said that after conferring with the FBI, the USAO consented to Campagna's document request "to the extent set forth below." CP 575. The FBI agreed to produce the 302 reports that covered the period between August 12 and October 19, 2009, but *refused* to provide any reports for dates before and after that. CP 575.[5]

On September 28, 2010, Campagna wrote Lynch and again requested copies of records pertaining to Kultin. Campagna zeroed in on the time period before August 12, 2009 and asked for the records pertaining to conversations between Kultin and Mockovak "that occurred between April 10, 2009 and August 12, 2009"; and for "records of communications, whether written or otherwise, between Kultin and any

[5] Similarly, the FBI agreed to provide a summary of the amounts of money that the FBI paid to Kultin, but declined to release copies of other documents pertaining to him. CP 575. Lynch said that the FBI would "only" produce those portions of the informant's file that were "outlined above," and thus declined to produce any records that might exist regarding any immigration assistance which Kultin might have received. CP 575.

agent or employee of the F.B.I., or any associated task force, including but not limited to Special Agents Lawrence Carr, Special Agent George Steuer, and Detective Leonard Carver." CP 577-78.

On October 4, 2010, Lynch wrote again, stating that *either* the FBI had already provided the records that the defense was requesting, "*or* the FBI is not authorized to provide the materials as a matter of FBI policy." CP 580. He said that "all releasable materials" had already been provided and that the FBI was not authorized to release anything more. CP 580.

On October 12, 2010, Mockovak's defense counsel served a subpoena duces tecum on the FBI's legal counsel, directing Agent Carr to produce documents or records by no later than October 21st. CP 582-86. The subpoena called for production, *inter alia*, of records relating to "any offers or discussion about assistance with Daniel Kultin's immigration status" or about "assistance provided to Daniel Kultin in any way." CP 583. On October 19, 2010, AUSA Brian Kipnis responded in writing and advised Campagna that the subpoena was not legally enforceable against the FBI or against any of its agents, and that the Superior Court had no jurisdictional authority over the FBI and could not order the FBI to comply with it. CP 588-89.

On October 20, 2010, Campagna wrote to Kipnis, renewing his request for any evidence bearing upon Kultin's credibility, citing to *Giglio*

v. United States, 405 U.S. 150 (1972), and arguing that Mockovak had a due process right to evidence that tended to impeach Kultin. CP 593.

On October 25, 2010, AUSA Kipnis wrote Campagna and argued that Mockovak had no right to any discovery from the United States because "the United States is not prosecuting Mr. Mockovak." CP 595. Kipnis said that if a compromise could not be reached the United States would be moving to quash the defendant's subpoena. CP 595.

B. The KCPA corrects its earlier misstatement that Kultin was a U.S. citizen.

On October 28, 2010, Detective Carver advised SDPA Storey by email: "We checked with our US Immigration Task Force Officer here and confirmed Kultin is a lawful permanent resident, granted asylee status in 1997." CP 599. The wording of this email (stating that Kultin's status as a lawful permanent resident was "confirmed") is strange since previously both Carver and Carr had described Kultin as a U.S. citizen. *See* CP 410, 464. Storey forwarded Carver's email to Mockovak's defense counsel that same day. CP 598.[6] Thus, the State informed Mockovak's attorney on October 28, 2010, that Kultin was *not* a U.S. citizen – contradicting what Detective Carver had previously stated back

[6] Later that afternoon, the two state court prosecutors exchanged emails, apparently on the same subject, but the entire contents of those two emails have been redacted. CP 598.

in November of 2009 when Mockovak was first arrested and charged.

C. **Roughly one month before the criminal trial began, the KCPA disclosed that Kultin had once been arrested by the INS, and represented that there was "no reason to believe" that Kultin had been offered "some form of immigration assistance" in exchange for his cooperation in this case. No mention was made of Kultin's pending application for U.S. citizenship.**

Having been denied the discovery that they sought, on November 18, 2010, Mockovak's attorneys filed a motion to dismiss the charges against him. They argued that while a state court judge might not have the power to order the federal government to produce discovery, she did have the power to dismiss the state court charges pursuant to CrR 8.3.

On December 3, 2010, the KCPA filed a response to Mockovak's motion to dismiss. CP 601-623. The KCPA argued that Mockovak's contentions that he had not been provided with adequate discovery were simply not true. The KCPA purported to respond specifically to Mockovak's complaint that he had not been told whether law enforcement had made any "inducements" to Kultin. In its brief the state prosecutors asserted that six months earlier the FBI had sent a letter that "confirms that no inducements were made to Kultin" and thus the State prosecutors concluded that "there is no reason to believe that 'Kultin was offered some form of immigration assistance' as an inducement." CP 602.

In support of its "no reason to believe" assertion, the State offered the declaration of Detective Carver. (Significantly, the State never

submitted any declaration from Agent Carr.) PRA documents disclosed four years later show that Carver first sent a draft of this declaration to Storey with an accompanying email which stated: "See the attached. I made some changes and ***added information about immigration stuff, hoping to bolster it a bit.*** Too much? Let me know. . . ." CP 625 (emphasis added). In his declaration Carver said he was familiar with a "criminal and arrest history report" and with "documentation" from the Department of Homeland Security.[7]

Carver's declaration stated that Kultin had first spoken about Mockovak "to FBI Agent George Steuer, who interviewed Kultin on April 10, 2009." CP 616. Steuer's report of that interview states that Kultin told Steuer that he "was once arrested by immigration officials who believed his immigration papers were not in order. However, when the case went before an immigration court, it was discovered that his papers were in order and the case was dismissed." CP 617. Carver's declaration further disclosed that Kultin had been issued a green card years ago and he was now a resident alien:

> I have reviewed Department of Homeland Security documentation and know that Kultin is a legal permanent resident of the United States. Kultin's records indicate he has been a permanent resident since 2004. As proof of that status, Kultin was issued a permanent resident card, commonly called a "green card" in 2005. Kultin would not be subject to deportation unless he was first convicted of

[7] It appears that these are different documents, but that is not entirely clear.

certain types of crimes.

During my interactions with Kultin, he never expressed any concerns about his standing with the INS.

With respect to this case, Kultin has not asked for and was not given any assistance with regard to his immigration status.

I am not aware of, and do not believe Kultin has provided assistance or information in any federal investigation other than the current case involving Michael E. Mockovak.

CP 628. In his declaration Carver said nothing about the fact that Kultin had an application for citizenship pending at that very moment.[8]

The KCPA, Mockovak's counsel, and counsel for the FBI, made argument before the Superior Court in connection with Mockovak's motion to dismiss. The Superior Court judge agreed that although she might not have the power to order the FBI to produce discovery for use in a state court case, she did have the power to dismiss the case. The Court

[8] Carver's did *not* state that he had personal knowledge of all of the facts set forth in his declaration, and the wording of it makes it clear that he did not have personal knowledge of much of the information set forth in it. Carver said that he got most of his information from reading documents authored by other people. While Carver clearly had personal knowledge of the fact that he himself had not provided any immigration assistance to Kultin, he had no way of knowing whether any other law enforcement official, such as Agent Carr or one of the Assistant U.S. Attorneys, had done so. Without personal knowledge, the statement is inadmissible. ER 602 ("A witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter.")

Moreover, Carver's statement was phrased solely in terms of the past. Carver asserted that Kultin has not been "given" – past tense – any assistance with his immigration status. *But conspicuously absent is any representation that Kultin has not been promised, or led to expect, that such assistance will be provided in the future.* Typically, when this type of assistance is given, it is not provided until after the criminal trial is over and the informant has performed to the satisfaction of the law enforcement agent. *See, e.g., United States v. Blanco*, 393 F.3d 382, 392 (9th Cir. 2004) (at trial informant testified, "I haven't received anything yet").

gave the "parties" (the FBI, represented by the USAO, and Mockovak) time to work out a compromise that would make it unnecessary for the Court to rule on the motion to dismiss.

On December 13, 2010, the state prosecutors told the Court that the FBI had provided several additional discovery materials to the defendant, and that the FBI had made a proposal to the defense regarding the defense request for a copy of an FBI manual on how to handle confidential informants. CP 630-32, 637. The state prosecutors attached a copy of a letter written by AUSA Brian Kipnis and addressed to the Superior Court judge and to counsel of record. In that letter the federal prosecutor told the Court that more information would likely be available at the hearing scheduled for December 16th. CP 637. Then, on December 16th, one of the state prosecutors told the Court that the defense and the FBI had reached agreement on all remaining discovery issues, and Mockovak's attorney confirmed that. CP 641.

However, neither the state prosecutors nor the USAO ever told Mockovak's attorneys that Kultin had an application for citizenship pending at least as early as April 10, 2009. Thus Mockovak went to trial without knowing that Kultin was currently seeking U.S. citizenship, and without knowing whether he had been given any indication that he would receive some *future* assistance in his effort to obtain citizenship.

D. **The Public Records Act Request and the KCPA's Response**

More than two years after his criminal trial ended, on November 20, 2013, through his attorney, Michael Mockovak sent a PRA request to the KCPA asking for copies of records in ten specified categories. CP 2, 15, 38, 44-48. On December 3, the KCPA responded that it had begun gathering the requested records and that it anticipated contacting Mockovak in approximately three weeks with an update. CP 2, 15, 39, 50. A period of ten months then passed, during which the KCPA sent no communications and no records to Mockovak. CP 3, 15.

On September 12, 2014, Michael Mockovak filed suit against King County and the KCPA alleging violations of the Public Records Act. CP 4. On October 13, 2014, the KCPA filed an answer in which it admitted that it had failed to provide any records for a period of ten months. CP 15.

The KCPA began producing records on September 30, 2014 when it produced a first installment of responsive records. CP 39, 55-60. Four more installments of records were produced on October 7th, 14th, 21st and 29th. CP 39-40, 62, 64, 66, 68-69. On October 29th KCPA also produced an exemption log sheet. CP 40, 71-156.

E. **Acceptance of the County's Offer of Judgment.**

On December 16, 2014, the KCPA sent Mockovak an Offer of

Judgment for $20,000 plus costs and attorneys' fees accrued up to the date of the offer. CP 1931, 1934-35. The Offer was to compensate Mockovak for the ten month delay in responding to his records request, and specifically did not include Mockovak's claim that the KCPA had improperly redacted or withheld certain documents identified on the October 29, 2014 exemption log. CP 1934-35. Mockovak accepted the Offer of Judgment on December 23, 2014. CP 1931, 1936.

F. **Documents disclosed in this PRA case show that the KCPA knew that Kultin had applied for citizenship, and strongly suggest that the KCPA knew his application was pending at the time of trial. Thus, at the time he testified Kultin had a motive to seek to please law enforcement in order to get them to support his application *after Mockovak's trial was over.***

In response to Mockovak's PRA request, the KCPA produced records that shed some light on Kultin's immigration status at the time of Mockovak's trial, and on some of Kultin's past difficulties with the INS. Most of these records are in the form of emails and many of them are heavily, and some are entirely, redacted. E-mails between SDPA Storey, Detective Carver, and Agent Carr, reveal that in 1997 the INS arrested Kultin, but that the INS "case" was dismissed with "no charges" brought. CP 672. Due to the redaction of all of Storey's e-mails in this chain, it is unclear what Kultin was detained for, what allegations were made by INS, why the case was "dismissed" and what "charges" were contemplated.

Agent Steuer's report also reveals that Kultin had a citizenship

application pending in April 2009, seven months prior to Mockovak's arrest. According to Kultin, he was granted citizenship in 2011 sometime after Mockovak's trial had ended. CP 491-92. This suggests that *after* Kultin had provided the critical testimony needed to convict Mockovak, Kultin may have received help from Carr or Carver with his application for citizenship which had been pending for at least 20 months.

Kultin has recently denied that his application was pending at the time of Mockovak's trial, but this testimony conflicts with the report of FBI Agent Steuer made in April of 2009. By July 24, 2015, when Kultin was deposed in this case, Kultin had a motive to conceal the fact that he had a citizenship application pending when he testified for the prosecution at Mockovak's criminal trial. If Kultin told the truth to Agent Steuer in 2009, then Kultin had good reason to believe that it was in his interest to provide whatever testimony the law enforcement agents wanted him to give, in order to curry favor with them. And if Kultin had reason to believe a law enforcement agent would help him get his citizenship if he helped to gather evidence sufficient to convict Mockovak, then long before the trial began, back in the investigation phase of the case Kultin had a motive for entrapping Mockovak by inducing him to commit a crime that Mockovak was not predisposed to commit, and was in fact reluctant

to commit.[9]

G. The PRA documents make it appear that the KCPA instructed law enforcement *not* to take any witness statement from Kultin regarding his prior INS arrest.

Documents disclosed for the first time in the PRA case shed considerable light on what the state court prosecutors knew about Kultin, when they knew it, and when (if ever) they disclosed what they knew to Mockovak's criminal defense attorneys. For example, seven days after Mockovak's arrest, on November 19, 2009 Storey sent an email to Carr and Carver. The subject line of the email is "Kultin statements." CP 670. The entire content of this email is redacted. However, the chain of emails initiated by this first email strongly suggests that Storey asked Carr and Carver to investigate Kultin's citizenship status and within one month she had an answer to her inquiry.

At 3:13 p.m. on December 15, 2009, Storey again sent an email to Carr and Carver. CP 672. This email has the same subject line as the initial email Storey sent to them back in November ("Kultin statements"). Again, the contents of this second email have been entirely redacted. About one hour later, at 4:31 p.m., Carr sent a reply e-mail to Storey (and copied Carver) in which he acknowledged that the FBI *did* have records

[9] Kultin also apparently concealed from law enforcement that he had lied in his application to obtain asylee status. *See infra* at pages 25-26. Kultin therefore had even more reason to curry favor with law enforcement to avoid deportation if the truth were exposed.

(called "302's") regarding conversations that Kultin had had regarding his immigration troubles. Carr asked Storey if she wanted him to get a signed witness statement from Kultin regarding this subject; but Carr suggested that if he did that for Kultin he would probably have to do that for all the witnesses the FBI had interviewed:

> We have searched his background, ***he does have an INS detention over his status, it was cleared up and no charges filed. There are 302's concerning Kultin's conversations related to this investigation (non-recorded).*** We (FBI) do not do signed witness statements. ***If you prefer them we can go back and make up some type of affidavit for Kultin to sign.*** If we do then [sic], I think you would have to go back and do that for all witnesses? In other words we do 302's or we do something else but not some 302's and some signed statements.

CP 672 (emphasis added).

On December 16, 2009 at 9:04 a.m. Storey responded to Carr's email of the previous day. Her response has been completely redacted. CP 674. Since no signed affidavit from Kultin was ever produced in discovery to Mockovak's defense attorneys, it seems reasonable to infer that Storey told Carr *not* to have Kultin sign any affidavit.

Despite the fact that Carr told Storey that there *were* FBI records ("302's) that summarized conversations that FBI agents had with Kultin about the "investigation" that the FBI did when it detained Kultin, no information about those conversations was ever provided to Mockovak's counsel, and Mockovak was never provided with copies of these 302's. (As noted above, the FBI agreed to produce some 302 reports, but only for

the time period between August 12 and October 19 of 2009. CP 575.

H. **Some kind of unspecified "victim assistance" was provided to Kultin, even though Kultin was never the victim of any crime.**

At 9:53 a.m. Carr sent another email to Storey. This email is not redacted and it states: "I have included Dani's email so you can connect with her. She says she has called you." CP 676. "Dani" turns out to be Dani Geissinger-Rodarte, a "Victim Specialist" employed by the FBI. The next day, December 17, 2009, at 11:34 a.m. Storey sends a reply email to Carr which stated in part Storey had "just talked with Dani" and that Storey was going to tell Kultin "that Dani is on board and to expect her assistance." CP 678. Twenty-two minutes later Storey sent Dani an email which appears to be seven paragraphs long, but six paragraphs have been redacted. The one unredacted paragraph states in part: "Dani: I am very grateful to have you on board on this case." CP 680.

One minute later Storey emailed Kultin. *Even though Kultin was not a victim of any of the criminal charges against Mockovak*, and was instead Mockovak's "co-conspirator," Storey told Kultin that 'a 'Victim Specialist'" named Dani Geissinger-Rodarte would be calling him. CP 682. She said Dani "will be of great help to you" and would send him a

letter describing "the assistance she can provide." CP 682.[10]

I. On April 10, 2009, Kultin told FBI Agent Steuer that he had an application for citizenship pending at that time.

An unredacted PRA document shows that Kultin had a citizenship application pending on April 10, 2009. George Steuer, an FBI Agent stationed in Oregon, interviewed Kultin on that date. Steuer's report states that Kultin told him that he "is currently in the application process to become a naturalized United States citizen." CP 553.[11]

Seven months later, on November 17, 2009, a few days after Mockovak had been arrested and charged, both Agent Carr and Detective Carver identified Kultin as a U.S. citizen. CP 421, 464. Apparently, as of November 17, 2009, law enforcement believed that Kultin's citizenship application had already been granted. But roughly one year later, when Carver checked Kultin's status, he learned that Kultin was *not* a U.S. citizen. CP 599. On October 28, 2010, Carver notified SDPA Storey of this fact, and Storey passed on Carver's email to one of Mockovak's attorneys. But no one told Mockovak's attorneys that Kultin had a

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[10] Then on December 19, 2009, Storey sent Kultin another email. Other than the words "Thank you" the contents of this email have been entirely redacted. CP 684. Even though this email was sent to a witness, the KCPA claims this email is protected by the work product privilege.

[11] Steuer's report also reveals that the source of the FBI's information about Kultin's arrest by the INS is Kultin himself: "KULTIN advised that he was once arrested by immigration officials who believed his immigrant paperwork was not in order. However, when the case went before an immigration court, it was discovered that his papers were in order and the case was dismissed." CP 553.

citizenship application pending at that time.

J. **About one month before trial SDPA Storey got an update from an ICE agent regarding Kultin's immigration status. Years later Storey "highlighted" this redacted email when assembling documents responsive to Mockovak's PRA request.**

Other PRA documents showing contact in November and December of 2010 between the KCPA and the Department of Homeland Security make it appear as if Storey made a continuing effort to find out whether Kultin's immigration status was changing, or might soon change. One month after Storey had passed on the information that Kultin actually was *not* a U.S. citizen, Storey was exchanging emails with an Immigration and Customs Enforcement ("ICE") agent. On November 30, 2010 at 2:47 p.m., ICE Agent Kimberly Morneau sent Storey an email that read: "*As discussed* – here is the link and the documents are attached." CP 686 (italics added). That was followed by an internet address for U.S. Customs and Immigration Services and copies of three documents.

The first document is entitled "Green Card (Permanent Residence)." It provides information on how to access a second website regarding "After the Green Card is Granted," and that website tells green card holders how to renew or replace a green card, and informs them of their rights and responsibilities as a permanent resident. CP 687-88. The second document, "Maintaining Permanent Residence" warns green card holders about acts which might cause them to lose their Green card

status.[12] The third document is entitled, "Rights and Responsibilities of a Green Card Holder (Permanent Resident)," and among other responsibilities it states that a green card holder is required "to obey all laws of the United States, the states, and localities, and must file income tax returns and report income to the IRS." CP 690.

Five minutes after emailing Storey these documents, Agent Morneau sent Storey another email which suggests that she was having trouble verifying Kultin's immigration status because she needed Kultin's consent before that information could be released:

> I just spoke with one of our Immigration attorneys. An individual with Citizenship and Immigration Services (CIS) would be the person to verify someone's status. But there is the privacy issue – the witness may need to consent to the information being released. . . . . The attorney asked whether the witness has prepared an affidavit/declaration relating to his status.

CP 691.[13]

Two and a half weeks later Storey sent Agent Morneau a short email response. *Id.* The last sentence reads: "Thank you for all your help on this." CP 692. The rest of this email is redacted. *Id.* More than three years later, in the fall of 2014 when the KCPA was finally assembling the

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[12] It states in part: "You may lose your permanent resident status (green card) if you commit an act that makes you removable from the United States under the law, as described in Section 237 or 212 of the Immigration and Nationality Act (INA) (see the "INA" link to the right). If you commit such an act, you may be brought before an immigration court to determine your right to remain a permanent resident." CP 689.

[13] Presumably Kultin is the witness whose consent was needed.

documents responsive to Mockovak's PRA request, Storey sent an email to Ethan Rogers and directs his attention to her 2010 email to ICE agent Morneau. Her email to Rogers said: "Highlighting this one. Will include when I send the rest." *Id.*[14]

The mysterious email exchange between Storey and Morneau suggests several possibilities. Since one document supplied to Storey addresses how a resident alien can *lose* his legal resident alien status (CP 689), one possibility is that Storey was worried that Kultin was in danger of losing his green card status. This suggests that Storey may have been inquiring to see if law enforcement could help Kultin avoid losing his green card.[15]

On January 12, 2011, about one month after her final email to ICE agent Morneau, Mockovak's criminal trial began. The jury returned its verdicts on February 3, 2011.

K. Deposition of Daniel Kultin, and Kultin's assertion of the Fifth Amendment self-incrimination privilege as a basis for refusing to answer questions regarding his immigration status.

In an effort to find out if Kultin had given documents pertaining to

[14] The privilege log supplied by the KCPA identifies the justification for the redaction of Storey's email to Morneau as "work product." Assuming, arguendo, that this email contains something that would ordinarily be covered by the work product privilege, the privilege log does not contain any explanation as to why any such privilege was not waived by sending the email to an ICE agent like Morneau.

[15] Another possibility is that Storey was trying to determine if Kultin was still seeking U.S. citizenship, so that she could see whether law enforcement could assist him in obtaining it.

his immigration or citizenship status to Detective Carver or Agent Carr, on July 24, 2015 Mockovak deposed Kultin. CP 466. At his deposition Kultin confirmed that he first came to the United States in 1994 when he was 18 years old. CP 471. One of the disclosed PRA documents states that Kultin was granted the status of an asylee in 1997. CP 599. Kultin was questioned about his initial immigration status as an asylee, but Kultin refused to answer, choosing instead to assert the Fifth Amendment privilege to remain silent. CP 484-85, 495-96. He did testify that he could not remember whether he or his father handled his initial immigration application, and he said that his reason for wanting to come here was that the U.S. was "a better country" which had better cars, better music, and better computer technology. CP 484-85. But when asked why he needed asylum he initially replied, "I have a feeling you're trying to make me guilty of something, so I'm not going to answer this . . . ." CP 486. Asked whether he was afraid that someone in Russia would hurt or harm him he first said he did not want to discuss this topic, and then said he was "going to take the Fifth on all questions regarding this." CP 487. When asked if he was "taking the Fifth" because he felt an answer might incriminate him he replied he was taking the fifth to that question as well. CP 489. Shortly thereafter he said that he didn't remember if he was ever granted asylee status. CP 495-96. He claimed not to remember whether

he ever asked the FBI to be a character reference for him. CP 519.

In response to the subpoena duces tecum served upon him Kultin testified that he had no documents relating to his application for citizenship, or to his prior INS arrest. CP 533-35.

L. Mockovak attempted to depose Seattle Police Department Detective Leonard Carver, but the Justice Department contended that Carver was a federal employee who could not be deposed without the Department's consent.

Mockovak initially noted Detective Carver's deposition for August 20, 2015 and served him with a subpoena duces tecum for documents related to Kultin's immigration and citizenship status. CP 1228-1232. On August 14th Carver contacted the office of Mockovak's counsel and said that he was not available on August 20th so Mockovak re-noted Carver's deposition for August 27th. CP 1234-1238.[16]

On August 17th Mockovak's counsel received a letter from a paralegal in the United States Attorney's office. CP 1240-41. The letter stated that the FBI was a federal agency, that Detective Carver was a member of a FBI Task Force, and that therefore Carver was an FBI employee. CP 1240. Accordingly, the letter stated that Detective Carver's testimony "cannot be compelled by a subpoena" and that he could not be deposed without the approval of the Justice Department. CP 1240-41. That

[16] Both deposition dates were well in advance of the discovery cut-off date of September 28th. CP 871.

letter described Detective Carver as an "FBI Task Force Officer," and made no mention of the fact that Carver was actually employed by the Seattle Police Department. CP 1240-41.

Citing to what are known as the *Touhy* regulations, 28 C.F.R. Part 16.21 *et seq.*, the paralegal's letter advised Mockovak's counsel that he could submit a request for DOJ permission to depose Carver, and concluded by promising that once he submitted such a request, it would be "quickly reviewed and acted upon." CP 1241.

Upon receipt of the paralegal's letter, Mockovak's counsel contacted AUSA Kerry Keefe. CP 1243-44. On August 19th, Keefe responded in an e-mail which stated that she would call counsel to later in the day, and that "Task Force Officers are considered to be 'employees' of the Department [of Justice] as that term is defined in the *Touhy* regulations . . . ." CP 1243. Keefe cited 28 C.F.R. 16.22(b) which provides:

> [T]he term employee of the Department includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States . . . .

CP 1243. Mockovak's counsel responded,

> When you call perhaps you could tell me why you think a Seattle Police Detective is "appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States ...." I don't think he is. If you think he is, could you tell me why you think that?

CP 1243.

On August 21st Mockovak's counsel received a phone call from Greg Jennings, Chief Counsel for the Seattle Division of the FBI, and then sent Jennings a follow-up letter later that day. CP 880, 1246-1250. After explaining Mockovak's position regarding Detective Carver's status,

> Mr. Jennings responded that whether or not *Touhy* applied, and whether or not the approval of the Justice Department and the FBI was legally required, he was tentatively inclined to grant such approval if [Mockovak] would simply request it.
>
> Mr. Jennings asked [counsel] to send him a written request for such approval. [Mockovak's counsel] agreed to do so, explaining that while [he] would request such approval, [he] was not abandoning his position that such approval was not legally required. [Jennings] said he understood. Mr. Jennings said he was not promising that he would grant such a request for approval, but he indicated that he would consult with the United States Attorney's Office and that he felt it was very likely that he would ultimately agree to grant such approval.
>
> Mr. Jennings and [Mockovak's counsel] agreed that it was far more effective to see if a speedy agreement could be reached, rather than for Mockovak to immediately seek a ruling from [the Superior Court] on the question of whether the *Touhy* regulations applied to a state law enforcement officer who was assigned to work with federal law enforcement officers on a Joint Task Force.

CP 881.

As promised, Mockovak's counsel sent Jennings a written request for DOJ and FBI approval later that day. CP 1246-50. Jennings promptly responded that he had reviewed Mockovak's request and passed it on to the United States Attorney's Office ("USAO"). CP 1255. Jennings stated that he understood the time pressure that Mockovak was under and that he

would let him know as soon as there was a decision. CP 1255.

M. The Superior Court's decision to grant Mockovak's Rule 56(f) motion to continue the County's Summary Judgment Motion, so as to permit Mockovak to take Carver's deposition first.

On August 26, 2015, Mockovak made a Rule 56(f) motion to continue King County's motion for summary judgment (then scheduled for argument on September 4th) to permit Mockovak the opportunity to depose Detective Carver before the summary judgment motion was heard. CP 871-877. In that motion Mockovak explained that it appeared "very likely that the Justice Department will consent to the deposition of Detective Carver," but that even assuming such consent was granted, unless the summary judgment motion was continued it was unclear that Carver's deposition could take place before September 4th. CP 875, 882.

In response, the KCPA opposed the motion to continue the summary judgment motion, arguing that Mockovak had not shown good cause why he had not attempted to depose Detective Carver earlier. Carver's CP 978-981.[17] But on September 2nd, the Superior Court granted Mockovak's Rule 56(f) motion "in order to permit plaintiff to depose Detective Carver," and continued the County's summary judgment motion to October 30th. CP 1007. Anticipating that DOJ approval of his request

[17] Meanwhile, on August 27th Detective Carver telephoned the law office of Mockovak's counsel and informed a paralegal there that he would not be appearing for his re-noted deposition because he was waiting for the FBI to decide whether to approve Mockovak's request for FBI approval of the deposition. CP 1005.

to depose Carver would soon be granted, Mockovak then re-noted Detective Carver's deposition for September 28th. CP 1200, 1257-58.

N. **The Justice Department's refusal to "authorize" the deposition of SPD Detective Carver. The Superior Court's subsequent denial of Mockovak's motion for an order compelling Carver to submit to a deposition.**

But on September 23, 2016, slightly more than one month after FBI counsel had approved the request and forwarded it to the U.S. Attorney's Office, AUSA Peter Winn advised Mockovak by letter that the Department of Justice was *denying* Mockovak's request for approval to depose Carver. CP 1201, 1261-62. Claiming that the records that Mockovak was seeking were "currently maintained in FBI files, as opposed to any documents in the state's possession," Winn stated that "at the present time, Detective Carver is not authorized by the Department of Justice to testify." CP 1261-62.

O. **Detective Carver's phone call notifying counsel that he was "caught in the middle"; that he had "given over the papers that he had" to someone; and that he was going to wait and see what the courts and the lawyers directed him to do.**

Two days later, on September 25th, Detective Carver telephoned the law office of Mockovak's counsel and spoke to counsel. CP 1201. He courteously notified counsel that he was not going to appear for deposition on September 28th. CP 1201. He said that he was "caught in the middle," and that he was just going to wait and see what the courts and "the

lawyers" directed him to do. CP 1201. He volunteered the information that in response to the subpoena duces tecum he had "given over the papers that he had," but he did not say to whom he had given these papers, nor did he identify what these documents were (other than to say that they were responsive to deposition subpoena duces tecum). CP 1201. He said he was calling because he was not sure that counsel had received AUSA Winn's letter and he wanted to be sure that counsel knew that he would not be appearing for deposition on the scheduled date of September 28th. CP 1201. Counsel did not ask Carver any questions, but thanked him for calling to inform him that he was not going to appear; and as he indicated, Carver did not appear for his deposition on September 28th. CP 1201.

P. **Mockovak's motion for an order compelling Detective Carver to submit to a deposition.**

Pursuant to CR 37 Mockovak then moved for an order compelling Detective Carver to submit to a deposition. CP 1180-1198. At this point, the United States Attorney's Office appeared in the case and filed a memo in opposition to Mockovak's motion, arguing that the Superior Court was without legal authority to order a Seattle Police Detective to submit to a deposition, or to order him to produce records in his possession, because the Detective was assigned to an FBI joint task force. CP 1272. The FBI claimed that the records in Detective Carver's possession were *federal* records, and that therefore principles of federalism precluded the Superior

Court from ordering the production of those records. *Id.* Mockovak argued that records in the possession of Detective Carver were not public records of a state agency, that Carver and the KCPA had used those records in connection with a state court criminal prosecution, and that it would violate the Tenth Amendment to permit the federal government to prohibit the production of state records in accordance with Washington State's Public Records Act. CP 1298-1304.

Q. **The hearing on the parties' motions for summary judgment and the Superior Court's directive that the parties should file a supplemental response.**

Both Mockovak and the KCPA made motions for summary judgment. CP 18-37, 355-407. Mockovak's motion to compel was noted for October 30th, the same day as the parties' motions for summary judgment. At the hearing held on the morning of October 30th the Superior Court informed the parties that she would not hear any oral argument on the motion to compel, but she proceeded to hear oral argument on the parties' summary judgment motions. RP 10/30/15 at 4, 59. Later that afternoon, the Court sent the parties this e-mail:

> Dear Counsel: Please provide this court with material that would assist in evaluating the importance of the withheld documents. In reviewing the withheld documents, this court must weigh the public interests at stake, if any, in disclosures that might show *Brady* violations, against the interests underlying the asserted work product exemption. *See Roth v. United States Department of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). Such material might include briefs submitted in the pending habeas proceeding,

> and/or trial briefs filed in the underlying prosecution, a transcript of closing argument from the same. *Roth*, 642 F.3d at 1178.

CP 1393.

On November 6th Mockovak responded to the Court's instruction by filing additional documents as the Superior Court had requested. CP 1394-1685. But Mockovak did *not* file any supplemental brief. Instead, Mockovak noted that Court had not asked for supplemental briefing:

> Plaintiff has not prepared any additional briefing or argument to submit to the Court at this time. Plaintiff read the Court's request for "material that would assist in evaluating the importance of the withheld documents" as a request for existing documents, similar to the type of transcripts and *previously* authored briefs that the federal court reviewed in the *Roth* case when it evaluated the documents withheld in that case. In the event that the County submits new briefing on the subject of what the Court should or should not order released to Mockovak, Mockovak objects to the submission of such a brief. In the alternative, if the County submits such additional briefing and the court accepts it, then Mockovak seeks leave of the Court to file a supplemental brief which responds to the County's brief.

CP 1395.

On November 9th the County also responded by filing additional documentary materials. CP 1700-1912. But in addition, on November 9th the County also filed a supplemental brief which made additional legal arguments. CP 1686-1699.

R. The Superior Court's decisions to grant the County's summary judgment motion and to deny Mockovak's motion to compel.

On November 23, 2015, the Superior Court granted the County's

motion for summary judgment, denied Mockovak's cross-motion for summary judgment, and dismissed Mockovak's remaining PRA claims. CP 1915-1917.[18] Two days later, the Superior Court entered an order denying Mockovak's motion to compel Detective Carver to submit to a deposition. CP 1913-14.

S. **Entry of Judgment**

The Superior court entered a final judgment on February 1, 2016. CP 1956-57. Pursuant to the Offer of Judgment which Mockovak had accepted in December of 2014, the Superior Court awarded Mockovak a total of $44,780.89 for attorneys' fees and costs in connection with the PRA claim that the County failed to respond promptly to his PRA request by failing to produce any documents for a ten month period. CP 1957. Mockovak filed timely notice of appeal. CP 1918-1927.

T. **Additional Facts Pertinent to Specific Classes of Documents**

In addition to the facts set forth above, some additional facts are set forth in the argument sections of this brief which pertain to the following specific categories of documents: (1) documents *prepared* by federal prosecutors after it was decided that the case would be prosecuted in state court; (2) documents *disclosed* by state prosecutors *to federal*

[18] The Superior Court never gave Mockovak the opportunity to file a response to the County supplemental brief, but its September 23rd order stated that the Court had considered the County's brief. CP 1916.

prosecutors, thereby waiving any work-product protection they might have had; (3) documents *disclosed to witness Daniel Kultin*; and (4) facts pertaining to the disclosure of criminal history information contained in the NCIC document.

V. APPELLATE REVIEW STANDARDS

The meaning of a statute is reviewed de novo. *Dover v. Clover Park Sch. Dist.,* 172 Wn.2d 471, 482, 258 P.3d 676 (2011). (Issue Nos. 1 & 3). Constitutional questions are questions of law and, accordingly, are subject to de novo review. *State v. McQuistion,* 174 Wn.2d 369, 275 P.3d 1092 (2012). (Issue Nos. 2 & 4).

The standard of appellate review in PRA cases is de novo. *Nissen v. Pierce County*, 183 Wn.2d 863, 872, 357 P.3d 45 (2015). Grants of summary judgment are also reviewed de novo. *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). When, as in the present case, a trial court's order is based solely on documentary evidence, appellate review is de novo. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 475, 947 P.2d 1169 (1997). (Issue Nos. 1-9).

The agency denying disclosure has the burden of proving that the records withheld, or the portions of the records which are redacted, are covered by one of the exemptions to the Public Records Act. *Limstrom*,

136 Wn.2d at 618; *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997); RCW 42.56.550(1).

VI. ARGUMENT

A. 5 U.S.C. §301 does not authorize the Department of Justice to issue a regulation governing the conduct of a detective employed by the Seattle Police Department simply because the detective worked with an FBI Agent on a joint task force.

1. Statutes and Regulations

Congress has provided that department heads may issue regulations for the control of "the conduct of its employees" and the custody of "its records [and] papers":

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct ***of its employees***, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. . . .

5 U.S.C. §301 (emphasis added). Such regulations are generally referred to as *Touhy* regulations.[19] The Department of Justice [DOJ] has adopted its own *Touhy* regulations. *See* 28 C.F.R. Part 16, Subpart B.

28 C.F.R. §16.21 (see Appendix A) gives the procedure to be followed when, in a proceeding to which the United States is not a party, one of the parties seeks "any information acquired by any person ***while*** such person was ***an employee of the Department*** as a part of the

[19] In *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951) The Supreme Court considered DOJ regulations adopted pursuant to 5 U.S.C. §22, the predecessor statute to 5 U.S.C. §301.

performance of that person's official duties or because of that person's official status." (Emphasis added). §16.22(b) (see Appendix B) provides that whenever such a demand is made, the "***employee*** shall immediately notify the U.S. Attorney ...." (Emphasis added). 28 C.F.R. §16.22(a) provides that "in response to a demand" for such information, the "***employee or former employee*** of the Department of Justice" is directed not to disclose any such information "without prior approval of the proper Department official ...." (Emphasis added). Finally, 28 C.F.R. §16.21(b) defines the term "employee" as follows:

> (b) For purposes of this subpart, ***the term employee*** of the Department ***includes*** all officers and employees of the United States ***appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States,*** including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(Emphasis added).

Mockovak submits that these regulations do not apply to Detective Carver because he is an employee of the City of Seattle, and he is not subject to the supervision, jurisdiction, or control of the U.S. Attorney General. Alternatively, if these regulations do apply to him, Mockovak submits that as applied they violate the Tenth Amendment.

2. The cases that the DOJ relies upon are obviously distinguishable since they do not involve state officers.

In its August 17th letter the DOJ purported to rely on *Elko County*

Grand Jury v. Siminoe, 109 F.3d 554 (9th Cir. 1997). But *Elko* involved a state grand jury subpoena issued to a Forest Service employee named Siminoe. Siminoe was a federal employee and nothing more. He was not also an employee of some State agency, nor was he a member of any joint task force where federal and state employees worked together. Thus *Elko* sheds no light on whether a state law enforcement officer can be "considered to be" a DOJ "employee."

The same is true of the *Touhy* case. In *Touhy* a prisoner brought a habeas corpus proceeding in a federal district court and during the proceeding a subpoena was issued and served upon George McSwain, the FBI agent in charge of the FBI's Chicago office. Agent McSwain appeared in court and citing the DOJ regulations, politely refused to produce the documents stating that without the permission of the Attorney General he could not do that. The district court held McSwain in contempt of court, but the Supreme Court reversed the contempt finding, holding that it was permissible for DOJ to centralize the decision as to whether to produce agency records by prohibiting any employee except the agency head from making that decision.[20] McSwain was not a state or

[20] The Supreme Court explicitly held that it was *not* deciding whether the U.S. Attorney General could withhold the subpoenaed documents because the case did not raise that issue and the Attorney General was not before the trial court. *Touhy*, 340 U.S. at 467. "We find it unnecessary . . . to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his

(Footnote continued next page)

local police officer, and he was not working with any state or local police officer on any "joint task force."

3. Congress limited the authority of Department heads to regulating "the conduct of its employees." The DOJ exceeded that authority when it purported to regulate the conduct of a state officer. A Seattle police detective is not a DOJ employee, even if he is assigned to a joint task force.

Under 5 U.S.C. § 301, Congress authorized federal agencies to adopt regulations for the conduct of "its employees," but it did not define the term "employees." DOJ then purported to define an employee as a person "appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States." But Detective Carver is a Seattle police officer so he is not covered by that definition.

"The ordinary dictionary definition of "employee" includes any "person who works for another in return for financial or other compensation." *NLRB v. Town & Country Electric*, 516 U.S. 85, 90 (1995), quoting *American Heritage Dictionary* 604 (3d ed.1992). As Detective Carver repeatedly stated, he is an employee of the City of Seattle. His work assignment, to work together with an FBI agent, in no way converts him into a federal employee.

In the Certificate of Probable Cause that he submitted to the King

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possession . . ." *Id.* And in a concurring opinion Justice Frankfurter said that he assumed that a court *could* hold the Attorney General in contempt if he refused to produce unprivileged material. "I assume the contrary – that the Attorney General can be reached by legal process." *Id.* at 472 (Frankfurter, J., concurring

County Superior Court, Detective Carver said that he was "a detective with the Seattle Police Department assigned to the FBI – Safe Streets, Violent Crimes Task Force and [that he had] reviewed the investigations conducted in Federal Bureau of Investigation File No. 166C-SE-95743." CP 1204. Similarly, in his sworn *Application for Authority to Intercept and Record* that he signed and filed in Superior Court when he sought judicial permission to record Mockovak's private conversation, Carver told the Court that he was "a commissioned and sworn law enforcement officer of the Seattle Police Department assigned as a detective with FBI – Safe Streets Task Force . . ." and that his "partner in this investigation is FBI Agent Carr; [and] we have worked closely on this investigation . . . ." CP 1206-07. Carver told the Court that initially he and Agent Carr thought that any criminal case against Mockovak would be charged and tried in federal court, but in October of 2009 they changed their minds and decided to focus their investigation on state law crimes. CP 1216.[21] At that point in time "the possibility of a state prosecution came to the

[21] "Investigators did not initially consider any prosecution of crimes in state court. It was not until October 29, 2009, that investigators identified state crimes as additional possible crimes being committed in this investigation. At that time investigators determined to focus their investigation on the above-listed state crimes in addition to the above-listed federal crimes."

Carver identified the "above-listed state crimes" as Solicitation of Murder and Conspiracy to Commit Murder. *Id.* at 2-3. He identified the "above-listed federal crimes" as Conspiracy to Commit Murder under 18 U.S.C. §§ 1111 & 1117. Carver said it was not until October 29, 2009 that he realized that the federal crime of conspiracy to commit murder also constituted conspiracy to commit murder under state law.

investigators[’] attention," so in an "abundance of caution" they decided to start complying with the Washington State's Privacy Act by seeking State court judicial authority to record Mockovak's private conversation. *Id.*

Thereafter the criminal charges *were* filed in State court. Detective Carver testified at the state court trial. When asked "How are you employed?" he responded, "I'm a Seattle police detective." CP 1226. When asked what his current assignment was he replied, "I'm presently assigned to the FBI's violent crime squad." *Id.*

Mr. Jennings, counsel for the FBI asserted that under the DOJ regulation, the DOJ itself considers state law enforcement officers who join federal task forces to be federal employees. But that dodges the issue of whether a federal agency can simply redefine state officers so that they are "deemed" federal employees. They cannot. Congress said that regulations could be adopted to govern the record keeping response of federal employees. But Congress did *not* say that agencies like DOJ could define employees to include anyone the agency sought to include. Congress did not give federal agencies the power to wave a magic wand and thereby declare municipal government employees to be federal employees simply because the agency "considers" them to be federal employees. As noted below, any such unlimited delegation of power would render the Tenth Amendment meaningless because it would

empower the federal government to usurp state sovereignty and to control the conduct of state officials.

B. A regulation that prohibits a city police officer from being deposed in a state court proceeding without first obtaining federal approval would violate the Tenth Amendment.

1. The Tenth Amendment prohibits the conversion of state employees into servants of the federal government.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Given this clear constitutional command, "It is incontestable that the Constitution established a system of 'dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997). Under this system there are two sovereigns, "one state and one federal, each protected from incursion by the other." *Id.* at 920. In *New York v. United States*, 505 U.S. 144 (1992), the Court struck down a law that compelled the States to adopt programs for the regulation of radioactive nuclear wastes. The Court held that the federal law violated the Tenth Amendment because "the federal government may not compel the States to enact or administer a federal regulatory program." *Id.* at 188.

2. The federal government cannot tell state law enforcement officers what they can and cannot do.

In *Printz* the Court dealt with a federal gun control law that "purport[ed] to direct state law enforcement officers to participate, albeit

only temporarily, in the administration of a federally enacted regulatory scheme." 521 U.S. at 904. Jay Printz, a Montana County Sheriff, challenged the provisions of the law that required him to conduct background checks on individuals who wanted to buy guns. These checks required state law enforcement officers to examine State, local, and national databases, to see if the would-be gun purchaser was ineligible to possess a gun. *Id.* at 903. Printz "object[ed] to being pressed into federal service" and argued that "compelling state officers to execute federal laws is unconstitutional." *Id.* at 905. The Supreme Court agreed. *Id.* at 933.

Recognizing that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service . . . the police officers of the fifty States," the Court held it was incompatible with state sovereignty to allow the federal government to "dragoon" state officers into administering federal law. *Id.* at 922, 928. The federal government sought to distinguish *New York v. United States* by arguing that the federal law in that case was aimed "at the State itself," but the law in *Printz* was aimed at individuals who were state officers. The Court rejected this argument, noting that although the law in *Printz* was directed to individuals, it was "directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as agents of the State." *Id.* at 930. Thus the Court rejected as "empty formalistic

reasoning" the argument that the federal government can control the conduct of state officers because they are merely individuals. *Id.* at 931. Adhering to its holding in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program, the Court struck down the commandeering portion of the federal gun control law:

> Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz, at 935. In the present case the U.S. Attorney advances equally "empty formalistic reasoning" when it argues that the rule of *Printz* does not apply because a Seattle police officer ceases to be a state officer, and becomes a federal officer, whenever he is assigned to a joint task force and works cooperatively with a federal officer.

3. Application of the DOJ regulations to Carver would violate the 10th Amendment. The Constitution leaves the realm of criminal law primarily to the States.

If this Court is not inclined to dispose of the federal government's objection to the deposition on the ground that the DOJ regulations do not apply to Carver, then it must address the Tenth Amendment issues. Mockovak submits that requiring DOJ approval before Carver can be deposed would violate the Tenth Amendment for several reasons.

First, under *Printz* just as Congress cannot force local police

officers to carry out its programs, neither can the DOJ force Seattle police officers to obey its rules or carry out its internal policies. If Seattle had a statute or rule that said that the decision whether to allow deposition of a police officer in a civil case could only be made by the Mayor, that would not violate the Tenth Amendment. But requiring a city police officer to get the permission of a federal official – the local U.S. Attorney – does violate the Tenth Amendment.

Second, the DOJ's position is even weaker than the position taken by the federal government in *Printz* because there it was recognized that Congress *did* have the power, under the Commerce Clause, to regulate the sale of guns. But it is universally acknowledged that the federal government does *not* have a general police power to make criminal laws. *Bond v. United States*, 134 S.Ct. 2077, 2086 (2014).[22] The Supreme Court has been very reluctant to permit the application of federal criminal law to purely local intra-state activity that has no connection to interstate commerce.[23] Thus, the attempt to regulate what a Seattle police officer does with his records of a criminal investigation into a state law crime is

[22] "A criminal act committed wholly within a State cannot be made an offence against the United States unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *Id. See also Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993).

[23] *See, e.g., Jones v. United States,* 529 U.S. 848, 859 (2000) (refusing to make virtually every arson in the country a federal offense); *United States v. Bass,* 404 U.S. 336 (1971) (avoiding interpretation of federal statute because it would "dramatically intrude upon traditional state criminal jurisdiction").

on even shakier constitutional ground that the law struck down in *Printz.*

Third, by purporting to overrule the Superior Court's determination that the deponent may have relevant testimony to give, and may be in possession of relevant documents, the local U.S. Attorney, as the DOJ decision maker, directly interfered with the operation of the judicial branch of state government. No federal official has the power to usurp the judicial power of the state courts by making evidentiary rulings that are binding on state court judges. In sum, by prohibiting the deposition of a city police officer who has been subpoenaed to testify and to produce evidence in a state case, the local U.S. Attorney's office violated the Tenth Amendment.

4. Regardless of whether records are currently in the possession of the FBI, and regardless of what agency "own" these records, all records that were *used* by Detective Carver are public records subject to the Public Records Act. As in *Concerned Ratepayers,* any document that was used by a municipal employee is a public record.

In the court below the U.S. Attorney argued that because the records Mockovak sought were in the possession of the FBI they were not subject to the Washington Public Records Act. CP 1269. Putting aside for the moment that clearly some of the records were in Detective Carver's own personal possession, it is well established that *neither* possession *nor* ownership is necessary in order for a document to be a public record under Washington State law. Although Mockovak cited *Concerned Ratepayers*

v. Clark County PUD, 138 Wn.2d 950, 983 P.2d 635 (1999) in the court below, the U.S. Attorney's Office ignored both the case and the Washington statute which defines a "public record."

> RCW 42.56.010(3) provides that the term "public record"
>
> > includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function, prepared, owned, ***used***, or retained by any state or local agency regardless of physical form or characteristics.

(Emphasis added).

In *Ratepayers*, the Court held that the absence of *possession* of a record "is not determinative of the issue" of whether it is a public record. *Id.* at 959. The Court held that since documents were seen and considered by Washington governmental employees, they were public records because they were "used" by a state governmental agency. In *Ratepayers* the Court acknowledged that the public utility district *never* possessed the document in question. Nor did it own the document. The document consisted of the design specifications of a turbine generator manufactured by a private company (General Electric). Nevertheless, the Court concluded that the PUD had "used" the document because its employees had attended a meeting in North Carolina and had examined the document at that meeting. *Id.* at 955.[24] The Court held that "regardless of whether

[24] The Court cited to the "Affidavit and deposition of James Sanders, PUD Director of Technical Services, indicating PUD officials' attendance at a meeting . . . at which time
(Footnote continued next page)

an agency ever possessed the requested information, an agency may have 'used' the information within the meaning of the Act if the information was either: (1) employed for; (2) applied to; *or* (3) made instrumental to a governmental end or purpose." *Id.* at 960. "[I]nformation that is reviewed, evaluated or referred to and has an impact on an agency's decision-making process" is a public record. *Id.* at 961. "Since the turbine design document was reviewed by utility employees, it was "used" by the PUD, and therefore it was held to be a public record. *Id.*

In the present case, despite the fact that most of the FBI's joint task force documents about Mockovak and about informant Daniel Kultin appear never to have left the FBI's possession, so long as Detective Carver read them (or possibly wrote them), he "used" them for a governmental purpose (conducting a criminal investigation and eventually arresting Mockovak and testifying against him). Just as the PUD in *Ratepayers* considered information about GE's turbine before they decided to buy the turbine for its power plant, Detective Carver considered information about Daniel Kultin before he decided to file a case against Mockovak in which Kultin served as the key prosecution witness. The GE turbine was used

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portions of the IPS 10380 "and every page that had anything to do with the combustion turbine" were viewed by the PUD's representative and consulting engineers . . ." The Court also relied upon a letter from the PUD's General Counsel which stated that the utility's engineering department and its consulting "engineers have seen and carefully evaluated most if not all of the technical data in the possession of GE regarding the turbine . . . ." *Id.*

for a governmental purpose (generating electricity). Daniel Kultin was used for a state governmental purpose (prosecuting Mockovak). In both cases, any record containing information about the thing or purpose that was evaluated and then used for a governmental purpose, is a public record subject to the Act.

The attempt by the United States Attorney's Office to dodge the definition of public record should be rejected. Indeed, if it is not rejected, then any state agency can evade the requirements of the PRA by simply working jointly with a federal agency and allowing the federal agency to store or warehouse the records that are used. In *Ratepayers* the Court did not permit records to be kept from public record requesters simply because General Electric kept them. Neither can this Court permit records to be kept from a records requester simply because the FBI has kept them in some joint task force office.

5. At the very outset of the state criminal prosecution Detective Carver freely admitted that he used the records of the FBI's Joint Task Force.

In its September 23rd letter refusing to approve the request to depose Carver, AUSA Peter Winn asserted that there was no reason to allow the deposition because plaintiff Mockovak has "fail[ed] to meet the required threshold showing of relevancy." CP 1262. But this contention must be rejected because the United States' assessment of relevancy is

based on its erroneous understanding of what is a public record.

The United States thinks that the only "relevant" documents are ones that the county possesses or owns. But once it is realized that records that county agents used are also public records, it becomes clear that records that Detective Carver used are public records as well, and therefore are quite relevant.

The KCPA used Detective Carver as its complaining witness. Its prosecution of all the criminal charges rested on Carver's certificate of probable cause and in that certificate Carver said:

> That Len Carver III is a detective with the Seattle Police Department assigned to the FBI – Safe Streets, Violent Crimes Task Force and ***has reviewed the investigation conducted in Federal Bureau of Investigation File No. 166C-SE-95743.***

CP 1204 (emphasis added). Similarly, when Carver sought judicial authority to intercept and record Mockovak's conversations he swore under oath, that he "worked closely" with his FBI partner on the case and said, "***I am familiar with all the files and records pertaining to this investigation.***" CP 1206-07 (emphasis added). Thus Carver twice swore under oath that he read and knew what was in the FBI's Task Force files, and he twice admitted to using these records to secure state court judicial orders (finding probable cause to support the criminal charges and finding good cause to issue an order authorizing Carver to record Mockovak's

private conversations without his knowledge or consent). Thus it is undisputed that a Seattle Police Officer ***used*** the documents in question. Therefore they are public records and Detective Carver's knowledge of what is in them is relevant, and the documents themselves are relevant.

6. At least some records were in the personal possession of Detective Carver, but rather than produce them he gave them to some unidentified lawyer. Handing off records to an unidentified lawyer, even if that lawyer is a lawyer for a federal agency, is not a permissible way of hiding documents from PRA requests.

Moreover, in addition to the records which the U.S. Attorney asserted (without any evidence to support the assertion) was in storage in in FBI file drawers, there clearly were some records that were in Detective Carver's own possession, because Carver *said* he had "given over the papers that he had" to some unidentified lawyer. CP 1201. These records, as well, are also public records subject to the PRA. A PRA request cannot be circumvented by divesting oneself of possession of responsive documents. Even in a criminal case a physical piece of evidence cannot be hidden by giving it to a lawyer. *See State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 833, 394 P.2d 681 (1964).[25] Similarly, the records that Carver gave to an unidentified lawyer should have been produced, and Carver should have been directed to testify to what those records are, and

[25] "The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.) . . . ."

to whom he gave them.

7. Here, as in *Neighborhood Alliance*, the case should be remanded so that the deposition can be conducted, and then the Superior Court can decide anew whether the County has carried its burden of proof.

Relying upon inapposite FOIA cases, in the Court below the United States argued that discovery in PRA cases should rarely be permitted. CP 1269-70. But the Washington Supreme Court explicitly *rejected* that contention in *Neighborhood Alliance, supra.* There the Court held the trial judge had erred by limiting the scope of discovery in a PRA case and held that limiting discovery in PRA cases was inconsistent with Washington's civil rules. 172 Wn.2d at 715. The Supreme Court held that there was no reason to treat discovery in a PRA case any differently than in any other civil case. *Id.* at 716.

Just as Mockovak did in this case, in *Neighborhood Alliance* the records requester sought to depose a municipal employee. After some negotiation, the County eventually agreed that the employee, Ms. Pam Knutsen, could be deposed, but before the deposition could occur the County moved for summary judgment. *Id.* at 712. Like Mockovak, Neighborhood Alliance moved for a continuance of the County's summary judgment motion so that it could first depose Knutsen. *Id.* And like Mockovak, the Alliance also moved to compel discovery, but a hearing on that motion was deferred. *Id.* at 713. The hearing on the

summary judgment motions and on the motion to compel was continued and the deposition of Knutsen occurred. *Id.* at 712. But at the deposition "the County still refused to allow Knutsen to answer most questions[,]" claiming that "many of the questions were outside the scope of discovery in a PRA case." *Id.* Moreover, the County "did not seek a protective order from the trial court to support its refusal to answer." *Id.*

The parties then argued their respective summary judgment motions and the Alliance argued its motion to compel the County to permit Knutsen to answer the deposition questions that the County asserted were beyond the scope of discovery in a PRA case. *Id.* at 713. As in the present case, the Superior Court then granted summary judgment to the County, and denied the motion to compel discovery. *Id.* Like Mockovak, the Alliance then appealed both the summary judgment and the denial of its motion to compel. *Id.*

The Supreme Court reversed holding that the trial court erred in refusing to grant the motion to compel, and in placing impermissible limitations on the scope of the deposition. One of the key issues in the case was why the County had allowed the employee's computer to be replaced. Because Knutsen's old computer was replaced, the record that the Alliance was seeking was destroyed and could not be produced in response to the PRA request. The Court held that the attempt to depose

Knutsen about the replacement of her computer was relevant to the PRA action because there was a contention that this action was taken in order to prevent disclosure of the document that the Alliance sought. *Id.* at 718. "Relevancy in a PRA action, then, includes, *why* documents were withheld, destroyed, or even lost." *Id.* Rejecting the County's contention that the deposition questions exceeded the scope of "relevancy," the Court held that "the agency's motivation for failing to disclose or for withholding documents is relevant in a PRA action." *Id.* at 717. The Court also held that the County acted improperly when it failed to seek a protective order allowing it to refuse to answer deposition questions:

> The County additionally objected to and refused to answer deposition questions as being outside the scope of a PRA action, relying on its own interpretations of the PRA statutes and case law. A party must answer deposition questions unless instructed not to because of privilege or discovery abuse. CR 30(d), (h). As in any other civil suit, ***the County should have . . . . allowed Knutsen to answer the deposition questions or else sought a protective order.***

Neighborhood Alliance, 172 Wn.2d at 718 (emphasis added).

The governmental conduct in the present case was considerably *worse* than the conduct of Spokane County in the *Neighborhood Alliance* case. In the Spokane case, the deposition took place, the deponent appeared and the deponent answered some questions. But in the present case, the deposition never took place at all, and Detective Carver never answered any questions. Moreover, neither King County nor the United

States made any effort to seek a protective order. Instead, as in the *Alliance* case, the government agencies simply relied on their own assessments of what was "relevant" and concluded that *nothing* that Mockovak might ask Detective Carver could possibly be relevant. Here, as in *Neighborhood Alliance,* the Superior Court erred in declining to grant the motion to compel.

The remedy for this error is also dictated by the decision in *Neighborhood Alliance.* There the Court remanded the case so that the records requester could conduct the deposition unhindered by the County's specious objections:

> Since discovery was not allowed to proceed, the record is incomplete, and we remand to the trial court for appropriate discovery. More expansive discovery will likely lead to information or records relevant to the PRA requests made in this case.

Neighborhood Alliance, 172 Wn.2d at 719. Since the same error was committed in this case, the same remedy must be granted.

C. **This Court should apply the rule of constitutional avoidance.**

Instead of deciding issues of constitutional law, courts routinely follow the prudent rule of constitutional avoidance and dispose of cases on non-constitutional grounds. *Utter v. Building Industry Association*, 182 Wn.2d 398, 434-35, 341 P.3d 953 (2015) (the "interpretative principle of constitutional avoidance mandates that [courts] choose the interpretation

of the arbitration rule that . . . avoids any constitutional problem").[26] In the present case, this Court can easily avoid deciding the Tenth Amendment issue regarding the scope of state court authority over records created and used jointly by federal and state officers working together on state court criminal case.

As noted above, Mockovak submits that the United States has no *statutory* authority to resist production of the sought after public records because the federal government's "housekeeping authority" over records only extends to records created by its own "employees," and Carver was never a federal employee. Mockovak submits that his construction of the word "employees" is correct and that the DOJ's interpretation of that word is incorrect. But even if the DOJ's construction of the word was equally plausible, it would raise serious constitutional problems with 28 C.F.R. 16.21 to construe the statutory words "its employees" to include a Seattle police detective who is assigned to a joint task force where he works with a DOJ employee.[27] Applying the rule of constitutional avoidance this Court should rule that Carver is not a DOJ employee. Consequently, the

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[26] *Accord Clark v. Martinez,* 543 U.S. 371, 380-81 (2005) ("when deciding which of two plausible statutory constructions to adopt . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail . . .").

[27] In *Bond, supra,* at 2091, the Court rejected the Government's construction of a criminal statute because such a construction "would alter sensitive federal-state relationships" and would "convert an astonishing amount of 'traditionally local criminal conduct' into 'a matter for federal enforcement.'"

DOJ regulations requiring U.S. Attorney approval before Carver can be deposed are not applicable, and Carver is legally required to produce the documents that he used in connection with the criminal investigation and state court prosecution of Mockovak.

D. The Superior Court erred when it "weighed" the "interests underlying the asserted work-product exemption" against *Brady's* due process disclosure requirement because *Brady* always trumps the work-product privilege.

1. Procedurally Mockovak was not prohibited from litigating the issue of whether *Brady* trumped the work-product privilege in a Public Records Act case.

The KCPA claimed that all of its redactions were justified by the work-product privilege. Mockovak challenged many of the redactions on the ground that the prosecutor's due process disclosure obligations under *Brady* and *Giglio* necessarily overrode any work-product privilege that might otherwise apply. Mockovak referred to all of the redacted documents that he believed probably contained *Brady* information as Category A documents. CP 752-53.[28] The KCPA made two arguments in response to Mockovak's reliance on *Brady*.

First, the KCPA argued that procedurally Mockovak could not make these arguments in the context of a PRA case, because they could only be made in a collateral attack proceeding such as a personal restraint

[28] These Category A documents can be found in the record as CP 756-808.

petition case. Second, as to the *merits*, the KCPA argued that even if Mockovak could raise the issue in a PRA case, the work-product privilege applied and was not outweighed or trumped by *Brady* and *Giglio.*

In support of its initial procedural objection, the KCPA argued that "[t]he Public Records Act is not an appropriate vehicle to resurrect the previously resolved criminal discovery disputes," and claimed that federal FOIA cases uniformly held that the federal FOIA could not be used as a procedural means of seeking *Brady* information in order to use it in a subsequent collateral attack proceeding. CP 30. In support of this procedural argument the KCPA cited *Roth v. United States Department of Justice*, 642 F.3d 1161 (D.C. Cir. 2011). CP 31.

In reply, Mockovak pointed out that *Roth* actually contradicted the KCPA's position because (1) the *Roth* Court *allowed* the records requester to use a FOIA lawsuit as a procedural mechanism for seeking *Brady* information that he could then use in a separate federal habeas corpus case,[29] and because (2) the Court *granted* the records requester judicial

[29] As Mockovak pointed out in the Superior Court (*see* CP 1312-1315), while *Roth* involved a different statute (the FOIA, not the PRA) and a different type of claimed exemption (a privacy exemption, not a work-product exemption), both *Roth* and subsequent D.C. Circuit cases have explicitly held that a convicted defendant ***can*** sometimes use the FOIA to obtain *Brady* information. Indeed, *Roth* itself explicitly states: "[W]e have never held that the public's interest in revealing *Brady* violations is categorically insufficient to warrant disclosure . . ." 642 F.2d at 1182. Similarly, the KCPA's ignores *Boyd v. Criminal Division*, 475 F.3d 381, 388 (D.C. Cir. 2007), where the appellate court said that ***because*** there had been "no showing that would suggest an actual *Brady* . . . violation," there was no basis to reject the Government's claim that the

(Footnote continued next page)

relief on the merits and issued an order compelling the FBI to disclose to Roth whether *Brady* material existed. *Id.* at 1181. The Superior Court eventually[30] decided to conduct an *in camera* review of the KCPA's redactions and ordered the parties to submit additional materials to assist the Court in deciding whether those redactions were proper. CP 1393. Thus, the Superior Court ultimately *rejected* the KCPA's procedural argument that Mockovak was legally precluded from raising his *Brady/Giglio* argument in the PRA case.

The Superior Court then turned to the substance of Mockovak's argument that the KCPA's obligations under *Brady* always trumped any redaction based upon the work-product privilege.

2. State prosecutors must disclose all favorable impeachment evidence to the accused, even if he does not request it, and even if the evidence is in the hands of federal officers who are working jointly with state officers.

The suppression of evidence that is favorable to a criminal defendant and material to either guilt or punishment is a violation of due

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withheld material was exempt from FOIA disclosure under the privacy exemption. Finally, the KCPA's contention that a FOIA suit can never be used to seek *Brady* information conflicts with *Blackwell v. FBI,* 646 F.3d 37, 43 (D.C. Cir. 2011) (Rogers, J. concurring), which states: "***the court rejects the government's broadly stated position*** that . . . a FOIA requester's desire to obtain *Brady* material is not a public interest for purposes of Exemption 7(C)." (Emphasis added).

[30] At oral argument, the Superior Court asked Mockovak's counsel a number of questions about the status of the Personal Restraint Petition which Mockovak had already filed, and counsel explained that this Court had granted a stay of that case – over the objection of the KCPA – to await the Superior Court's decision in the Public Records Act case. RP 10/30/15, at 34-38. That case is *In re Restraint of Mockovak*, COA No. 74576-0-I and it was stayed by order of Judge Verellen on November 23, 2015.

process, regardless of the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government must provide such evidence even if the defense fails to request it. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995). This includes evidence that may be used to impeach a witness's credibility. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The suppression of evidence which significantly undermines the testimony of a key prosecution witness meets the requirements of a *Brady* violation.[31] "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *United States v. Kohring*, 637 F.3d 895, 905-06, (9th Cir. 2010). *See, e.g.*, *Banks v. Dretke,* 540 U.S. 668, 678 (2004) (failure to disclose fact that the informant was paid $200). This includes evidence regarding a government informant's immigration status where it provides a motive for the informant to testify in favor of the prosecution. *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004).

Neither lack of possession of the documents containing exculpatory information, nor lack of knowledge that some other investigating agency possesses them, suffices to relieve state prosecutors

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[31] A *Brady* violation has three components: (1) the evidence at issue must be favorable to accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently and; (3) prejudice must have ensued. *Strickler v. Green*, 527 U.S. 263, 281-82 (1999).

of their *Brady* obligation to find and disclose such documents. *Kyles*, 514 U.S. at 437;[32] *United States v. Zuno-Arce,* 44 F.3d 1420, 1427 (9th Cir. 1995).[33] Knowledge of federal agents that they have *Brady* information is imputed to state officials prosecuting the defendant, whether or not the state officials are aware of the existence of such information.[34]

The duty to disclose evidence is not limited to cases where a government official has explicitly promised to confer a benefit upon a witness in exchange for his testimony. *Hovey v. Ayers*, 488 F.3d 892, 897 (9th Cir. 2006). The *Brady* disclosure obligation extends to situations where there is an implied understanding or a tacit agreement that a benefit will be forthcoming after the witness testifies. *See, e.g., Wisehart v. Davis,* 408 F.3d 321, 323-24 (7th Cir. 2005);[35] *Hovey* at 914-15, 919;[36]

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[32] "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."

[33] "[E]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does."

[34] *See Hays v. Alabama*, 85 F.3d 1492, 1497 n.2 (11th Cir. 1996) (knowledge of exculpatory evidence in the possession of federal agents was imputed to the State because of the level of cooperation between state and federal law enforcement agents); *cf. United States v. Antone*, 603 F.3d 566, 570 (5th Cir. 1979) (state officers' knowledge of existence of *Brady* evidence was properly imputed to the federal government which was prosecuting the defendant).

[35] "[T]here might have been a tacit understanding that if [the witness's] testimony was helpful to the prosecution, the state would give him a break on some pending charge . . . Express or tacit, either way there would be an agreement, it would be usable for impeachment, and it would have to be disclosed to the defense."

Douglas v. Workman, 560 F.3d 1156, 1186 (10th Cir. 2009);[37] *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989).

Reutter demonstrates that even when there is no express or implied agreement, a pending application can itself require disclosure. In *Reutter* the State's key witness was scheduled to have a sentence commutation hearing before the state parole board. His hearing was postponed so that it did not occur until after the witness had testified at Reutter's trial. When the hearing was held one of Reutter's trial prosecutors spoke in support of commutation of the witness' sentence. Although Reutter's trial judge had ordered the State to disclose all *Brady* information, the State did not inform Reutter that the witness "had applied for a commutation of his sentence, or that his hearing was scheduled to take place" on the day that Reutter's trial ended. *Id.* at 581. Although there was no agreement between the witness and the prosecution, the Eighth Circuit found a *Brady* violation:

> [T]here is a reasonable probability that the outcome of [Reutter's] trial would have been different if the jury had known that [the witness] was a candidate for commutation of sentence and that his commutation hearing was scheduled to take place soon after [the

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[36] Although the prosecutor told witness Hughes that he was *not* making him any promise, he also told Hughes, "Don't worry, we'll take care of it" and "insinuated something would be done for him"; prosecutor admitted that he "may have" spoken with someone in another prosecutor's office on behalf of Hughes; held this tacit understanding should have been disclosed.

[37] "Like the majority of our sister circuits, we conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness."

> witness'] appearance as state's witness at [Reutter's] trial.
>
> Our conclusion does not depend on a finding of either an express or an implied agreement between [the witness] and the prosecution regarding the prosecution's favorable recommendation to the parole board. The District Court found there was no agreement and this finding is not clearly erroneous. The fact that there was no agreement, however, is not determinative of whether the prosecution's actions constituted a *Brady* violation requiring a reversal under the *Bagley* standard. We hold that, viewed in the context of [Reutter's] trial, the fact of [the witness'] impending commutation hearing was material in the *Bagley* sense and that petitioner therefore is entitled to relief.

Reutter, 888 F.2d at 581-82. Similarly, in this case, a pending citizenship application, like a pending application for commutation of sentence, is a fact that falls within the scope of the *Brady* duty of disclosure.

3. Mockovak's PRA Act request has revealed that Kultin had a citizenship application pending when he testified at Mockovak's trial, and that he was granted citizenship sometime after the trial ended.

The documents that were produced in response to Mockovak's PRA request show that Kultin, the State's main witness in the criminal case, had been arrested by the INS in the past; that a "case" had once been filed against him and was later dismissed; that Kultin had applied for citizenship; and that his citizenship application was pending on April 9, 2009. CP 553. At his deposition in this case held on July 24, 2015, Kultin *denied* that he had a citizenship application pending in 2009. CP 510-11. In his deposition he testified that he did not apply for citizenship until after Mockovak's criminal trial concluded. CP 491-92, 501-02. But the April 9, 2009 report of FBI Agent Steuer contradicts him on this point. CP 553

("Kultin is currently in the application process to become a naturalized United States citizen."). Thus it appears that his application was submitted at least 21 months before Mockovak's trial, and that it was still pending when Kultin testified at that trial in late January of 2011.[38] Regardless of when he actually submitted his application, at his July 2015 deposition Kultin testified that he was not granted citizenship until sometime in 2011, sometime *after* Mockovak's trial ended on February 3, 2011.[39]

But Mockovak did not know these critical facts. Initially, on November 17, 2009, the KCPA erroneously informed Mockovak that Kultin *was* a U.S. citizen. CP 464. After repeated discovery requests for information about Kultin's immigration status, on May 10, 2010 SDPA Storey told Mockovak's attorney that "Kultin was apparently the subject to [sic] an INS investigation, which was quickly resolved. The FBI has denied our requests for further information." CP 570. Finally, on October 28, 2010, Storey corrected the erroneous information provided in November of the previous year and notified defense counsel that Kultin actually was *not* a U.S. citizen, but was merely a permanent resident alien. CP 599. The KCPA *never* told Mockovak's counsel that Kultin had an

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[38] The other possibility is that Kultin submitted *two* citizenship applications, one in 2009 which was either denied or withdrawn, and another one in 2011, which was granted.

[39] At his 2015 deposition Kultin testified, "As far as I know, I'm a U.S. citizen." CP 491. "I became a U.S. citizen, as far as I remember, about four years ago." CP 491. "Q. This was after you testified at the trial of Dr. Mockovak? A. I believe it was." CP 492.

application for citizenship pending in April 2009 (before he had even started to act as an informant). Nor did the KCPA tell him that Kultin's application for citizenship was pending throughout the entire period of his undercover informant activities. Moreover, while SDPA Storey did tell Mockovak's attorney that Kultin had once been "subject to an INS investigation," she did not disclose that the INS had once arrested Kultin, or that the INS had filed some sort of "case" (possibly initiating a deportation proceeding) against him, and then had later dismissed the "case" without filing any "charges."

4. Kultin's invocation of the self-incrimination privilege at his deposition supports the inference that he lied to INS about his need for asylum and thus remains subject to being stripped of his citizenship and deported if his fraud comes to the attention of the INS.

At his deposition Kultin repeatedly asserted the Fifth Amendment privilege against self-incrimination and refused to answer questions about his initial immigration status as an asylee, and his prior INS arrest. CP 486-89. "[O]nce a witness in a civil suit has invoked his or her Fifth Amendment privilege against self-incrimination, the trier of fact is entitled to draw an adverse inference from the refusal to testify." *King v. Olympic Pipeline*, 104 Wn. App. 338, 355-56, 16 P.3d 45 (2000). *Accord Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Therefore, from Kultin's assertion of the privilege, this Court can infer that an answer would tend to show

that Kultin committed a crime when he obtained his initial immigration status as an asylee by falsely representing that he needed asylum to escape from persecution in Russia.

A person who obtains citizenship by means of fraud can have his citizenship revoked, and can be deported, no matter how many years in the past the fraud was perpetrated. *Knauer v. United States*, 328 U.S. 654, 671-72 (1946); *Corrado v. United States*, 227 F.2d 780, 783-84 (6th Cir. 1955). At the time when Kultin agreed to work as an undercover informant for the FBI, he stood in an extremely vulnerable position. If it had been discovered that he had obtained his asylee status, and thereafter his citizenship, by means of fraud, he could have been (and today he still could be) stripped of his citizenship and deported. To avoid such a fate, Kultin had a powerful motive to please law enforcement by entrapping Mockovak into criminal activity. But Mockovak's criminal defense lawyers were deprived of this powerful impeachment evidence because it was never disclosed to them. If Mockovak's defense counsel had received this information he would have used it during Kultin's cross-examination to show that Kultin possessed a strong motive to please federal investigators by persuading Mockovak, after six months of trying, into agreeing to hire people to kill his business partner.

Moreover, by entrapping Mockovak, and then by providing

damning trial testimony against him, Kultin could have expected to ingratiate himself with three law enforcement agencies: the FBI, the Seattle Police Department, and the KCPA. In return for helping the KCPA to convict Mockovak, Kultin could expect these agencies to support his application for citizenship. Thus, to win this support for his citizenship application Kultin had every incentive to entrap Mockovak, and to shade his testimony to favor the prosecution.

5. The fact that an informant has been led to expect assistance with immigration or citizenship matters is powerful *Brady/Giglio* impeachment evidence.

Mockovak's case is similar to the *Blanco* case. There the government's case depended heavily on the credibility of a Drug Enforcement Agency ("DEA") informant named Rivera. Blanco's defense, like Mockovak's, depended on convincing the jury that the informant was a liar. During the discovery process, Blanco repeatedly requested information regarding payments made to Rivera, as well as any other consideration given to him for his testimony, including special immigration treatment. *Blanco,* 392 F.3d at 389-90. As in Mockovak's case, in *Blanco* the Government eventually turned over the information regarding how much it had paid Rivera, but it failed to provide any information regarding Rivera's immigration status. The Government's attorneys "refused to provide the requested information" stating that it was

"unaware of any 'favors'" that Rivera might have received and that the DEA had advised the U.S. Attorney's Office that it was "unwilling" to provide a copy of Rivera's contract with the DEA until after Rivera testified. *Blanco,* 392 F.3d at 390. "The government nowhere mentioned Rivera's immigration status in its opposition" to Blanco's motion. *Id.*

It was not until a DEA agent was being cross-examined in the middle of trial that the defense fortuitously discovered that Rivera was a former undocumented immigrant who had received a "public benefit parole visa" from the INS at some point in time. *Blanco*, 392 F.3d at 390. The cross-examination revealed that Rivera was an illegal alien who was receiving special treatment from the INS in return for his work as an informant with the DEA. *Id.* Then, when Rivera testified, Rivera admitted that his visa had expired and that the DEA agents he worked with were aware of that fact. *Id.* at 392. Rivera denied that the DEA agents had promised to make his immigration status legal if he assisted the DEA in its investigations; but when asked if the DEA had given him "any green card or any visa papers" he replied, "not yet." *Id.*

Blanco was convicted of various drug crimes and he appealed raising a claim that the Government had violated *Brady* and *Giglio*. The Ninth Circuit agreed with him:

> It is obvious from the foregoing narrative that the government suppressed information that should have been turned over to

> Blanco under *Brady* and *Giglio*. Any competent lawyer would have known that Rivera's special immigration treatment by the INS and the DEA was highly relevant impeachment material.

Blanco, 392 F.3d at 392. The appellate court remanded the case, directing the trial court judge "to order the government to produce all files and other information pertaining to [the informant] in the possession of the DEA and the INS, as well as any other potentially exculpatory information" including "all information pertaining to [the informant's] immigration status, his special parole visa, and his work for the DEA in return for consideration relating to his immigration status." *Id.* at 394.

Just as Mockovak's prosecutors claimed that they did not have access to the FBI's information about Kultin, the *Blanco* prosecutors claimed they did not know of Rivera's immigration status and his special treatment because the DEA never shared this information with them. The *Blanco* Court rejected this argument, holding that:

> Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does.... Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned.

Blanco, 392 F.3d at 388.

Similarly, in Mockovak's case the KCPA had a duty to turn over any information regarding Kultin's INS arrest and his pending citizenship application even if the information was primarily controlled by the FBI.

Kultin's testimony was a key element of the prosecution's case against Mockovak. The defense was entitled to use evidence of Kultin's pending citizenship application and his past INS detention to impeach Kultin's credibility. The prosecution's failure to turn this information over prevented the defense from conducting a cross-examination which may very well have changed the outcome of the trial.

The Supreme Court emphasized the importance of presenting relevant impeachment evidence to the jury through cross-examination in *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974). Here, as in *Davis*,[40] Mockovak was entitled to inform the jurors about Kultin's pending citizen application and his past INS arrest so that the jury could make a fully informed decision about his credibility. Kultin was in a "vulnerable status" as a resident alien, and law enforcement was in a position to help him, just as law enforcement in *Davis* was in a position to help witness Green. But because Kultin's status was not disclosed, Mockovak was

[40] There the defense was prohibited from cross-examining the prosecution's main witness about his "vulnerable" juvenile probation status. The Court reversed the jury verdict and remanded the case for a new trial, concluding, "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that ***the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.'*** The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure ***because of Green's vulnerable status as a probationer***, as well as of Green's possible concern that he might be a suspect in the investigation." *Davis,* 415 U.S. at 317-18 (emphasis added).

denied the ability to impeach Kultin with evidence of his motive to lie.

6. The Due Process requirements of *Brady* and *Giglio* trump the work-product privilege and require full disclosure of any evidence that pertains to Kultin's immigration status or to his pending citizenship application.

In Washington the work product privilege applies to:

> documents and other tangible things that (1) show legal research and opinions, mental impressions, theories or conclusions of the attorney or of other representatives of a party; (2) are an attorney's written notes or memoranda of factual statements or investigation; and (3) are formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation.

Limstrom v. Ladenburg, 136 Wn.2d 595, 611, 963 P.2d 869 (1998). But the privilege is not absolute. Factual statements and other tangible items gathered by an attorney are subject to disclosure if "the party seeking disclosure of the documents actually has substantial need of the materials and that the party, is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means." *Id.* at 611-12.

As a constitutional right,[41] *Brady* always trumps the statutorily created work-product privilege in regards to non-opinion work-product. *United States v. Edwards*, 777 F.Supp.2d 985, 995 (E.D. N. Carolina 2011), citing 2 Wright & Miller, Federal Practice and Procedure, §254, at 81 & n. 60 (2d ed. 1982) ("Because *Brady* is based on the Constitution, it

[41] Indeed, even a statutory right that is *not* of constitutional magnitude always trumps the work-product privilege. *See*, e.g., *Goldberg v. United States,* 425 U.S. 94, 102 (1976), holding that nothing in the Jencks Act exempts a witness statement that is "the 'work-product' of Government lawyers," so the Act always trumps the privilege.

overrides court-made rules of procedure."). *Accord Castleberry v. Crisp,* 414 F. Supp. 945, 953 (N.D. Okla. 1976) ("[T]he work product discovery rule cannot, of course, be applied in a manner which derogates a defendant's constitutional rights as propounded in *Brady.*"); *United States v. Goldman*, 439 F. Supp. 337, 350 (S.D.N.Y. 1977) ("Of course, if [work product] material be of a *Brady* nature, then it must be produced.").[42] While *Brady* and *Giglio* ordinarily do not compel disclosure of the prosecutor's thought processes and mental impressions of the evidence, they do require the disclosure of any favorable *facts*, even if such facts are contained within opinions protected by the work-product privilege.[43]

7. *Roth* is largely inapplicable to this case and to the extent that it is applicable it supports Mockovak's position.

In the court below, the KCPA relied upon *Roth v. Department of Justice*, 642 F.3d 1161, 1177 (D.C. Cir. 2011) for the proposition that a

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[42] *See also Bunch v. State,* 964 N.E.2d 274, 301 (Ind. 2012) ("Even if [the reports] were [covered by the work-product privilege]," the "defendant's right to fundamental due process outweighs the State's interest in nondisclosure." [Citation]. Thus, the *Brady* rule can require disclosure of evidence not otherwise discoverable if the evidence is shown to be exculpatory."); *Ex Parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012) ("the duty to reveal material exculpatory evidence as dictated by *Brady* overrides the work-product privilege"); *People v. Collie,* 30 Cal.3d 43, 59 n.12, 634 P.2d 534 (1981) ("[M]anifestly, it [the work product privilege] cannot be invoked by the prosecution to preclude discovery by the defense of material evidence" citing *Brady*); *Waldrip v. Head*, 620 S.E.2d 829, 832 (Ga.2005) ("were the work product doctrine and the constitutional right to exculpatory evidence to be in conflict, the former obviously would have to yield to the latter.").

[43] *See Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006) ("[I]n general, a prosecutor's opinions and mental impressions of a case are not discoverable under *Brady* ***unless*** they contain underlying exculpatory facts").

FOIA lawsuit is "not a substitute for discovery in criminal cases." CP 1028. Therefore, the KCPA argued that Mockovak was precluded from arguing that *Brady* trumps the work-product privilege in a Public Records Act lawsuit. CP 1028. In response Mockovak pointed out that

(1) he was not challenging his conviction in the PRA suit; like the plaintiff in *Roth*, he was simply making a records request;

(2) Mockovak was not "relitigating" a *Brady* issue that had already been litigated in a prior case, and thus his case is like Roth's third FOIA request which had not previously been litigated;

(3) in *Roth* there was no claim that any documents were exempt from disclosure because they were covered by the work-product privilege; instead the federal government relied solely on the federal statutory privacy exemption to the FOIA; and

(4) ultimately the *Roth* Court held that the records requester *was* entitled to the disclosure of any governmental records containing *Brady* information that tended to show that the defendant was innocent and had been wrongfully convicted.

Thus *Roth* supports Mockovak's position that the due process *Brady* obligation to disclose negates the existence of any work-product privilege and that a convicted defendant *can* use a statutory records act request to obtain documents that should have been disclosed in a prior criminal case.

(a) A PRA lawsuit cannot be used to seek vacation of a conviction, and Mockovak has not sought that relief in this case. But as *Roth* shows, a records request case can be used to seek records which can then be used in a separate case (such as a PRP) seeking to overturn a conviction.

The obligation to produce a record in a PRA or FOIA case requires both a request and an existing record within the scope of the request. The

obligation to produce *Brady* information requires *neither* a request *nor* an existing record. In a criminal case the defendant is entitled to *Brady* information regardless of whether he ever asked for it and regardless of whether the information is recorded in any document. *Kyles*, 514 U.S. at 433. In a PRA case, a violation occurs whenever an existing, nonexempt public record is requested and is not timely disclosed. If there is no existing record responsive to the PRA request, there is no PRA violation even though the government agency may have known of *Brady* information that it never placed in a public record. The KCPA was therefore correct when it stated that "government's constitutional obligation under *Brady* to disclose exculpatory material to a criminal defendant is not coextensive with the agency's statutory obligations under the FOIA." CP 1027.[44] In addition, the KCPA is correct when it asserts that a PRA lawsuit is not a mechanism by which a convicted defendant can raise a constitutional challenge to his conviction, and that such a

[44] The KCPA cited cases like *Stimac v. DOJ,* 620 F.Supp. 212 (D.D.C. 1986), where courts have stated that a generic discovery request for *Brady* information is improper in an FOIA suit. In *Stimac* a pro se plaintiff made a discovery motion asking "for access to *Brady* material." *Id.* at 213. Stimac's motion was not a request for specific public records; it was a request for all favorable *Brady* information regardless of whether it was contained in any record. The district court properly held that this kind of discovery request was improper in a FOIA suit. *Id.* Unlike Stimac, Mockovak never made a *Brady* request in this PRA case. Instead, he made detailed requests for specific kinds of records, which were found and produced in redacted form. Mockovak simply disputes some of the redactions allegedly based on the work-product privilege because he maintains that *Brady* trumps that privilege whenever the redacted material contains evidence that would have been favorable to Mockovak in the criminal case.

challenge must be raised in a collateral attack proceeding. CP 1027.

But these propositions are irrelevant to this case because Mockovak never asked the Superior Court, and he is not asking this Court in this appeal, to overturn his conviction. As noted in the court below, he filed a PRP in this Court, and it is in *that* proceeding that he is seeking to have his conviction overturned. CP 1316. So Mockovak is litigating his challenge to his conviction in the proper forum.

In the PRA suit in Superior Court Mockovak sought specific records and challenged specific redactions which the KCPA made in them. The KCPA claimed those redactions were justified under the work-product privilege. Mockovak contests these redactions on the ground that there can *never* be a valid claim of work-product privilege if the information should have been previously disclosed because it was covered by *Brady*. Since *Brady* always defeats a claim that a document is exempt from PRA disclosure, a PRA lawsuit *is* the proper forum for litigating the legality of such redactions.

(b) The *Roth* Court distinguished between two FOIA requests that had already been fully litigated in other cases, and a third request that had never been previously litigated, holding that there was no bar to litigating the response to the third request. Here there was no prior PRA litigation and thus there is no attempt to "relitigate" anything.

The procedural history of the *Roth* case is somewhat complex and will not be repeated at length here (for a more detailed discussion see CP

1312-14). Roth was an attorney representing Lester Bower, a man who had been convicted of four murders. Roth believed that the FBI had documents which would support Bower's claim of innocence by showing that some other individuals actually committed the murders. Roth actually made *three* FOIA requests for documents over a span of several years. While a federal court concluded that the responses to Roth's first two FOIA requests had been legally proper, and that it could not reexamine prior judicial rulings that had examined *those* FOIA requests, since no court had previously examined the denial of his *third* FOIA request, a federal court *could* review that claim. The *Roth* Court went on to rule that Roth *had* made a showing sufficient to overcome the *privacy* exemption to FOIA, and therefore Roth *was* entitled to an additional disclosure:

> ***We conclude that the balance tilts decidedly in favor of disclosing whether the FBI's files contain information linking [three other men] to the FBI's investigation of the killings.*** As a result, we shall reverse the district court's rejection of Roth's challenge to the FBI's Glomar response and remand for further proceedings.

Id. at 1181 (emphasis added).[45]

(c) Neither *Roth*, nor any of the district court cases cited by the KCPA involved the assertion of the exemption for material covered by the work-product privilege.

In addition to *Roth*, the KCPA cited several federal district court

[45] The D.C. Circuit Court concluded that Roth <u>was</u> entitled to documents "that could help exonerate" the prisoner. *Roth*, 642 F.3d at 1181 ("[T]he public . . . has a compelling interest in knowing whether the FBI is refusing to disclose information that could help exonerate Bower [the prisoner represented by Roth, the records requester]").

cases where agencies of the government asserted statutory exemptions to the FOIA.[46] *None* of these cases involved assertions of the work-product exemption and thus none of them are relevant.[47] The cases that Mockovak has cited (see pages 76-77 and fn. 42, *infra*) all involve the work-product privilege, and they all hold that that privilege is trumped by *Brady*.

Roth, the principal case upon which the KCPA purports to rely, involved the assertion of the *privacy* exemption to the FOIA. Under *federal* law, the privacy exemption to the FOIA calls for weighing the records requester's interest against the privacy interest of another individual identified in the sought after record. Under *state* law, when considering a public records act request for a record, a PRA court is *forbidden* to employ such a weighing approach.

(d) The Superior Court erred when it borrowed the *Roth* "balancing" approach used in a FOIA case where the government invoked the privacy exemption of Section 7(c). But even when a Washington agency asserts the privacy exemption to the PRA (which it has never done in this case), a balancing approach is expressly forbidden by both statute and precedent.

In the present case, the Superior Court erred when it "weighed"

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[46] In the court below the KCPA has cited *Marshall v. FBI*, 802 F.Supp. 125 (D.D.C. 2011); *Richardson v. DOJ,* 730 F.Supp.2d 225 (D.D.C. 2010)*; Smith v. ATF*, 977 F.Supp. 496 (D.D.C. 1997) and *Cucci v. DEA*, 871 F. Supp. 508 (D.D.C. 1994).

[47] One case cited by the KCPA, *Williams & Connolly v. SEC,* 662 F.3d 1240 (D.C.Cir. 2011), did involve the work-product privilege, but it did not involve any claim that the privilege was destroyed by the existence of *Brady* material. It involved only the question of whether there had been a voluntary waiver of the work-product privilege. There was no contention that the withheld material contained *Brady* information.

Mockovak's due process right to disclosures under Brady "against the interests underlying the asserted work product exemption." CP 1393. The Superior Court borrowed this weighing approach from the *Roth* case, but *Roth did not involve the work product exemption. Roth* involved the assertion of the federal privacy exemption to FOIA.

In *Roth* the records requester was seeking documents that showed that other individuals were suspected of the murders that Roth's client had been convicted of. The federal government claimed that it would be an unreasonable invasion of the privacy of these other individuals to release these records because "being associated with a quadruple homicide would likely cause them precisely the type of embarrassment and reputational harm that Exemption 7(C) is designed to guard against." 642 F.3d at 1174. Under that exemption,[48] the FOIA exempts disclosures which would constitute "an unwarranted invasion of personal privacy." When determining whether such an unwarranted invasion would result, a federal court is directed to "balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." *Id.*

Several FOIA cases hold that Exemption 7(C)'s protection against unwarranted privacy invasions is overcome whenever the records

[48] 5 U.S.C. §552(b)(7)(C).

requester can show a basis for "a belief by a reasonable person that [an] alleged Government impropriety might have occurred." *National Archives v. Favish*, 541 U.S. 157, 174 (2004). If that low threshold is met, then Exemption 7(C) does not apply and the documents must be disclosed.

Many federal cases explicitly recognize that a *Brady* violation is precisely the type of governmental "impropriety" which does override Exemption 7(C). *See, e.g., Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011); *Boyd v. DOJ,* 475 F.3d 381, 387-88 (D.C. Cir. 2007); *Roth*, 642 F.3d at 1181 (D.C. Cir. 2011).[49] The D.C. Circuit has consistently ***rejected*** the federal government's argument that a records requester's desire to find evidence of a *Brady* violation can never overcome the privacy exemption of 7(C). *Blackwell*, 646 F.3d at 43 (Rogers, J., concurring) (***"the court rejects the government's broadly stated position that . . . 'a FOIA requester's desire to obtain Brady material is not a public interest for purposes of Exemption 7(C).'"***) (emphasis added).

The privacy exemption to the Public Records Act is a *much* narrower exemption than the FOIA privacy exemption. Moreover, the KCPA has *never* claimed that it applied to this case. It has relied solely on the work-product exemption and never sought to rely on RCW 42.56.210

[49] "Weighing the competing interests, we conclude that the balance tilts decidedly in favor of disclosing whether the FBI's files contain information linking [three other men] to the FBI's investigation of the killings" [for which Bower was convicted]."

(formerly 42.17.310), the privacy exemption in the PRA that covers "certain personal and other records exempt." But even if the KCPA *had* attempted to rely on the PRA's privacy exemption, it would not apply because under the PRA the "balancing" of an individual's privacy interests against the public interest in disclosure is explicitly *forbidden. Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 798, 791 P.2d 526 (1990). *Accord Dawson v. Daly,* 120 Wn.2d 782, 795, 845 P.2d 995 (1993).

(e) In the *Sheehan* case, this Court rejected King County's contention that it should follow the federal FOIA law approach of "balancing" privacy interests against the public interest in disclosure.

In *King County v. Sheehan*, 114 Wn. App. 325, 57 P.2d 307 (2002), this Court explicitly *rejected* the argument that a Washington court should borrow and apply the balancing approach used by federal courts when applying FOIA law. In *Sheehan* the Superior Court held that the County did not have to disclose the full names of its police officers because when the officers' privacy interest was balanced against the public's right to disclosure, the balance tipped in favor of the officers and therefore disclosure of their names was covered by the exemption in RCW 42.17.310(b)(1). On appeal, the KCPA argued that this ruling was correct and urged this Court to follow federal FOIA precedent that endorsed such a balancing approach.

But this Court held that such a balancing approach was foreclosed

by the PRA's statutory definition of the privacy exemption and by Washington Supreme Court precedent. This Court specifically held that reliance on federal FOIA precedent was prohibited:

> Certain federal cases have held that the privacy exemption of [FOIA] prevents disclosure of names and addresses when coupled with employee job classification, and salary and benefits information. [Citations]. . . In interpreting Washington's Public Disclosure Act, our courts may look to the federal courts and their interpretation of FOIA. [Citation]. However, it is important to bear in mind that "***the state act is more severe than the federal act in many areas***." [Citing *PAWS v. Univ. of Washington*, 125 Wn.2d 243, 266, 884 P.2d 592 (1994)]. ***Most significantly, unlike federal cases interpreting FOIA, "the use of a test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted."***

Sheehan, 114 Wn. App. at 317, citing *Dawson* and *Brouillet* (emphasis added). The KCPA fails to acknowledge this explicit holding of *Sheehan* even though King County was the respondent in *Sheehan* and even though the County was represented by an attorney in the office of the KCPA.

(f) A balancing approach is even more indefensible when the government argues that its interests under the work-product doctrine can be "balanced" against the public's interest in learning about possible *Brady* violations. The whole point of *Brady* was to eliminate work product protection for facts favorable to the defendant.

While the work-product privilege may cover other kinds of information, the whole point of *Brady v. Maryland* was to establish that it has no application whatsoever to evidence favorable to a criminal defendant that tends to establish his innocence or to impeach the veracity

of prosecution witnesses. The rationale for a work-product privilege is that an attorney should not have to turn over the fruits of his investigative efforts to his adversary, because that could strengthen his adversary's case and thus such a disclosure could cause him to lose his case. An attorney that fears that he will have to turn over unfavorable evidence to his adversary has an incentive not to investigate at all. Rather than chill such investigation, the work-product doctrine assures an attorney that he can investigate without running the risk that he will have to turn over unfavorable evidence to his adversary.

But the underlying premise of *Brady* is that prosecutors should not be primarily concerned with *winning* their cases; their focus should be instead on seeking justice. The duty to disclose exculpatory evidence, even when not requested, makes it *harder* for prosecutors to win convictions. But the duty to disclosure does not constitute an unwarranted intrusion into an attorney's work-product because such evidence is *never* protected by the work-product doctrine. "Society wins not only when the guilty are convicted, but when criminal trials are fair . . ." *Brady*, 373 U.S. at 97. In other words, whenever the prosecutor knows of evidence that suggests that the defendant is innocent, or that the State's witnesses may be lying. *Brady* flatly rejects the premise that underlies the work-product doctrine and the evidence is *not* protected from disclosure.

Any factual material that could support the argument that Kultin had a motive to lie, either to gain citizenship or to avoid deportation, has no work-product protection.

In this case, the *unredacted* portions of disclosed PRA documents such as the follow-up inquiries to Prosecutor Storey's e-mails suggest that her *redacted* inquiries and responses contain additional factual information regarding Kultin's immigration status, citizenship application, and his prior INS detention. CP 672, 674, 678, 680, 682, 692. Such information is quite likely to constitute *Brady* and *Giglio* material. Most critically, the documents disclosed so far and Kultin's deposition testimony reveal that Kultin – the State's star witness – had filed an application for citizenship that seems to have still been pending when Kultin testified at Mockovak's trial. Because it was pending, and because it can be inferred that Kultin lied in his application for asylum, Kultin had a strong incentive to shade his testimony in order to please law enforcement officers so that they would support his application for citizenship. And even if Kultin did not submit his application until after Mockovak's trial ended, since he intended to apply for citizenship, he had a strong motive to testify in a manner that assisted the prosecution. He also had a strong motive to shade his testimony to please law enforcement officials so that they would not deport him for obtaining his initial asylee status by means of fraud.

(g) When conducting its in camera review, this Court must be convinced that the KCPA has carried its burden of proof as to each redaction.

It is well-settled that in a PRA case the burden of proof is not on the records requester to show that he has a right to a copy of a public record. "The burden of proof rests on the agency to prove that it does not have the duty to disclose." *In re Request of Rosier*, 105 Wn.2d 606, 609, 717 P.2d 1353 (1986). *Accord Neighborhood Alliance*, 172 Wn.2d at 715; *Gronquist v. State*, 177 Wn. App. 389, 398, 313 P.3d 416 (2013). In the present case, that means that in order to carry its burden of proof, for *each* redaction the KCPA must show that no fact has been withheld which, if disclosed, could be used to impeach the veracity of informant Kultin. When this Court conducts its independent *de novo* review of the redactions, Mockovak urges this Court to rule that any redacted material that could have been used to impeach Kultin must be disclosed to Mockovak and should not have been redacted.

E. **The privilege does not apply to any document authored by the federal attorneys (Category C documents), since they were not prepared in anticipation of litigation.**

RCW 42.17.310(1)(j) exempts records covered by the work-product privilege from the Public Records Act. *Dawson*, 120 Wn.2d at 790. But the work-product privilege only covers documents "prepared in

anticipation of litigation or for trial" by a party's attorney or a party's representative. *Heidebrink v. Moriwaki,* 104 Wn.2d 392, 394-95, 706 P.2d 212 (1985); CR 26(b)(4). Neither the United States, nor the Justice Department, nor the FBI, was ever a party to the case of *State v. Mockovak*, King County Cause No. 09-1-07237-6 SEA. In fact, AUSA Kipnis explicitly relied on this fact as his justification for refusing to honor a subpoena duces tecum issued by Mockovak's defense attorney, stating that Mockovak had no right to any discovery from the United States because "the United States is not prosecuting Mr. Mockovak." CP 595.

Since the United States and the FBI were not parties to the state court prosecution, *nothing* that federal attorneys ever wrote could fall within the scope of the work product privilege. All of the redacted documents authored by federal attorneys Lombardi, Greenberg, Lynch, Kipnis, Bennett, and Jennings, were written *after* it had been decided that Mockovak would be prosecuted in state court. Mockovak collected all of these documents and referred to them as "Category C" documents. CP 753.[50] All of these documents were written *after* Mockovak had been arrested and charged in King County Superior Court. Since no trial in federal court was ever anticipated, the work product privilege simply does not apply to these documents. Accordingly, all of the documents placed in

[50] These documents can be found in the record at CP 842-870.

Category C should be disclosed to plaintiff Mockovak without redactions.

F. **Any work-product privilege was waived when the KCPA disclosed information to the USAO. There is no such thing as a selective waiver of the privilege and the "common interest" exception to waiver does not apply.**

It is well settled that "a party can waive the attorney work product privilege as a result of its own actions." *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002). *Accord United States v. Nobles*, 422 U.S. 225, 229, 239-40 (1975). So when the KCPA sent communications to the federal attorneys, even assuming they contained some content that would ordinarily be protected by the work-product privilege, such protection was waived when the KCPA sent these communications to third parties. Mockovak collected all these documents and referred to them as "Category B" documents. CP 753.[51] Most of these documents are documents that were sent to federal prosecutors (but a few of them are emails that were sent to witness Daniel Kultin. CP 838-841).

The KCPA tries to argue that the "common interest" doctrine applies to the documents written by the state prosecutors and sent to the federal attorneys. But as the Supreme Court has said, "the 'common interest' doctrine is not an expansion of the [work-product] privilege at all; it is merely an exception to waiver." *Sanders v. State*, 169 Wn.2d 827,

[51] These documents can be found in the record at CP 809-841.

854, 240 P.3d 120 (2010), citing *Morgan v. Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009). "Under the 'common interest' rule, communications exchanged between multiple parties engaged in a common defense remain privileged" and do not lose their protected status by reason of waiver. *See Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008), cited in *Morgan*, at 757. The KCPA and the USAO were not "engaged in a common defense." Nor were they "engaged in a common prosecution." Indeed, as AUSA Kipnis stated, the United States was not prosecuting Mockovak at all. Since the two offices were not jointly prosecuting Mockovak, the common interest exception to the waiver doctrine does not apply. Based upon the documents that the KCPA has disclosed, far from having a common interest, there was outright adversity between the state prosecutors and the federal authorities.

1. Disclosed documents show conflict between the KCPA and the U.S. Attorney's Office.

(a) The U.S. Attorneys rejected Prosecutor Storey's requests for documents and refused to provide documents.

The unredacted portions of the documents that have been disclosed show that for roughly one year the federal prosecutors and the state prosecutors were in sharp conflict with each other. While the state prosecutors expressed their need to obtain documents from the FBI so that they could provide them to Mockovak's attorneys in compliance with

State court discovery rules, the federal attorneys consistently refused to cooperate and disavowed any interest in the State court prosecution. Beginning a mere seven days after Mockovak's arrest and charging in state court, on November 19, 2009 Prosecutor Storey and FBI Agent Carr both wrote to AUSA Vince Lombardi requesting copies of documents in informant Kultin's file (the "source file") so that they could provide them to Mockovak's counsel. CP 694. Lombardi and Bruce Bennett, division counsel for the FBI, sent responses that have been completely redacted. CP 696, 698. These were followed by an inquiry from Agent Carr asking the federal prosecutors to "tell me what I need to do here to obtain clearance to release information to the [state prosecutor] for discovery?" CP 698. The response to Carr is nearly entirely redacted. CP 698.

Roughly two weeks later the state prosecutor sent a letter wrote to the federal prosecutors stating that "the State requires all materials that the FBI and/or SPD have collected, written, prepared, and/or possess in connection with the above-listed investigation numbers." CP 700. Storey listed ten specific categories of documents that the KCPA needed. CP 700-701. Two more weeks passed before a federal prosecutor responded that the U.S. Attorney was "unable at this juncture to provide you with any information belonging to the Federal Bureau of Investigation." CP 703. He told Storey that her previous letter request for

documents had not been sufficiently specific, and therefore he was "unable to act favorably on [her] request at this time." CP 704.

On December 18, 2009, noting that "FBI agents documented the investigation in 302s and other material" Storey again wrote to the federal prosecutors and again "request[ed] disclosure of the contents of this FBI file." CP 706. On December 21, 2009 a federal prosecutor wrote back and told Storey that her request for documents was still not specific enough. CP 709. He also explained that the federal government would *not* honor continuing requests for information. CP 710.

When Storey notified FBI Agent Carr that the federal prosecutors were not cooperating and were refusing to send her documents, Carr responded to Storey saying, "Strange, what do you do now?" CP 713, 717. Storey responded to Carr (in an email that is completely redacted, CP 722) and then Carr replied to Storey in an email that seems to betray a fair amount of frustration over the federal agencies' refusal to provide Storey with the documents she was seeking. Carr's email reads:

> ***I could tell you but I'd have to kill you by letter.*** There are no other crimes being investigated, unfortunately I can't provide you direction because I have not run into this before. You'll have to work it out with your counterparts. When the attorneys get it figured out, let me know and I will do as directed. . . .

CP 717 (emphasis added).

(b) Detective Carver's December 22, 2009 protest E-mail.

Detective Carver then joined the email discussion by sending a

lengthy email to a federal prosecutor (Greenberg), two state court prosecutors (Larson and Ehlert), two members of the Seattle Police Department (Best and Washburn), and two members of the FBI (Maeng and Dean). Carver voiced his alarm and concern over the FBI's refusal to provide documents to the KCPA. Carver said that the FBI's refusal to provide documents to state prosecutors caused him to "anticipate serious problems" for criminal cases investigated jointly by the FBI and SPD:

> As you know, we are a task force and responding law enforcement includes both local police (TFO's) and FBI agents. ***I have been informed that we are no longer permitted to provide any FBI work product to state prosecutors, to include FBI 302's, reports, evidence items, etc., absent a Touhy request.***
>
> It is unlikely state prosecutors will be able to submit the requisite Touhy letter and secure FBI approval within 72-hours of a suspect's arrest. In fact, there are at least three present cases that are stalled as a result of the Touhy requirement (State v. Montoya, State v. Mockovak and State v. Threlkeld). ***In State v. Mockovak, a murder-for-hire case, the prosecutor has submitted at least two Touhy letters, both of which have been denied.*** . . .

CP 725-26 (emphasis added).

(c) The FBI blamed SDPA Storey for failing to submit an adequate request letter. Storey sent a third letter in which she requested information about Kultin's expectations.

FBI Agents Maeng and Jennings both responded to Carver's email. Jennings told Carver that Storey had not followed the directions given to her by Bennett, that her *Touhy* request letter had been inadequate, and that her second *Touhy* request letter was still inadequate. CP 724-25.

On December 24, 2009 attorney Bennett sent Storey another email

telling her what she needed to submit to him but the overwhelming majority of this email is redacted. CP 728-29. On December 30th Storey sent Bennett a third request letter, which is nine pages long and which has been mostly redacted. CP 731-39. Storey told Bennet that the King County Superior Court has ordered the KCPA to provide Mockovak's attorneys with discovery by February 18, 2010. CP 731. The very first category of documents that Storey describes in this *Touhy* request letter is "reports documenting interviews with Daniel Kultin." CP 732. She also requests any reports regarding "promises to Kultin, expectations of Kultin, [and] payments to Kultin . . . ." CP 732.

(d) The U.S Attorney announced that the FBI would unilaterally decide what portion of its documents to release.

On January 14, 2010, AUSA Kipnis responded to Storey's third letter requesting documents by advising her that the FBI would decide what "portion" of the requested documents it was willing to turn over to the State prosecutors. CP 741. He did not describe what this "portion" consisted of; he simply delegated to the FBI the authority to decide what documents the FBI was willing to produce. CP 741.

(e) Five months later, the FBI still refused to release "certain documents" which pertained to informant Kultin. Instead, Agent McLaughlin informed Storey that the FBI had drafted a "suitable document" that contained the information Storey requested. The "suitable document" was completely silent on the subject of Kultin's immigration or citizenship status.

From the documents provided in response to Mockovak's PRA request, it is not possible for Mockovak to discern what documents, if any, the FBI actually provided to the KCPA. But the record does show that the FBI never produced any documents at all regarding Kultin. On June 10, 2010, FBI Agent Laura McLaughlin informed Storey that the FBI remained unwilling to provide Storey with documents about informant Kultin (the Confidential Human Source):

> Per Federal Bureau of Investigation (FBI) ***certain documents*** within your request are considered to be internal documents and ***are not authorized for distribution outside of the FBI. These documents primarily pertain to a Confidential Human Source*** and are also restricted by 5 United States Code Section 552 (a) (7) (b) (2) & (7).

CP 747 (emphasis added).

Instead of providing the requested documents regarding Kultin, Agent McLaughlin told Storey that the FBI had "drafted a suitable document" which she claimed contained the information that Storey requested. CP 747. But while the "suitable document" which the FBI provided to Storey did contain information about how much money the FBI had paid to Kultin, it did not contain any information regarding Kultin's immigration or citizenship status and it was completely silent on the subject of whether or not Kultin had been promised, or led to expect, any assistance in those areas. CP 748-49. The memo was unsigned, unsworn, and the author was not identified. CP 748-49. The document

stated that Kultin had been told that the FBI "cannot guarantee any rewards, payments or other compensation," but it did not identify what such "rewards" or "other compensation" might be. CP 749.

Finally, on June 25, 2010, Detective Carver sent Storey an email in which he stated that "the FBI will not release actual file documents, nor am I permitted to release investigator's notes at this time." CP 751. After this impasse between the state prosecutors and the federal authorities was reached in June, it appears that the state prosecutors simply stopped trying to persuade the federal prosecutors to give them Kultin's file. Mockovak's criminal defense attorneys kept trying to persuade the federal prosecutors to provide these documents, but they too had no success. On October 25, 2010, AUSA Kipnis wrote Campagna and rejected his request for information about informant Kultin; Kipnis told Campagna that Mockovak had no right to any discovery from the United States because "the United States is not prosecuting Mr. Mockovak." CP 595. Ultimately, neither the FBI nor the U.S. Attorneys Office ever produced any information about Kultin's immigration status, citizenship application, or his prior arrest by the INS.

In light of the well documented history of a refusal to cooperate with the KCPA, any argument by the KCPA that they shared a "common interest" with the federal prosecutors is untenable. The KCPA argued that

the federal prosecutors were also contemplating prosecuting Mockovak (at some undisclosed time after the state court trial ended), but the KCPA failed to produce any evidence to support that claim. On the contrary, as the last letter from the U.S. Attorney's Office succinctly and unequivocally stated: "The United States is not prosecuting Mockovak." CP 595. Accordingly, none of the emails or letters that the state prosecutors sent to the federal attorneys have any work-product privilege because disclosure to the federal attorneys waived any privilege that such communications might have had if they had been sent only to persons within the office of the KCPA. Once these communications were sent to persons outside the KCPA they ceased to have work-product protection. As noted below, there is no such thing as a selective waiver of the work-product privilege, and therefore disclosure to the federal attorneys completely vitiates any such privilege.

2. There is no such thing as a selective waiver of the work-product privilege. Once a document is voluntarily disclosed to any third party, it has lost all work product privilege protection.

The KCPA argued below that although it disclosed work-product protected documents by sending them to the federal prosecutors employed by the Department of Justice ("DOJ"), such disclosures were selective and did not effect a waiver of the work-product privilege to anyone else in the world. But case law from other jurisdictions shows that courts have

generally rejected the notion that the work-product privilege can be selectively waived as to some third parties, but not as to others. Once a party discloses to one third party the work-product privilege is lost and disclosure must thereafter be made to the entire world.

For example, in *In re Columbia/HCA Health Care Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002) the Sixth Circuit held that a similar waiver of the work-product privilege occurred when privileged materials were voluntarily disclosed to the DOJ. Columbia/HCA, the target of a federal investigation into possible Medicare and Medicaid fraud, decided to voluntarily turn over internal audits and related documents to the DOJ in hopes of negotiating a settlement. DOJ and Columbia did reach a settlement agreement, but once that agreement came to light several insurance companies and other private payors brought suits against Columbia/HCA claiming that they too had been overbilled. The private payors sought the same documents that Columbia/HCA had voluntarily disclosed to DOJ. Columbia/HCA refused to provide them asserting the work-product privilege. The private payors argued that the privilege had been waived when the documents were produced to DOJ. The district court agreed and ordered the documents produced. The Sixth Circuit affirmed and rejected the contention that it was possible to make a "selective" waiver of the

privilege. The Court held that a party cannot pick and choose among different entities, waiving the privilege as to some and resurrecting the privilege against others. *Id.* at 295-98, 305-307.[52] Other federal circuit courts also have rejected the concept of a "selective" waiver.[53]

In sum, if the KCPA had wanted to maintain its work-product privilege it should not have voluntarily disclosed work-product to the federal attorneys working for the Department of Justice. Having voluntarily shared work-product information with them, any privilege has been waived and the documents in Category C are no longer protected by the privilege, and thus are not exempt from disclosure under the PRA.

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[52] In exchange for Columbia/HCA's cooperation, DOJ agreed that it would never argue that by disclosing privileged documents to the DOJ that Columbia/HCA had waived any privilege. *Id.* at 292. The Court held that the fact that the DOJ had agreed never to argue that the privilege had been waived was simply irrelevant. *See also Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993) ("even if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, this agreement does not prevent the disclosure from constituting a waiver of the privilege, it merely obligates the recipient to comply with the terms of any confidentiality agreement."). So far as Mockovak is aware, there was no confidentiality agreement between the KCPA and the DOJ in this case. But even if there were, as *Columbia/HCA* and *Bowne* have held, it would not prevent this court from holding that a waiver had been made and from ordering disclosure of the documents.

[53] *See, e.g., Chrysler Motors Corp. Oversight Evaluation Program Litigation*, 860 F.2d 844, 846-47 (8th Cir. 1988) (Chrysler voluntarily disclosed documents to class action group pursuant to a confidentiality agreement and then refused to turn same documents over to the Government; held privilege waived; fact that disclosure to class action group made pursuant to a confidentiality agreement held irrelevant); *Westinghouse Electric Corp. v. The Philippines*, 951 F.2d 1414, 1431 (3d Cir. 1991) (voluntary disclosure to the SEC and the DOJ constituted a waiver and therefore the Philippines was entitled to obtain the same documents); *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984) (disclosure to SEC waived work product privilege, therefore documents must be provided to private plaintiff because it would be "inconsistent and unfair" to allow appellant corporation to select to whom they will disclose the documents); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982) (disclosure of work-product documents to SEC waived privilege and documents must be provided to grand jury).

G. **Any matter covered by the work-product privilege that is contained in the KCPA's emails to witness Kultin was waived by disclosure to Kultin. The privilege does not cover disclosures to witnesses.**

The KCPA never offered any explanation as to why emails sent to its witness Daniel Kultin would retain any protection under the work-product privilege. Kultin was not an attorney and was not an employee of any attorney who was working in anticipation of any litigation. Even if the KCPA's emails to Kultin did contain statements regarding the prosecutors' mental thoughts, impressions, and strategies regarding the trial of the criminal charges against Mockovak, by disclosing such thoughts to a witness any work product privilege was clearly waived.

The record contains a small number of email communications from prosecutors Storey and Barbosa to Daniel Kultin. CP 838-841. No matter what these emails contain, they lost any work-product privilege the moment they were sent to Kultin. This Court should rule that these emails should not have been redacted, and that they must be disclosed in full.

H. **Here, as in *United States v. Gupta* and *Doubleday v. Ruh*, any existing work-product privilege must give way because Mockovak has a substantial need for this information and he is unable to obtain it elsewhere without undue hardship.**

The work-product privilege is not an absolute privilege. Under CR 26(b)(4) work-product materials may be obtained upon a showing that the party seeking the document has a "substantial need" for the documents

and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." "The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party." *Pappas v. Holloway*, 114 Wn.2d 198, 210, 787 P.2d 30 (1990). *Cf. State v. Pawlyk*, 115 Wn.2d 457, 477 n.4, 800 P.2d 338 (1990) (in case where the defendant was offering an insanity defense, the prosecution showed a substantial need for access to report of the defendant's retained psychiatric expert).

In *Doubleday v. Ruh,* 149 F.R.D. 601 (E.D. Cal. 1993), Allison Doubleday was arrested by police but the district attorney's office declined to charge her. Doubleday filed a civil rights suit against the arresting officers alleging that they conspired to use excessive force against her and to coerce the prosecutor's office into charging her when criminal charges were not warranted. Doubleday issued a subpoena duces tecum to the prosecutor's office seeking the complete prosecutorial file. The prosecutor moved to quash the subpoena on the ground that the witness interviews that it contained were protected by the work-product privilege. The Court held that even assuming that the documents were covered by the work product privilege, Doubleday's substantial need for the documents in the prosecutor's file entitled her to discover the file:

> This case involves colorable allegations that the police officers involved here manipulated evidence and the district attorneys so

> that the plaintiff would be improperly prosecuted. If such allegations are true, the best evidence of these improprieties would be the contemporaneous statements of the witnesses, especially those of the sheriff's officers involved. While it is true that the sheriff's officers and other witnesses could be deposed, the passage of time and the present, potential bias of the defendants may color recollections such that what was said at the time cannot accurately be deciphered. In short, there is a substantial need for the contemporaneous information, and an undue hardship in attempting to reconstruct the information at this time.

Doubleday, 149 F.R.D. at 607.

Similarly, Mockovak clearly has a "substantial need" for any documents in the possession of the KCPA which show that *Brady/Giglio* information was withheld from him. Mockovak's PRA request has already succeeded in unearthing some previously undisclosed *Brady/Giglio* information. The redactions in the documents which have been produced may contain additional *Brady/Giglio* information. Clearly, Mockovak has a "substantial need" for any documents containing *Brady/Giglio* information because the existence of any document would establish a due process violation that would entitle Mockovak to a new criminal trial. *See, e.g.*, *Benn v. Lambert*, 283 F.3d 1040, 1054 (9th Cir. 2002) ("The prosecution failed to disclose evidence of Patrick's persistent misconduct while acting as an informant" and "this evidence was impeachment material that was suppressed by the prosecution.").

In *Benn* the prosecution's key witness, an informant named Patrick, testified that the defendant tried to hire someone to kill a man

named Hartman. Defendant Benn's two murder convictions were set aside because informant Patrick's testimony that Benn tried to hire someone to kill Hartman made the jury more likely to believe that Benn was guilty of the premeditated murders of two men named Dethlefsen and Nelson. If the *Brady/Giglio* information about Patrick had been disclosed, Benn might have been acquitted of the Dethlefsen and Nelson murders. Similarly, in the present case, informant Kultin testified that Mockovak discussed having Kultin hire someone to kill a man named Bradley Klock. Though acquitted of conspiring to kill Klock, Mockovak was convicted of attempting to murder Joseph King. If the *Brady/Giglio* information about Kultin had been disclosed, Mockovak might also have been acquitted of the attempted murder of King.

There are no alternative ways for Mockovak to obtain the *Brady/Giglio* information that he seeks to obtain from the KCPA in this PRA case. The only organizations which possess the records at issue are the KCPA and the DOJ (which includes the FBI). Mockovak has already attempted to obtain such information from the FBI and the FBI has refused to disclose any documents. CP 417. Therefore, there are no alternative means of obtaining the information sought.[54] Accordingly, if there are any

[54] *See also United States v. Davis*, 131 F.R.D. 391, 396 (S.D.N.Y. 1990) ("we conclude that General Dynamics has made the requisite showing of substantial need and *(Footnote continued next page)*

records in any of the three categories that this Court believes are still protected by the work product privilege, plaintiff Mockovak asks this Court to rule that the privilege must give way in light of Mockovak's demonstrated need for access to those records and his inability to obtain them by any other means.

Mockovak notes that the relief he seeks is similar to the relief granted in *United States v. Gupta*, 848 F.Supp.2d 491 (S.D.N.Y. 2012). In that case the SEC and the USAO conducted a joint investigation into criminal insider trading. The United States charged Gupta with criminal offenses and Gupta sought disclosure of *Brady* information in the possession of both the SEC and the USAO. The USAO argued that it had no obligation to review the files of the SEC for potential *Brady* information, but the court flatly rejected that contention:

> Where the USAO conducts a "joint investigation" with another state or federal agency, courts in this Circuit have held that the prosecutor's duty extends to reviewing the materials in the possession of that other agency for *Brady* evidence. [Citation]. . . . [A]ny argument that the Government's duty does not extend so far merely because another agency, not the USAO, is in actual possession of the documents created or obtained as part of the joint investigation is both "hypertechnical and unrealistic."

Gupta, 848 F.Supp.2d at 493. The SEC objected to the disclosure of materials covered by the work product privilege, and the district court

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lack of substantial equivalent to override the law enforcement privilege. As a fallback position . . ., the Government claims that the interview transcripts are privileged as work product. The same standard, that of substantial need, must be met in order to overcome this privilege. [Citations]. As we explained above, this standard has been met here."

acknowledged that the SEC's witness interview records constituted classic work product. Nevertheless, the district court ruled that the privilege had to give way to the extent that documents contained *Brady* information:

> [T]he court questioned at the February 16 oral argument whether Gupta's interest in receiving *Brady* material to prepare for the criminal case is a "substantial need" that overcomes work product protection. Having reviewed the supplemental briefing the parties submitted on this issue, the Court concludes that it does.

Gupta, 848 F.Supp.2d at 496. The district court also concluded that Gupta had also shown that he had no other way of obtaining these witness statements. *Id.* The court ordered a review of the work product materials and ordered disclosure of any *Brady* material found within them. *Id.* Mockovak submits the same ruling should be made here.

I. By voluntarily disclosing the contents of the NCIC Criminal History Search the County has waived the "other statute" exemption for this document.

The KCPA has withheld an NCIC Criminal History Search on the grounds that disclosure of this document is prohibited by 28 U.S.C. §534 and 28 C.F.R. §20(c) and therefore it is exempt under the "other statute" exemption provided by RCW 42.56.070(1). However, in the criminal case, the KCPA forwarded to defense counsel the October 28, 2010 email that Detective Carver had sent to Storey. Carver's email purports to report on his inquiry to the "US Immigration Task Force" and it summarizes what Immigration disclosed to him. CP 599. Similarly, the FBI's June 7, 2010 letter purports to summarize some of the information about Kultin's

immigration status. CP 613-14. And Detective Carver's declaration filed in court purports to summarize information that he learned from a "criminal history and arrest report" and "documentation from the Department of Homeland Security." CP 628. From the fragments of disclosures made in this PRA proceeding, we now know that Detective Carver sent Storey a draft of his declaration with an accompanying email stating: "I made some changes and added information about immigration stuff, hoping to bolster it a bit. Too much? Let me know . . . ." CP 625. And while claiming an exemption on the one hand, the KCPA too has voluntarily described the contents of the document. The County voluntarily discloses the fact that this document "includes Kultin's identifying information . . . and notes an absence of any felonies, warrants, protection orders, or arrests, with exception of a 1997 immigration and naturalization service arrest that includes no particular details." CP 31. Thus the KCPA describes in detail the contents of the very document that it seeks to withhold.

But it is settled that "voluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption. . ." *Dow Jones & Co. v. US DOJ,* 880 F.Supp. 145, 150-51 (S.D.N.Y. 1995). The same is true of a PRA exemption. The KCPA cannot say, "we claim this exemption and so we won't show you this document, but trust us, this is

what it says . . ." Having disclosed what the document says, the KCPA must release the document.

In *New York Times v. US DOJ*, 756 F.3d 100 (2nd Cir. 2014) the Government withheld a classified Memorandum prepared by legal counsel for the Department of Defense. This Memorandum contained the government's legal analysis of why it was lawful for the United States to kill American citizens with drone aircraft. Ordinarily, this document would be exempt from disclosure under the FOIA, but the Second Circuit held that the applicable exemptions were waived when the DOJ voluntarily disclosed the content of the Memorandum by officially releasing a 16-page DOJ White Paper that contained the same content as the Memorandum. *Id.* at 116.

Similarly, since the KCPA's attorneys have disclosed the contents of informant Kultin's criminal history record by describing it in their brief, they cannot simultaneously withhold the document. Having described its contents, any exemption it may once have enjoyed has been waived. The NCIC document should be released without redactions.

VII. REQUEST FOR AWARD OF ATTORNEYS FEES AND COSTS

A. Fees Requested Pursuant to RAP 18.1 and CR 37(a)(4).

Because the County and the United States unjustifiably refused to permit the deposition of Detective Carver to take place, and failed to seek

a protective order, Mockovak is entitled to an award of fees for his reasonable expenses incurred, including attorney fees, in obtaining an order to compel. CR 37(a)(4). He should also receive a fee award for his expenses reasonably incurred in the prosecution of this appeal. "[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal." *Sharbono v. Universal Underwriters Ins. Co.,* 139 Wn. App. 383, 423, 161 P.3d 406 (2007).

B. **Fees Requested Pursuant to RAP 18.1 and RCW 42.56.550(4).**

When a records requester prevails in an action challenging the withholding of documents in a Public Records Act case he is entitled to an award of attorney fees and costs pursuant to RCW 42.56.550(4). *ACLU v. Blaine Sch. Dist.,* 95 Wn. App. 106, 117, 975 P.2d 536 (1999). Attorney fees on appeal are included. *PAWS v. University of Washington*, 114 Wn.2d at 690. To the extent that this Court holds that some of the redactions claimed by the KCPA were improperly claimed (for any of the reasons in Argument sections D through I), Mockovak will be the prevailing party, and as such he requests an award of his fees and costs.

VIII. CONCLUSION

For these reasons Appellant Mockovak asks this Court:

1. To hold that the Superior Court erred when it denied Mockovak's motion for an order compelling Detective Carver to submit to

a deposition; and to remand with directions that such an order be granted; and that Detective Carver may not decline to produce public records on the ground that such records are "owned" or "possessed" by the Department of Justice. Any documents that Detective Carver used in the prosecution of the state court criminal case against Mockovak must be produced, either directly to Mockovak, or if there is a claim that they contain privileged material, they must be surrendered to the Superior Court for in camera review.

2. When conducting its *de novo in camera* review of the unredacted copies of the redacted documents which the KCPA filed under seal, this Court should rule that all the documents in Categories B and C must be produced to Mockovak either because (a) they never had any work product protection since they were not prepared in anticipation of litigation; or (b) because any work-product protection they once might have had was lost when they were disclosed to third parties.

3. To examine *all* the sealed unredacted documents, not just those in Category A, and to order the disclosure to Mockovak of any redacted material that contains either exculpatory evidence or impeachment evidence that Mockovak could have used to impeach informant Kultin.

4. And to award Mockovak his reasonable attorneys' fees and costs incurred in this court and in the court below.

Respectfully submitted this 14th day of June, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
James E. Lobsenz WSBA #8787
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., 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 the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

Attorneys for Defendant
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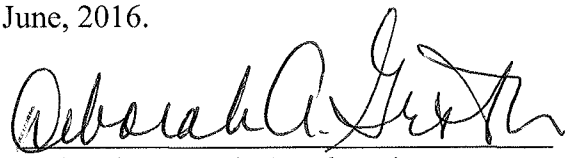
Peter.Winn@usdoj.gov

DATED this 15th day of June, 2016.



Deborah A. Groth, Legal Assistant

APPENDIX A

Code of Federal Regulations

Title 28 - Judicial Administration

Subpart B—Production or Disclosure in Federal and State Proceedings
Source:Order No. 919-80, 45 FR 83210, Dec. 18, 1980, unless otherwise noted.

§ 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term *employee of the Department* includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(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.(d)

This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

APPENDIX B

Code of Federal Regulations

Title 28 - Judicial Administration

§ 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.