74459-3

No. 74459-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Appellant,

v.

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

Respondents,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Theresa Doyle

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This case seeks the production of public documents. The documents are especially significant because they will assist in uncovering potential governmental misconduct, specifically an illegal effort to conceal benefits promised to a non-citizen government informant in return for his testimony in a criminal proceeding.

In their efforts to prevent disclosure of documents that would uncover what transpired, the United States and the County contend that the federal government can eliminate protections afforded by state law simply by having federal and state law enforcement officers work together. According to the United States, and shockingly acquiesced in by the County, so long as a Seattle Police Detective works on a joint task force with the FBI, the Seattle Police Detective is no longer subject to the laws of the State of Washington. That is not the law.

> The great innovation of [the Constitution's] design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" . . .. ***The Constitution contemplates that a State government will represent and remain accountable to its own citizens.***

Printz v. United States, 521 U.S. 898, 920 (1997) (emphasis added). The United States and the County attempt to turn that principle on its head. [1]

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[1] See R. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U.L.Rev. 870, 945-46 (2015) ("Some of the most basic and universal features of American police departments exist to facilitate political accountability ... *Joint task forces do not share*

(Footnote continued next page)

As part of their efforts to conceal what actually occurred, the United States and the County seek to prevent the disclosure of documents on the ground that they are work product. But it is black-letter law that the party asserting work product must come forward with evidence – not theories or arguments, but evidence – to prove that the documents' authors had either a *subjective* belief that they were going to be involved in litigation and an objectively reasonable basis for such a belief. Without citing to *any* evidence the County simply asserts the federal attorneys created these documents in anticipation of litigation. The government does not get a pass on the requirement to present evidence just because it is the government. That is especially so when the documents bear upon whether the government itself engaged in illegal conduct.

Nor should the County be permitted to avoid disclosing documents based upon the common interest doctrine. The County has failed to carry its burden to establish that it agreed to share confidential information as part of a common interest prosecution. The County and the United States did not jointly prosecute Mockovak. To the contrary, the United States

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these accountability-promoting features. ... This muddling of responsibility is particularly troubling because joint law enforcement task forces commonly engage in precisely those activities that local jurisdictions might well restrict ...") (italics added).

Accord Herman, *Collapsing Sphere: Joint Terrorism Task Forces, Federalism and the War on Terror*, 41 Willamette Law Review 941, 941-42 (2005): "These hybrid federal/local law enforcement programs . . . have muddled the lines of authority and accountability that have characterized our dual sovereignty model of federalism."

decided not to prosecute Mockovak and a County Senior Deputy told a Superior Court judge that even if the Court dismissed the pending state criminal court charges, the federal government probably would *not* prosecute Mockovak. CP 307-08. Moreover, the same county prosecutor represented that rather than working cooperatively with the County, "the FBI has denied the County prosecutors' requests for further information." CP 570. Despite these undisputed facts, the County argues – but does not present evidence – that it disclosed documents to federal attorneys only as part of an agreement to keep all of the information confidential based upon a common interest. This Court should reject the County's argument.

The County also argues that there was no waiver of work product protection when it disclosed information to witness Daniel Kultin. As one federal court has noted, if such disclosures could be cloaked in secrecy then even the most blatant coaching of a witness could be hidden. *SEC v. Gupta*, 281 F.R.D. 169, 173 (S.D.N.Y. 2012). This Court should reject the County's argument.

As the transcript of the summary judgment hearing shows, it was the County that brought the *Roth*[2] case to the Court's attention and urged the Court to follow it. RP 30-31 (Appendix A). The County now concedes that the "balancing test" applied in *Roth* is *not* applicable in the

[2] *Roth v. Dept. of Justice*, 642 F.3d 1161 (D.C. Cir. 2001).

work product context, and thus admits that the Superior Court erred it directed the parties to furnish the court with materials that would assist the court in applying the *Roth* "balancing test." CP 1393. *Brief of Respondent County ("BORC")*, at 9 & 37. This Court should find that the Superior Court applied the wrong legal standard when it conducted its in camera review.

II. ARGUMENT

A. THE UNITED STATES CANNOT PROPERLY PREVENT A SEATTLE POLICE DETECTIVE FROM COMPLYING WITH A WASHINGTON STATE COURT SUBPOENA.

1. Carver did not cease to be a Seattle Police Department Detective when he also became a Special Deputy United States Marshal.

Detective Carver took an oath and thereby became a Special Deputy United States Marshal who was "designated" as a Task Force Officer ("TFO"). CP 1376. In the legal opinion of Greg Jennings, FBI Division Chief Counsel, once this oath was administered, Detective Carver became a Special Federal Officer who "receives his assignments from a Supervisory Special Agent of the FBI, is under the day to day supervision and control of the FBI, . . . and [who] is required to comply with the investigative and administrative requirements of the FBI and the DOJ." CP 1376. Jennings stopped short of opining that Carver *was* an officer or an employee of the United States, stating only that all FBI Task

Force officers "and TFO Carver in this case, are ***considered to be*** appointed federal officials, who are subject to the supervision, jurisdiction and control of the Attorney General of the United States" for purposes of the DOJ's own regulations. CP 1376 (emphasis added).

In support of his legal opinion, Jennings stated that "[p]eriodically, investigations conducted by Special Agents and TFOs will be prosecuted in state court." CP 1376-77. But his opinion is striking for what it fails to mention. Carver testified for the prosecution in the state court trial. When asked, "How are you employed?" Carver replied simply, "I'm a Seattle police detective." CP 175, 1204, 1226.

Although Carver repeatedly identified himself as "a commissioned and sworn law enforcement officer of the Seattle Police Department" (CP 616, 1204, 1206), Jennings never even mentioned the fact that Detective Carver worked for the Seattle Police Department. Instead Jennings studiously avoided saying anything at all about what status or employment Carver had *before* he was sworn in as a Federal Task Officer. But Jennings did make this strange statement: "The fact that a matter is prosecuted in state court as opposed to federal court ***does not convert the status*** of a federal law enforcement officer, whether that federal law enforcement officer is an FBI Special Agent or an FBI TFO, ***to the status of a state actor.***" CP 1377 (emphasis added).

As the quoted language shows, Jennings bases his analysis on the absence of any "conversion" of Carver into a state actor. But Jennings' presentation is disingenuous. Jennings either (1) falsely implies that Carver was never a state law enforcement officer, or (2) suggests that once Carver took an oath to become a deputy marshal and became a "Special Federal Officer" he *ceased* to be a state law enforcement officer. Appellant submits that this is a dishonest portrayal of Detective Carver's status. Just because Carver became a Joint Task Officer or a Special Federal Officer does not mean that he *ceased* to be a city police officer or that he *lost* his status as a state actor.

By simply ignoring Carver's status as a state officer, the United States seeks to evade the legal issue of whether it is unconstitutional for the FBI to prohibit a state police officer from complying with a state court subpoena, or with the requirements of a state law such as the Public Records Act, by simply directing him not to comply.[3]

Ignoring the fact that Carver is a Seattle Police Detective, the United States argues that the sovereign immunity of a federal employee insulates Carver from state court process. *Brief of Intervenor-United States* ("*BOIUS*") at 25. The United States purports to rely on *Boron Oil Co. v.*

[3] The United States has never identified either the lawyer who instructed Carver not to obey the deposition subpoenas (CP 1201, 1230-31, *see* Appendix B), or the lawyer to whom Carver turned over the public records in his possession.

Downie, 873 F.2d 67 (4th Cir. 1989) and *State v. Vance*, 184 Wn. App. 902, 339 P.3d 245 (2014). But unlike Detective Carver, the employees in those cases were *solely* federal employees.[4]

2. Long ago the Supreme Court held that when a state jailer takes custody of a federal prisoner from a U.S. Marshal, he remains a state officer whose actions *cannot* be controlled by the federal government.

The United States also ignores cases like *Randolph v. Donaldson*, 13 U.S. 76 (1815) which show that the Framers understood that state officers were not stripped of their state sovereignty just because they worked cooperatively with federal agencies. *Randolph* involved a dispute between a state jailer and a U.S. Marshal. The State jailer agreed to assist the U.S. Marshal by housing his federal prisoner. But by agreeing to do this the state jailer did not agree to submit to the control of the U.S. Marshal and he did not forfeit the sovereignty of the State: "The marshal has no authority to command or direct the keeper in respect to the nature of the imprisonment." 13 U.S. at 86.[5]

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[4] Jack Downie was an "On Scene Coordinator" employed by the Environmental Protection Agency with no state government position whatsoever. In *Vance*, no one contended that FBI Agent Alfred Burney and ICE Agent Julie Peay held state positions.

[5] "From the outset of our constitutional experience . . . reception of federal prisoners in state jails was understood to be the result of voluntary assistance provided to the federal government by a coequal sovereign." R. Chen, *State Incarceration of Federal Prisoners After September 11*, 69 Brook. L. Rev. 1335, 1346 (2004), citing to *Printz*, 521 U.S. at 909-10. Thus, even when a state official and a federal official participate in a kind of "joint incarceration task force," working together to provide jail space for federal prisoners, the state official remains completely free from federal control and subject to state laws. The Supreme Court has consistently adhered to the *Randolph* decision.

(Footnote continued next page)

The United States does not even attempt to explain how it could constitutionally order a police officer not to produce his own investigative police records in response to a state subpoena, and compel him to hand those records over to a federal attorney, without violating the Tenth Amendment, when the United States cannot even control how a state jailer confines federal prisoners housed in a state jail pursuant to a *statutorily* authorized agreement between a state and federal agency.[6]

3. A citizen's right to be protected by the laws of his State does not simply disappear if the individual officer doesn't object to being told what he can and cannot do by the federal government. The *Bond* decision recognizes that a citizen has standing to object to violations of the principle of federalism.

Mockovak contends that the federal government violated the Tenth Amendment and the constitutional principles of federalism set forth in

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Pointing to *United States v. Logue,* 412 U.S. 521, 529 (1973), one scholar notes that "[t]his characterization of state jail officials as acting exclusively as creatures of state sovereignty even when housing federal prisoners has been embraced in modern cases as a matter of federal statutory interpretation by the United States Supreme Court." Chen, *supra,* at 1348. In *Logue* the federal government contracted with State jailers to house its prisoners and argued that it had the right to control how the State operated the jail. But the Court *rejected* this contention, holding a federal/state prisoner housing agreement authorized by statute "gives the United States no authority to physically supervise the conduct of the jail's employees." *Logue*, at 529-30.

[6] The United States also attempts to rely on *Logue* to support its sovereign immunity argument. But *Logue* simply held that the federal government could not be held liable under the Federal Tort Claims Act for the negligence of county employees of the state jail because the county employees were *not* employees of the United States. This holding actually supports Mockovak's argument that because Detective Carver is *not* an employee of the United States, the federal statute (the Housekeeping Act) upon which the United States relies, which gives federal agencies the power to control their "employees," does *not* authorize the DOJ to adopt regulations to control the conduct of a city police officer like Carver, because the DOJ does *not* employ him.

Printz v. United States, 521 U.S. 898 (1997). There the Supreme Court held that the Federal government may neither issue directives requiring the States to address certain issues, nor command States' officers to enforce a federal regulatory program. *Id.* at 935.

The United States argues that *Printz* is not controlling because *Printz* prohibits the Federal government only from ordering State officers to do things that they do not want to do.[7] According to the United States, the Seattle Police Department has no objection to being ordered to disobey subpoenas, to withhold public records in the possession of its officers, and to give those records to a federal lawyer who then will refuse to provide them to anyone in the state court system. *BOIUS*, at 23-24. There is nothing in the record to support that assertion.[8]

But even assuming, *arguendo*, that there was something in the record to support the contention that the Seattle Police Department and/or Detective Carver followed these federal commands "voluntarily," that would not suffice to evade *Printz* or to cure the constitutional problem.

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[7] The United States contends that "[t]he [*Printz*] Court reasoned that the Tenth Amendment prohibits the 'compelled enlistment' of state officials who 'object to being pressed into federal service' without the option of opting out. *Id.* at 905. This logic does not strip a local law-enforcement agency of its power to *voluntarily* assign one of its officers to the FBI. Nor does it prevent the FBI from requiring that officer to comply with federal regulations as a condition of the assignment."

[8] The only evidence in the record as to what Detective Carver wanted to do is Carver's phone message statement announcing that he felt he was "caught in the middle." CP 1201. That message does not provide any support for the idea that Detective Carver "voluntarily" gave the records in his possession to an unnamed lawyer.

The flaw in the United States' argument is that it assumes that the rights secured by the Tenth Amendment belong to Detective Carver alone, or perhaps to Detective Carver and the Seattle Police Department. The erroneous assumption is that Mockovak has no standing to complain if a Seattle police officer "voluntarily agrees" to follow the orders of an attorney or a Special Agent who works for the FBI.

But Mockovak – like any other citizen – does have standing to complain about violations of state sovereignty and the Tenth Amendment. American "citizens . . . have two political capacities, one state and one federal, each protected from incursion by the other . . .." *Printz*, at 920. "This separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921. Quoting from the *Federalist No. 39* the Court noted that due to the division of power between two governments "a double security arises to the rights of the people." *Id.* at 922.

In *Bond v. United States*, 131 S.Ct. 2355 (2011), the Supreme Court *expressly* held that the Tenth Amendment protects the freedom of citizens from the Federal Government and that citizens *do* have standing to assert these rights. "The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State." *Id.*, at 2363-64. Besides protecting State governments and state officers, federalism

and the Tenth Amendment also protect individuals:

> State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.

Bond at 2364, quoting *New York v. United States,* 505 U.S. 144, 181 (1992). "Federalism secures the freedom of the individual." *Id.* Consequently, "the individual liberty secured by federalism is not simply derivative of the rights of States" and [f]idelity to principles of federalism is not for the States alone to vindicate." *Id.*

> Federalism also protects the liberty of all persons within a state ***by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.*** [Citation]. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.

Bond, 131 S.Ct. at 2364 (emphasis added).

In the present case, therefore, federalism protects "the liberty of all persons" – including Mockovak – to make sure that the promulgation of a regulation by the Department of Justice in excess of its delegated constitutional powers "cannot direct or control the actions" of state officers like Detective Carver by forcing him to disobey subpoenas, or to disregard the command of the Washington Legislature that the public records of this State be made available to its citizens by transferring custody of those records to a federal actor who claims (erroneously) to be beyond the reach of state court process.

In *Bond* no state official objected to the assertion of federal power to prosecute the defendant for an act that was arguably beyond the power of the United States to prosecute. Nevertheless, the Court held that defendant Bond had standing to object based upon principles of federalism and on the Tenth Amendment.[9] Even if the record supported the contention of the United States that no state officer objects to the orders given by the unnamed FBI lawyer, that would be irrelevant. Mockovak, like Bond, has standing to object, and he does so object.

In addition to harming Mockovak, the violation of the federalist structure of our government also harms all the citizens of Washington by depriving them of the means to hold their own state officers accountable when those officers participate in joint federal/state task forces.[10]

In this case, according to the United States we have a state law enforcement officer who – because he is "assigned" to a Joint Task Force where he works with a federal FBI agent – is no longer subject to supervision by the Seattle Police Chief, or the Mayor of Seattle, or the Seattle City Council. Instead the United States argues that he must answer to a Supervisory Special FBI Agent, who in turn answers to Attorney General Loretta Lynch. Thus, Washington voters have no way of holding

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[9] "She is not forbidden to object that her injury results from disregard of the federal structure of our Government." *Id.* at 2366-67.

[10] *See generally New York v. United States,* 505 U.S. at 168-69.

them accountable should they decide to direct Detective Carver to violate Washington State law. In fact, in this case the record of the criminal trial shows that the FBI *did* authorize Detective Carver to violate Washington law, because a Supervisory Special FBI Agent authorized Carver to violate Washington's Privacy by engaging in what the FBI calls "Otherwise Illegal Activity." See Trial Exhibit No. 63 (Appendix C).

The inability of a State to hold its own officers accountable is precisely the vice that the Supreme Court identified in both *New York v. United States* and in *Printz*.[11] And yet contrary to *New York* and *Printz*, the United States contends that whenever a State police officer joins a joint federal/state task force he becomes a Special Federal Officer and ceases to be subject to the laws of Washington State. The United States claims that as a result of joining a joint FBI task force, Washington courts lose both the power to enforce subpoenas served upon such Washington police officers, and the power to enforce laws guaranteeing State citizens access to the records of their own government.

Appellant Mockovak respectfully submits that under *Printz* and *New York* the federal government violated the constitutional principles of federalism and the Tenth Amendment by interfering with the sovereignty

[11] "[E]ven when Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166; *Printz*, 521 U.S. at 924.

of Washington State. This Court should reverse and remand with directions that Detective Carver must produce the subpoenaed documents which relate to the FBI informant Daniel Kultin and his immigration and citizenship problems and concerns.[12]

B. THE RESPONDENTS FAILED TO CARRY THEIR BURDEN OF PROVING THAT THE FEDERALLY AUTHORED E-MAILS (1) WERE "PREPARED IN ANTICIPATION OF LITIGATION," AND (2) THAT THEY WERE PREPARED BY OR FOR "A PARTY."

1. The Respondents presented no proof whatsoever that the federal attorneys anticipated federal litigation at the time they prepared their letters and emails.

"[T]he burden of proof rests with . . . the party asserting the 'work product' doctrine to demonstrate that the notes were prepared in anticipation of litigation." *Sandberg v. Virginia Bankshores, Inc.*, 979 F.2d 332, 335 (4th Cir. 1992).[13] "[T]he burden is on the party claiming protection to show that anticipated litigation was the "driving force behind the preparation of each requested document." *In re Professionals Direct Insurance,* 578 F.3d 432, 439 (6th Cir. 2009).

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[12] Of course this entire constitutional issue can be avoided simply by ruling that such joint task officers are not "employees" of the United States.

[13] *Accord Holmes v. Pension Plan of Bethlehem Steel*, 213 F.3d 124, 138 (3rd Cir. 2000); *Mullins v. Department of Labor of Puerto Rico*, 269 F.R.D. 172, 175-76 (D. Puerto Rico 2010) ("As the party seeking protection from the privilege, it has only made conclusory statements that the document was made in anticipation of litigation and has not offered facts, evidence or any other proof to support its contention. Without such proof to support its position, the defendant has not successfully carried its burden of proof to show that privilege applies to the contested document."). "If that burden is not met, the court's inquiry ends and the documents must be produced." *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 473 (6th Cir. 2006).

If the party resisting disclosure demonstrates that a document *is* protected work product, *then* the party seeking disclosure of the document bears the burden of proving substantial need for the document and an inability, without undue hardship, to obtain the document by other means. But *first* the party resisting disclosure bears the burden of proving that the document constitutes work product. The party resisting disclosure must prove that the document was prepared in anticipation of litigation and that it was prepared by a party.[14]

To prove that a document was created in anticipation of litigation the party asserting work product must meet both a subjective and an objective test. The party must show that there was "a subjective belief that litigation was a real possibility, and that belief must have been objectively

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[14] Relying upon *Block v. City of Gold Bar*, 189 Wn. App. 262, 280, 355 P.3d 266 (2015), the County claims that if the government asserts work product that assertion suffices to prohibit disclosure unless the "requestor bears [the] summary judgment burden to show otherwise." *BORC*, at 16, n.12. The County insinuates the "burden to show otherwise" is a burden of persuasion. But in fact, the Court in *Block* was referring only to the ordinary burden of production that requires a party resisting summary judgment to offer something to create a genuine issue of disputed fact:

"Block failed in her burden to show that any genuine issue of material fact regarding these records. If she believed the claims of exemption were invalid, she could have sought in camera review of these records. But she did not. Moreover, she has failed to call our attention to anything in this record where she provided evidence, not mere allegations, to show the existence of any genuine issue of material fact that the records were not exempt." *Id.*

In contrast, in the present case, neither the United States nor the County offered any evidence to suggest that the documents authored by the federal attorneys were prepared in anticipation of any federal litigation. Since neither Respondent presented any evidence to support even the slightest inference that the federal attorneys were anticipating litigation at the time they created the federal documents, the Respondents were the ones who failed to carry their burden of proof.

reasonable." *In re Sealed Case,* 146 F.3d 881, 884 (D.C. Cir. 1998).

A party may satisfy its burden of showing anticipation of litigation "in any of the traditional ways in which proof is produced in pretrial proceedings such as affidavits made on personal knowledge, depositions, or answers to interrogatories . . ." *Toledo Edison Co. v. G.A. Techs., Inc.*, 847 F.2d 335, 339 (6th Cir. 1988).[15] Where an "undisputed affidavit . . . is specific and detailed to indicate that the documents were prepared in anticipation of litigation or for trial," then the party claiming work product has met its burden. *Id.* at 341. However, application of the work product privilege will be rejected where the only basis for the claim is an affidavit containing a "conclusory statement." *Guardsmark Inc. v. Blue Cross & Blue Shield,* 206 F.R.D. 202, 210 (W.D. Tenn. 2002).[16]

In the present case neither the County nor the United States submitted any such proof. The Respondents did not even offer a conclusory statement from someone claiming personal knowledge. *No one* testified that the documents in question were created in anticipation of

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[15] *Accord Safeco Ins. Co. v. M.E.S., Inc.*, 289 F.R.D. 41, 50 (E.D.N.Y. 2011) ("***It is particularly important that the party opposing production*** of the documents, on whom the burden of proof as to privilege rests, ***demonstrate by specific and competent evidence*** that the documents were created in anticipation of litigation.") (emphasis added).

[16] "There has been no showing that a lawyer, or any representative of Guardsmark, had a subjective belief that litigation was a real possibility, and, even if someone had such a subjective belief, it would not, under the circumstances, have been objectively reasonable." *Id.* at 210. *Accord Mullins,* 269 F.R.D. at 175-76 ("[party asserting work product] has only made conclusory statements that the document was made in anticipation of litigation and has not offered facts.").

litigation. The authors of the federal documents were attorneys Kipnis, Bennett, Lombardi, and a paralegal named Seilinger. None of them submitted an affidavit. None of them claimed that when they wrote their emails or letters they wrote them because they had a subjective belief that the United States was going to become a party in litigation.[17]

It is not enough that future litigation is theoretically possible; a party claiming work product protection must present evidence that future litigation was actually anticipated by the party who prepared the document.[18] In *Holmes*, for example, the plaintiffs sued the administrators of their pension plan for interest on benefits that were not promptly paid to them. Prior to filing suit, the plaintiffs brought an administrative claim with the plan administrators. This prompted an attorney for the plan to prepare a legal memorandum analyzing the merits of the plaintiffs' claim for interest. When the claim was denied, the plaintiffs sued and in discovery they sought disclosure of the memorandum. The plan resisted disclosure claiming that the memorandum never would have been prepared but for the possibility that the plaintiffs were going to bring a

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[17] In contrast, compare the affidavit examined by the Court in *In re Sealed Case*, 146 F.3d at 886, where the attorney affiant explicitly stated, "I was further aware that the NPF had been criticized . . . as an organization used . . . to evade federal campaign finance laws, and thus I had a significant concern that litigation over this issue was probable."

[18] "The exemption does not afford a government agency the right to block disclosure of documents because of some possible relevance to a future hypothetical dispute." *Yakima Newspapers v. City of Yakima*, 77 Wn. App. 319, 325, 890 P.2d 544 (1995).

lawsuit, which, in fact, they later did bring. The Third Circuit held that it was abuse of discretion to conclude that the legal memorandum was protected work product because there was no evidence presented to show that future litigation was actually anticipated. *Holmes,* 213 F.3d at 139.[19]

2. Whether material was prepared in anticipation of litigation requires examination of the specific facts regarding the expectations of the parties at the time the document was created.

On November 18, 2010, Mockovak's trial counsel filed a motion in the alternative seeking either an order suppressing all evidence obtained by federal agents or an order dismissing the state court prosecution. CP 603. The Superior Court never ruled on the motion; instead, the motion to dismiss became moot when, on December 13, 2010, the prosecutor told the Court that Mockovak and the United States had reached a compromise agreement under which Mockovak would be given all of the discovery that he needed. CP 641, 1806.

In this PRA appeal, the County prosecutors argue that Robinson's dismissal motion shows that there was a "prospect" of federal court

[19] "***There is nothing in the record indicating that the Defendants have carried their burden of showing that the memorandum was, in fact, prepared in anticipation of possible litigation.*** . . . The mere fact that the memorandum was prepared "in connection with" Plaintiff Holmes' administrative claim to interest on his delayed benefits hardly establishes that it was prepared in anticipation of litigation. The Magistrate Judge abused his discretion in assuming otherwise." (Emphasis added). *Accord Diversified Industries v. Meredith*, 572 F.2d 596, 603-04 (8th Cir. 1977) (not enough that conduct might result in litigation of some sort in the future); *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980) ("the DOE has failed to carry its burden of establishing that litigation was fairly foreseeable at the time the memoranda were prepared").

litigation at the time the documents were created. According to the County, all of the federally authored documents are exempt under the work product doctrine because they were all created "in anticipation of" the possibility of federal court criminal prosecution. The County argues that this possibility "continued to loom even after state charges were filed" and that federal criminal charges were "almost certain to follow" if the defense motion to dismiss the state court charges had been granted. *BORC*, at 19. The County's arguments miss the mark.

First, the County offers no evidence to support its argument. ***No one*** testified that they wrote their document in anticipation of a federal court criminal prosecution which they believed was likely to occur in the future. Since no evidence was presented the County's theory is simply that – a theory –and a theory without any evidence to support it does not suffice to carry the County's burden of proof.[20]

Second, the County's theory ignores the chronology of events. As the chart in Appendix D shows, 14 of the 19 federally authored documents were created ***before*** the motion to dismiss was filed in November of 2010. The County simply asks this Court to assume that when these documents

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[20] *See, e.g., Bowne v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993) ("Putting to one side the court's repeated, explicit directions to the parties that they rely upon competent evidence, we must reject AmBase's argument because its privilege log, unsupported by any evidence, is inadequate to sustain its [work-product] claims."

were written, their federal authors anticipated (1) that Mockovak's attorney was going to file a motion to dismiss at some point; *and* (2) that it was likely that the Superior Court would grant the motion to dismiss; *and* (3) that after a state court dismissal was granted the United States Attorney would then decide to file criminal charges against Mockovak in federal court. Therefore, the County would have this Court *assume* that the federally authored documents, many of which were created in November and December of 2009, were created "in anticipation of litigation" that was likely to be commenced more than a year later, after the state court charges had been thrown out.

Third, the County's argument to this Court ***conflicts*** with the argument that the County made to the Superior Court judge who heard argument on the motion to dismiss on December 13, 2010. On that date Senior Deputy Storey told Judge Robinson that she should *not* assume that if she dismissed the State court charges, that there would then be a federal prosecution; on the contrary she told Judge Robinson that federal prosecutors "probably" would *not* file charges. CP 307-08.[21] So in 2010

[21] "And before we get too far into things today, I want to clear up what I think is probably some confusion that was created in this courtroom on this case last Monday, and that has to do with the position of this case in the state court relative to federal court, and whether or not the feds will just take the case from this court."

"I don't know as I stand here if this is important or relevant to the court, but I think that we ought to have it on the record that – and I spoke with the U.S. Attorney's office

(Footnote continued next page)

the King County Prosecutor's office told a judge that federal prosecution probably would *not* happen, but in 2016 the same office is telling this Court the exact opposite and arguing that the federal prosecutors authored these documents, because they anticipated that they *would* be bringing a federal prosecution. This behavior is condemned by the judicial estoppel doctrine which prohibits a party "from asserting a particular position in a judicial proceeding and later taking a clearly inconsistent position in order to gain an advantage." *Harris v. Fortin*, 183 Wn. App. 522, 333 P.3d 556 (2014). This Court should not even entertain the County's argument.

Fourth, the County attempts to paint attorney Robinson as the one misleading the Superior Court. The County argues that Robinson told the Superior Court trial judge that the United States would surely prosecute Mockovak if the Superior Court dismissed the state court charges. *BORC*, at 19. But the record shows this is untrue.[22] In fact, attorney Robinson

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last week – we are not privy to the reasons they initially declined the case. We have no idea why they declined the case. We know that they preferred to send it to us.

"We don't know if the case at the time met their filing standards. We know they haven't reviewed the case since they declined it, which is over a year. ***We have no idea, if they were to review the case now,*** how long it would take or ***whether it would now fit their filing standards.***

"***I would suggest that it probably doesn't, because I don't think – if it didn't meet their filing standards earlier, I doubt that it would now meet their filing standards.*** So the argument that it's just automatic that the feds would take this case, if we were to dismiss it is a fallacy." (Emphasis added).

[22] More than a year after the trial had ended, *after* Mockovak raised a claim of ineffective assistance based upon Robinson's failure to make a motion to suppress the recorded conversations which constituted the state prosecutors' entire case, *then* attorney Robinson asserted that if he had brought such a motion, and if he had won it and thus

(Footnote continued next page)

was careful to tell the trial judge that he was *not* saying that federal prosecution was a sure thing, or even that it was likely. He was addressing a possible concern that there could be a gap in time between the dismissal of the state charges and a decision by the federal authorities whether to proceed. He said that if the state court charges were dismissed, the dismissal could be timed so as to give the federal prosecutors adequate time to see if they wanted to file criminal charges. CP 308-09.[23]

In sum, the County simply argues that since federal prosecution became a theoretical possibility in November of 2010, and remained a theoretical possibility until December 13, 2010, that this Court should assume – without any evidence to show it – that the federal attorneys who wrote the documents were anticipating federal litigation at the time they created the documents nearly a year earlier. The County refuses to

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garnered a dismissal of the state charges, that he believed the federal prosecutors would have decided to file federal criminal charges. But this assertion actually contradicts what Robinson told the trial judge in the fall of 2010. CP 308-09.

Of course, one of the reasons the federal prosecutors declined to charge the case in the first place is that Mockovak was asserting the defense of entrapment, and in federal court the prosecution bears the burden of proving the absence of entrapment beyond a reasonable doubt, whereas in state court the defendant must prove the existence of entrapment. The County offers no explanation as to why this Court should simply assume that the federal government would have decided to prosecute despite having to bear this heavy burden, when it had previously declined to prosecute.

[23] "MR. ROBINSON: . . . ***I'm not suggesting that they would definitely take the case.*** I was trying to deal with the issue of Dr. Mockovak being under conditions of release from some court – to the extent that that was important to the court – and I still think that if the court finds that dismissal is appropriate in this matter, ***you can time that dismissal in a way to give the federal authorities all the time they want to review the case.***" [¶] "***If they choose not to take it, that's their business*** ...." (Emphasis added).

disclose the federally authored documents on the ground that they constitute the work product of the federal attorneys, even though no federal attorney has made that claim, and no evidence was presented from any source to meet the two requirements of showing that these attorneys had a subjective belief that they would later be prosecuting a federal case and that their subjective beliefs were reasonable. Here, as in *Holmes, Mullins, Coastal, Diversified, Guardsmark,* and *Professionals,* this Court should hold that the party claiming the work product exemption has failed to carry its burden of proving that the withheld documents were prepared "in anticipation of litigation."

C. KING COUNTY WAIVED ANY WORK-PRODUCT PRIVILEGE WHEN IT DISCLOSED ITS WORK PRODUCT TO THE FEDERAL ATTORNEYS.

1. To demonstrate waiver, it is not necessary to show disclosure to an adversary.

King County argues that the "work product [privilege] is waived only by disclosure to an adversary." *BORC,* at 20-21, citing *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002). But *Limstrom* does not stand for that proposition. *Limstrom* held that *despite* the fact that there was disclosure to an adversary, there was no waiver because the disclosure was *compelled by a criminal discovery rule* that the prosecutor

had to comply with.[24] The County cites other cases where the appellate court held that a waiver *had* occurred because there had been a disclosure to adversaries. Of course disclosure to an adversary constitutes waiver. But those cases did not have any occasion to rule on whether a waiver occurred by means of disclosure to an entity that was not an adversary. Moreover, this Court has stated the rule of waiver broadly, without mentioning any requirement that the disclosure had to have been made to an adversary.[25] If a party wants to prevent disclosure to an adversary, the documents must have been kept confidential in the first place.

2. The county prosecutors did not secure either a court order, or an agreement requiring the federal attorneys to keep their work product information confidential.

The County ignores cases that hold that a voluntary waiver of the work product privilege "occurs when a party discloses [protected] information to a third party who is not bound [to maintain its confidence]." *Great American Assurance Company v. Liberty Surplus Insurance,* 669 F. Supp. 1084, 1092 (N.D. Cal. 2009), quoting *Bittaker v.*

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[24] Attorney Limstrom sought "offer sheets" regarding plea bargain offers that had been made to other DUI defendants. *Id.* at 136. On remand the Superior Court ruled that any work product privilege was waived by providing them to DUI defense attorneys as part of their criminal discovery. *Id.* at 138. The Court of Appeals reversed holding that there is no waiver when disclosure is made pursuant to a court rule that *compels* disclosure. *Id.* at 147. The Court never said that disclosure to an adversary was a requirement before a waiver could be found. That issue simply never came up.

[25] *See State v. Portch,* 177 Wn. App. 1001, *3 (2013) ("the voluntary disclosure of work product to a third party generally results in a waiver of the privilege.").

Woodford, 331 F.3d 715, 719 (9th Cir. 2003).

The *Bittaker* case is of great relevance since it involves a claim of waiver of work product arising in the context of habeas corpus litigation. Like Mockovak, Lawrence Bittaker was convicted of a crime in a state court. Bittaker sought federal habeas corpus relief, asserting a claim of ineffective assistance of counsel. The question in *Bittaker* was whether the prisoner waived the attorney-client privilege and work product protection only for the duration of the federal habeas litigation, or were they waived for all time and for all purposes, including any possible retrial of the petitioner which might occur in State court if he succeeded in getting his conviction overturned. Before the prisoner waived his privileges, the district court entered a protective order that prohibited the Attorney General from turning over privileged materials to any other attorneys, or to the local prosecutorial agency that would be involved in any retrial. The Attorney General challenged this protective order, and the Ninth Circuit upheld it. Thus, when the state prisoner turned over privileged materials to the California Attorney General in the habeas litigation, the Attorney General ***was bound*** to keep the information confidential. Therefore, prisoner Bittaker's waiver in the habeas proceeding did not waive these privileges for a state court retrial.

In the present case, no court order required the federal prosecutors

to maintain the confidentiality of the state prosecutors' documents and there was no agreement between the state prosecutors and the federal attorneys which obligated the federal attorneys to keep the information confidential. Since the federal prosecutors ***were not bound*** to keep the information confidential, there was a waiver of work product protection.

3. The County's attempt to rely on the common interest doctrine fails.

The County characterizes Mockovak's contention that the state court prosecutors and the federal prosecutors were in conflict with each other as "nonsensical," claiming that there were merely some "frictions between aligned counsel," which can occur even between attorneys employed by the same office. *BOCR*, at 21. The County argues that, "Any assertion that DOJ and PAO attorneys were adverse parties in this instance is readily belied by ***their common investigative and prosecution interests***." *Id.* at 22 (emphasis added). In this manner the County tries to fit this case within the "common interest" exception recognized in *Sanders v. State*, 169 Wn.2d 827, 854, 240 P.3d 1320 (2010).

But the record provides no support for any claim that there was a "common prosecutorial" interest. Instead, the record contains the federal attorneys' flat refusal to supply *Brady* material to the defense with the accompanying assertion: "Here, the United States is not prosecuting Mr. Mockovak. Thus, Mr. Mockovak has no reciprocal right of discovery in

regards to the United States." CP 595. Further, the record contains the County Prosecutor's statement to the trial judge in the criminal case that the United States probably would *not* prosecute Mockovak, *even if the trial judge dismissed the state court charges*. CP 307-08.

Division Three's recent decision in *Kittitas County v. Sky Allphin*, 2016 WL 4648103, provides a useful contrast to the present case. The *Allphin* Court held that the common interest doctrine applied because the record clearly showed that a county agency and a state agency were jointly and cooperatively pursuing "a civil enforcement action" against Chem-Safe, a company that was violating Washington laws regarding the handling of moderate risk waste materials. The case involved emails between a deputy prosecutor representing the County's Public Health Department and employees of the Washington Department of Ecology. The Court found that the sending of such emails did not waive the work product privilege because "the County and Ecology worked cooperatively to enforce the environmental laws and were thus 'on the same legal team.'" *Slip Opinion*, at 7. "[T]he County and Ecology shared a common interest in the enforcement of state and local environmental regulations." *Id.* at 8 (emphasis added). Moreover, the Department of Ecology was "statutorily required" to assist local governments in enforcing regulations pertaining to high risk wastes. *Id.* at 16 n. 6.

In sharp contrast, the record in this case does *not* show that the county prosecutors and the U.S. Attorney's office undertook a joint prosecution of Mockovak. The two agencies were *not* both State agencies, and they were not both federal agencies. The United States *refused* to supply the state prosecutors with the discovery materials that they requested, expressly because the United States was not the prosecuting authority.[26] Finally, no law – state or federal – requires the U.S. Attorney or the FBI to assist the county prosecutors. In sum, the County has failed to demonstrate the common interest exception "to the general rule that the voluntary disclosure of a privileged attorney-client or work product communication to a third party waives the privilege." *Id.* at 13-14.

D. PROSECUTORS NEVER DISCLOSED WHETHER KULTIN HAD AN APPLICATION PENDING WHEN HE TESTIFIED AT THE CRIMINAL TRIAL, OR IF HE INTENDED TO FILE ONE SHORTLY AFTERWARDS.

The County asserts that it ***eventually*** told Mockovak everything about Kultin and his citizenship application and his immigration troubles, so no harm no foul. But this is not accurate. The County simply ignores the timing of its disclosures and the failure to disclose whether a citizenship application was pending ***at the time of trial.*** In an attempt to

[26] As Prosecutor Storey said in her letter to Mockovak's defense attorneys, she had asked the FBI for information about Kultin's immigration difficulties, but ***"[t]he FBI has denied our requests for further information."*** CP 570 (emphasis added).

whitewash the withholding of key factual information the County ignores the following chronology of events:

11/17/09: The prosecution filed a certification of probable cause which erroneously stated that Kultin was a US citizen. CP 411, 464.

5/25/10: The prosecution sent Mockovak's defense counsel 983 pages of additional discovery, and on one of those pages (#4318). FBI Agent George Steuer stated in his report that ***on April 10, 2009,*** Kultin told him that he "is ***currently in the application process*** to become a naturalized U.S. citizen." CP 553.

10/28/10: The prosecution sent an email to defense counsel stating that "Kultin ***is*** a lawful permanent resident, granted asylee status in 1997." CP 599.

1/12/11: Mockovak's criminal trial started.

1/26/11: Kultin finished testifying for the prosecution. CP 492.

Sometime in 2011: According to Kultin,

> He applied for citizenship sometime in 2011. CP 501-02. But he says he cannot remember if his application was pending during the time the trial was taking place. CP 506.

Sometime in 2011: According to Kultin,

> He received citizenship sometime in 2011. CP 491-92.

Now consider how Mockovak's criminal defense counsel was likely to have viewed this information, coming to them as it did. On May 25, 2010, defense counsel received discovery that informed them ***that more than one year earlier in April of 2009*** Kultin said he had a citizenship application pending. The report said absolutely nothing about whether his alleged citizenship application was still pending on any later day in 2009 or on any day in 2010. Nor did it disclose whether that

application had ever been granted, *or* denied, *or* withdrawn.

Now consider the additional disclosure made by the prosecution on October 28, 2010. This disclosure – made by e-mail – informed the defense attorneys that Kultin was not a citizen (contrary to what the defense had been told on November 17, 2009) and that at the present time – October 28, 2010 – Kultin was "a lawful permanent resident." Again, the County would have this Court view this disclosure as saying something about whether or not Kultin had a citizenship application pending on that date. The County wants this Court to infer that this disclosure conveyed the message that Kultin had a citizenship application pending on October 28, 2010, *and* that this was the same citizenship application that had been pending on April 10, 2009. But there is nothing in the record to support that inference.[27] Another possibility is that there was no application pending on that date, but that Kultin *intended* to file a new application in the near future, perhaps right after he finished testifying for the prosecution in the criminal case; that way he could point to the service he had performed for law enforcement as evidence that he would make a fine citizen. There isn't any way of knowing but one thing is for

[27] The truth could have been any number of things: (1) perhaps the same application had been pending continuously since April 10, 2009 and had not yet been acted upon; *or* (2) perhaps that application had been *denied* and no application was pending; *or* (3) conceivably that application had been withdrawn and then later a new application had been submitted which had not yet been acted upon and that second application was pending; *or* (4) no application was pending on October 28, 2010.

sure: the October 28th e-mail *did not* inform Mockovak's counsel that a citizenship application was pending on that date.

Moreover, in light of Kultin's own deposition testimony in this PRA case, it appears that either he filed his citizenship application *during the criminal trial*, or else he filed it later in 2011 shortly after the trial ended. He eventually testified that he applied for and received citizenship in the same year (2011), and that he received citizenship *after* he testified against Mockovak. CP 502-03 (Appendix E).

Kultin agreed that he was in contact with the FBI through the trial. CP 506 (Appendix E). And he said he was granted citizenship sometime in 2011 after the criminal trial of Mockovak was over. CP 492-93 (Appendix E). If Kultin is lying and the government knows it, then the government should have disclosed to Mockovak that Kultin is lying. And if Kultin is telling the truth, then it looks very much like Kultin and someone employed by either state or federal government conspired to make sure that he *didn't* receive citizenship until *after* he testified so that the fact that he was getting rewarded for his testimony against Mockovak could not possibly come out during the criminal trial.

E. THE COUNTY NOW CONCEDES THAT THREE REDACTED DOCUMENTS CONTAIN "IMMIGRATION RELATED" FACTS. THOSE DOCUMENTS SHOULD BE PRODUCED WITHOUT REDACTION.

In its appellate brief the County concedes that there *are* redactions

which *do* involve "immigration related fact[s] concerning Kultin." *BORC*, at 27. The County says there are "only" three such redacted documents – numbers 26, 77 and 99 – and that they contain "references [which] reflect incidental facts that had been disclosed to Mockovak well before his trial and do not, therefore, implicate *Brady*." *Id.*

No. 26 is an e-mail from a state prosecutor to Dani Geissinger-Rodarte, an FBI "Victim Specialist." CP 1046 (Appendix F). Twenty-two minutes before sending this email, she sent Agent Carr an e-mail telling him that she was going to send Kultin an e-mail telling him "to expect her assistance." CP 678. And she *did* send Kultin such an e-mail, and she told him that Geissinger-Rodarte would send him a letter outlining "the assistance she can provide" and that she would "be a great help to you as this case progresses." CP 682. Six paragraphs from No. 26 were redacted.

Now, in light of the County's concession that the redacted paragraphs in the email to Geissinger-Rodarte refer to "immigration related fact[s] concerning Kultin," it is revealed that the prosecutor's email refers to ***both*** "immigration related" facts and the "assistance she can provide" to Kultin. The inference is *very* strong that Geissinger-Rodarte was tasked to provide "immigration related assistance" to Kultin. This is *precisely* the type of *Brady* material that the Constitution requires the government to disclose as the decision in *United States v. Blanco,* 392

F.3d 382, 392 (9th Cir. 2004) demonstrates.[28]

The County has now disclosed that an e-mail between the two county prosecutors *also* discusses "immigration related" facts concerning Kultin (Document 77) and so does a redacted e-mail (Document 99) from one of the prosecutors to Agent Morneau, who works for Citizenship and Immigration Services. All three documents should be disclosed without redactions because all of them apparently refer to Kultin's immigration status and to some form of "assistance" to be provided to him.

Although the County seeks to brush aside its belated concession as dealing only with "redundant" facts, the inference from the content and relationship among the emails should be disclosed. Indeed, if the County is correct that the material is truly "redundant" of information already disclosed, then any work product privilege has been waived by means of those prior disclosures. The redactions should never have been made.

F. DISCLOSURE TO A NON-PARTY WITNESS WAIVES THE WORK PRODUCT PRIVILEGE, EVEN IF THE DISCLOSURE WAS MADE BY A PROSECUTOR HANDLING A CRIMINAL CASE.

It is settled law for decades that, "The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239 (1975). The

[28] "Any competent lawyer would have known that Rivera's special immigration treatment by the INS and the DEA was highly relevant impeachment material."

County claims that there is some kind of work product protected information contained in the state prosecutor's emails sent to Kultin (Documents #100, 109, 110, 111), and that the privilege was *not* waived by disclosing this information to him.

The County cites cases which are clearly not on point,[29] and ignores cases such as *State v. Garcia*, 45 Wn. App. 132, 138, 724 P.2d 412 (1986), where this Court *rejected* the contention that a prosecutor's notes of a witness interview constituted work product that was exempt from disclosure under CrR 4.7(f)(1).[30]

While work-product waiver issues do not frequently arise in the context of criminal litigation, cases such as *SEC v. Gupta*, 281 F.R.D. 169 (2012) demonstrate that prosecutors waive work product protection when they disclose work product to witnesses. In *Gupta*, attorneys from the SEC commenced an insider trading civil enforcement action against Rajat

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[29] For example, the County purports to rely on *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985), noting that the attorney showed documents to "a witness" and the court held there was no waiver. But the County neglects to mention that the witness, Raymond Peil, was the attorney's own client and a party defendant in the case. Thus everything the attorney said to his client in confidence was protected by the attorney-client privilege and nothing was disclosed to a third party. In *Sporck* the issue was whether the work product privilege was waived pursuant to Fed. R. Evid. 612 because the documents were used to refresh the defendant/witness' memory before he testified. This argument was rejected because there was no foundational showing that the documents were used to refresh the witness' memory. That is miles from any issue presented here.

[30] "Our courts, in interpreting CrR 4.7, have also refused to insulate materials from discovery simply because a statement was taken or notes compiled by an attorney," citing *Goldberg v. United States,* 425 U.S. 94, 102 (1976) and *State v. DeWilde,* 12 Wn. App. 255, 257, 529 P.2d 878 (1974).

Gupta, and the United States Attorney's Office for the Southern District of New York ("USAO") brought criminal insider trading charges against him as well. In the civil action, Gupta deposed Lloyd Blankfein, the CEO of Goldman Sachs. Blankfein was a non-party witness. *Id.* at 170. Blankfein testified that he had met with one of the federal prosecutors from the USAO who was handling the criminal prosecution, with at least one FBI Agent, and with attorneys from the SEC. Gupta asked Blankfein "what the SEC and USAO attorneys asked him at these meetings and what documents they showed him." *Id.* The SEC attorneys objected, claiming that answering the question would reveal both SEC and USAO work product information. They instructed Blankfein not to answer. Gupta argued that any work product privilege had been waived. The District Court agreed with Gupta, holding that federal prosecutors cannot show a document to a witness and then assert work product privilege to justify the refusal to disclose that document. *Gupta*, 281 F.R.D. at 173. The court ordered Blankfein to answer Gupta's questions regarding what the federal prosecutors said to him. *Id.*

The county prosecutors in this case are in the same position as the federal prosecutors in *Gupta*. By disclosing work-product to a witness, the County's prosecutors waived any work product protection. Here, as in *Gupta*, this Court should find a waiver and the County should be ordered

to disclose unredacted copies of their emails to Daniel Kultin.

G. THIS APPEAL WAS TIMELY FILED

The County contends that the notice of the appeal in this case was filed prematurely. *BOCR* at 42. This is incorrect. The notice was filed after the Superior Court had disposed of all the disputed claims between the parties. The only act that occurred after the filing of the notice of the appeal was the Court's ministerial act of implementing the County's Offer of Judgment (which Appellant Mockovak had accepted back in December of 2014, and which he is not challenging on appeal), by entering that judgment. CP 1957. The Superior Court entered an order granting summary judgment to the County and denying Mockovak's motion for summary judgment on November 23, 2015. The Court also entered an order denying Mockovak's motion to compel Carver to submit to a deposition on November 25, 2015. CP 1914. Mockovak filed his notice of appeal on December 22, 2015, *after* written entry of both of those orders, and *within* 30 days of both. CP 1918. So the notice of appeal was not filed prematurely.

But even if it was prematurely filed, that would make no difference. The County ignores the unequivocal language of RAP 5.2(g): "A notice of appeal . . . filed after the announcement of a decision but before entry of the decision will be treated as filed on the day following

entry of the decision." He was not required to file another notice of appeal after entry of the judgment which he had accepted more than a year earlier. *See State v. Rundquist*, 79 Wn. App. 786, 905 P.2d 922 (1995) (prosecution's appeal timely when notice filed after FFCL entered but ten months before entry of written order because "RAP 5.2(g) cures any defect in premature notices"); and *Editorial Comment to Rule 5.2* ("a premature notice will not be penalized").

III. CONCLUSION

Appellant asks this Court to vacate the decision below and

(1) to order disclosure of the federally authored documents;

(2) to order disclosure of all the documents that state prosecutors gave to federal attorneys and to witness Kultin;

(3) to conduct a de novo *in camera* review of the redacted documents and to order disclosure of any redacted material that is *Brady* information; and

(4) to remand with directions that the Superior Court shall order Detective Carver to obey the deposition subpoenas, and shall conduct an in camera review of any documents that Carver furnishes in response to those subpoenas.

Respectfully submitted this 12th day of October, 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:

Attorney for Respondent
Michael J. Sinsky
KING COUNTY PROSECUTOR'S OFFICE
516 3rd Ave Rm W400
Seattle WA 98104-2388
mike.sinsky@kingcounty.gov

Attorneys for Intervenor-Respondent United States
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Attorneys, Appellate Staff
US Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530
Michael.Shih@usdoj.gov

DATED this 12th day of October, 2016.

Deborah A. Groth, Legal Assistant

APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

MICHAEL MOCKOVAK, Plaintiff, vs. KING COUNTY, a political subdivision of Washington State; and the KING COUNTY PROSECUTING ATTORNEY'S OFFICE, a local public agency, Defendants.	Cause No. 14-2-25191-2 SEA Appeal No. 74459-3-I

SUMMARY JUDGMENT MOTION

The Honorable Theresa B. Doyle Presiding

October 30, 2015

Transcribed by: Reed Jackson Watkins
206-624-3005

And the people who do these sorts of responses, it's an administrative entity that's making a determination. Just not practical to think that a Public Records Act responder is going to be able to make a Brady determination in a case and determine whether or not a work product document should or shouldn't go out. Those are not -- it's not legitimately the sort of thing that the PRA provides for.

The second response to that is that these cases -- a number of the cases do deal with a different exemption under the Freedom of Information Act. They deal with the privacy exemption. But those comments that these cases are making about how you don't look at Brady, they're dealing with -- that comment is a general principle that's applicable to all the Freedom of Information Act and Public Records Act cases. It's that issue that individual criminal discovery is appropriately related -- raised in the criminal case or post-conviction case where individual rights are adjudicated and it's not appropriate in a PRA case where individual interests, context, motive is irrelevant.

The statements that the courts have made and that make that point clear, they're occurring in this privacy context where the court -- and that's actually a broader exemption or it's a more flexible exemption. They're dealing with a balancing approach there, whether or not there's a general public interest that overrides an individual privacy

interest. So they have greater latitude to look at these sorts of concerns than a work-product exemption review would incorporate.

An example of this is in Roth and there was some discussion about Roth in the reply. That case makes clear that they're not looking at individual Brady claims. "A party's" -- this is a quote from the case: "A party's" --

THE COURT: And you're saying this is in your re- -- Mr. Lobsenz' reply?

MR. SINSKY: The Roth case we initially cited --

THE COURT: Okay.

MR. SINSKY: -- in our opening brief.

THE COURT: All right.

MR. SINSKY: And then there was some criticism of that citation saying, Hey, that didn't even deal with work product; that dealt with a different exemption.

THE COURT: Mm-hmm.

MR. SINSKY: And then our response to that was, Yes, it deals with a different exemption, but it's a general concept that applies to the act in general.

And so I guess a little bit of discussion of that case, they're saying "A party's personal stake in the release of requested information is irrelevant to the balancing of public and third-party privacy interests. FOIA is not a substitute for discovery in criminal or habeas cases. It's

APPENDIX B

Honorable Theresa Doyle

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

MICHAEL MOCKOVAK, Plaintiff, v. KING COUNTY; and the KING COUNTY PROSE CUTING ATTORNEY'S OFFICE, Defendants.	NO. 14-2-25191-2 SEA DEPOSITION SUBPOENA AND SUBPOENA DUCES TECUM DIRECTED TO **LEONARD I. CARVER**

TO: **LEONARD I. CARVER III**
c/o Seattle Police Department

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of your deposition in the above case.

PLACE OF DEPOSITION: Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, Washington 98104 Tel: (206) 622-8020	**DATE AND TIME:** Thursday, August 20, 2015 at 9:30 a.m. **METHOD OF RECORDING:** Court Reporter

YOU ARE ALSO COMMANDED to bring with you to produce and permit inspection and copying the following documents or tangible things:

All documents (letters, emails, text messages, etc.) in your possession that discuss or mention any of the following topics:

(1) Daniel Kultin's citizenship;

(2) Daniel Kultin's immigration status;

(3) Daniel Kultin's desire to obtain U.S. citizenship;

(4) Daniel Kultin's status as an asylee, or as an applicant for asylum in the United States;

(5) any difficulties that Daniel Kultin ever had with U.S. Immigration and Naturalization Services;

(6) any incident wherein Daniel Kultin was arrested;

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

(7) any request that you, or any other law enforcement officer, provide assistance to Daniel Kultin in any citizenship or immigration matter, including, but not limited to, obtaining citizenship for Kultin or a relative of Kultin, obtaining a green card for Kultin or a relative of Kultin, and avoiding deportation or arrest of Kultin or any relative of Kultin by INS;

(8) any document that contains any support for, or endorsement of, Daniel Kultin, for any purpose whatsoever; and

(9) any document authored by any federal, state, or local government agency or agency official regarding Kultin's citizenship or immigration status.

ISSUING OFFICER SIGNATURE:	**DATE:** August 12, 2015
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER: James E. Lobsenz, WSBA No. 8787 Attorney for Plaintiff Mockovak Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, Washington 98104 Tel: (206) 622-8020	

DATED this 12th day of August, 2015.

CARNEY BADLEY SPELLMAN, P.S.

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

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
Michael J. Sinsky
KING COUNTY PROSECUTOR'S OFFICE
516 3rd Ave Rm W400
Seattle WA 98104-2388
mike.sinsky@kingcounty.gov

DATED August 12, 2015.

Deborah A. Groth, Legal Assistant

APPENDIX C

DEFENDANT EXHIBIT 63

FD-759 Revised 07-17-2009 Page 1	FEDERAL BUREAU OF INVESTIGATION **Notification of Authority Granted for Use of Electronic Monitoring Equipment - Not Requiring a Court Order**

Background Information

To:	Date:
SE	8/10/2009
From: SE	For FBI Field Office Use Only CM#:
Contact Name: SA Lawrence D Carr	(•) Consensual Monitoring ( ) Other Electronic Surveillance
Case File ID: 166C-SE-95743	Title Text: Michael Mockovak; Brad Klock (victim); Murder for Hire

OIA Authority for CHS

Are you seeking OIA Authority for a CHS to consensually monitor in a two-party state?

(•) Yes (OIA authority for CHS is only valid for 90 day increments - additional 90 day increments will require submission of another FD-759)

Based upon a thorough review of the aforementioned request, it has been determined that the proposed criminal activity is necessary for the following reason(s):

To obtain information or evidence essential for the success of an investigation that is not reasonably available without such authorization, or

To prevent or avoid the danger of death, serious bodily injury, or significant damage to property, and

The benefits of the activity and evidence to be obtained from the source's participation in the OIA outweigh the risks.

The following points were considered in making the determination:

1. The importance of the investigation;
2. The likelihood that the information or evidence sought will be obtained;
3. The risk that the CHS might misunderstand or exceed the scope of his/her authorization;
4. The extent of the CHS's participation in the OIA;
5. The risk that the FBI will not be able to closely monitor the CHS's participation in the OIA;
6. The risk of violence, physical injury, property damage, or financial lose to the CHS or others; and
7. The risk that the FBI will not be able to ensure that the CHS does not realize undue profits from his/her participation in the OIA.

( ) No (If not OIA, consensual monitoring can be authorized for the duration of the investigation unless the monitoring circumstances substantially change)

OIA approval for a CHS shall be maintained in the appropriate CHS file with a copy placed in the appropriate ELSUR file.

Investigation Classification Level

( ) Unclassified (•) Confidential ( ) Secret

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1. Reason for Proposed Use:	2. Types of Equipment:
Collect Evidence	Body Recorder
	2a. Equipment Concealed:
	On a Person
3. Interceptee(s): (If Public Official, Include Title and Entity)	4. Consenting Party (Identify ONLY on Field Office Copy):
Name: Michael Mockovak	Confidential Human Source ☑ Protect Identity
☐ And others yet unknown	Source #: S-00022169
	4a. The following mandatory requirements have been or will be met prior to Consensual Monitoring taking place:
	○ National Security ◉ Criminal
	☑ Consenting party has agreed to testify;
	☑ Consenting party has agreed to execute the consent form prior to monitoring/recording; &
	☑ Recording/transmitting device will be activated only when consenting party is present.

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FD-759 Revised 07-17-2009 Page 3	FEDERAL BUREAU OF INVESTIGATION **Notification of Authority Granted for Use of Electronic Monitoring Equipment - Not Requiring a Court Order**

5. Location where monitoring will likely occur:	6. Duration of proposed use:
Location (City or County): Renton State: Washington	○ For the duration of investigation (including OIA for FBI employees) ◉ For 90 days (OIA for CHS - renew every 90 days) Expiring On: 11/10/2009 6b. Check box if verbal authority was obtained. ☐

7. Chief Division Counsel (CDC)/Office of the General Counsel (OGC) has been contacted, foresees no entrapment, and has advised monitoring is legal & appropriate.	8. Violations
Name: SA Carrie Zadra Date of Contact: 8/10/2009 ADC Review: Initials: [signature] Date: 8/10/09 Field Office: Seattle	Title: 18 U.S.C: 1958

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9. DOJ approval is required if the requested monitoring includes any of the following sensitive circumstances (Check all that apply):

☐	Monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Level IV or above, or a person who has served in such capacity within the previous 2 years.
☐	Monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any state or territory, or a judge or justice of the highest court of and State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his/her official duties.
☐	Consenting/non-consenting party is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers.
☐	Consenting/non-consenting party is in the custody of the Bureau of Prisons of the U.S. Marshals Service.
☐	Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General for the Criminal Division, or the U.S. Attorney in the district where an investigation is being conducted has requested the investigating agency obtain prior written consent for making a consensual interception in a specific investigation.

10. Synopsis and predicate of Case (the synopsis of the investigation should articulate pertinent, timely facts and predication for which the purpose of the consensual monitoring is requested):

The subject in this case has been communicating with the source for approximately one year with regard to having a former business partner killed. On 08/05/2009, the subject and source met where discussion became obvious the subject was ready to move forward with a plan to bring the plot to fruition. Another meeting was scheduled for 08/11/2009 where it is believed the subject will begin to speak in "plain" language his desires, to include a date for the execution of the planned murder.

Because of this, it would be advantageous in gathering the strongest possible evidence to have the meeting recorded. AUSA Vince Lombardi was briefed on this case and investigative plan and he concurred with the effort.

☑	Some states, by law, do not authorize one party consensual recording of conversations nor provide for a law enforcement exception to this prohibition. Under the AGG-Dom, one party consensual recording of communications to, from, or within such states is Otherwise Illegal Activity. By signature below, the SAC, or a designee, approves the consenting party's Otherwise Illegal Activity in conducting one party consensual recordings of communications when one or both parties are in a state requiring two party consent.

Approval/Review

11. ADC Review		12. SSA	
Initials:	Date: 8/10/09	Signature: for JSM	Date: 8/10/09
13. ASAC (If applicable)		**14. SAC (If applicable)**	
Signature:	Date: 8-10-09	Signature:	Date:

FBI HQ Approvals

15. Unit Chief (If sensitive circumstances exist)	
Signature:	Date:

APPENDIX D

APPENDIX D

Federally authored documents

The following documents were authored by federal attorneys on the following dates. They can be found in the Clerk's Papers at the pages indicated, and they are referenced in King County's Privilege Log with the identified Privilege Log document number:

Date & & Time	Author	Privilege Log No.	Clerk's Paper No.
11/19/09, 11:27 a.m.	Lombardi	10	845-46
11/19/09, 2:48 p.m.	Bennett	11	843
11/19/09, 3:13 p.m.	Bennett	11	843
11/19/09, 3:22 p.m.	Kipnis	12	843
11/30/09, 5:15 p.m.	Kipnis	14	844
12/22/09, 7:00 p.m.	Jennings	none	withheld
12/24/09, 9:56 a.m.	Bennett	41	847-48
1/14/10, 10:11 a.m.	Bennett	47	849-50
9/29/10, 9:34 a.m.	Seilinger	64	862-63
9/29/10, 3:48 p.m.	Bennett	65	862, 865-66
9/29/10, 4:57 p.m.	Lombardi	66	865-66
9/29/10, 5:16 p.m.	Lombardi	68	864
9/29/10, 5:20 p.m.	Lombardi	70	864
(November 18: Motion to compel or dismiss filed in Superior Court)			
11/22/10, 5:09 p.m.	Kipnis	76	867
11/30/10, 11:34 a.m.	Kipnis	88	868

12/8/10, 1:39 p.m.	Jennings	91	869

(December 16: Superior Court told defense motion is moot because agreement on discovery had been reached)

12/28/10, 3:43 p.m.	Jennings	103	870
12/18/09, 10:50 a.m.	Connery	124	withheld

APPENDIX E

Q A Federal judge?
A I don't know what kind of judge he was.
Q This was after you testified at the trial of Dr. Mockovak?
A I believe it was.
Q Okay. I can remind you that you testified in January of 2011. I believe you started testifying around January 24th and testified for about three days or so. Does that sound about right to you?
A I'm sure it's in the record. But as far as I remember, the time frame is about right.
Q Okay. And the trial was over on an early day in February. I don't know, February 1, 2, 3, something like that. You wouldn't have been in the courtroom anymore when it was -- when the jury came back. But... To the best of your recollection how much longer after, say, February 1, how much longer after the trial was over before you became a U.S. citizen?
A I don't remember.
Q Do you know whether it would be more than a week after the trial was over?
A I believe it was.
Q Okay. Do you think it was more than a month after the trial was over?
A That, I don't remember.

Q Okay. So, it could be anywhere from a week to six months, anywhere?
A I assume it's possible.
Q Okay. At some point in time after you came in -- let's see if I can get the year right -- 1994, did you become at some point a green card holder?
A Correct.
Q When?
A I don't remember the exact year.
Q Okay. Roughly what do you remember?
A What do you mean what do I remember?
Q Well, I think you were a green card holder for more than a year before you became a citizen.
A I believe I was a green card holder for five years.
Q Okay.
A At least.
Q At least. Okay. So, until at least 1999? No? You tell me what you remember.
A I remember I had the green card, and I was a green card holder for at least five years before I applied for U.S. citizenship.
Q Okay. You filled out your own application for a green card?
A I believe I did.
Q That wasn't done by your father; was it?

A I don't remember the exact months --
Q Uh-huh, but...?
A -- of the process.
Q Okay. But the whole process anyway, from start applying to finish and getting granted citizenship.
A As far as I remember it took several months.
Q Several months.
A As far as I remember.
Q But less than a year, apparently?
A I don't remember the exact time frames.
Q I know that. Do you think it took less than a year? You're telling me you thought you applied in 2011 and you got it in 2011.
A Are you asking me what I think or --
Q Yeah.
A -- what I remember?
Q What do you think?
A I can't think. I can only remember.
Q Yeah. What do you remember?
A I remember it took several months. It could be less than a year; it could be more than a year.
Q What's the most it could be?
A I don't know.
Q Well, do you think you waited two years?
A As far as I remember -- I don't remember. I don't

remember how long it took.

Q Do you know other people who have applied for U.S. citizenship?

A I'm sure I do.

Q Okay. Who are they?

A I know, you know, people who have done it in the past.

Q Okay. Who are they?

A Let's see.... I know some friends who I think have applied for U.S. citizenship at some point.

Q Yeah. Who?

A I have a feeling that --

Q -- Are you going to refuse to answer the question?

A I'm going to take the 5th on that.

Q You're going to take the 5th to the question of who do you know that has applied for U.S. citizenship?

A Because I don't feel that --

Q -- I'm just asking. You're going to take the 5th to the question "Who do you know that's applied for U.S. citizenship"?

MR. SINSKY: I'm going to object to the question on the relevance ground. This is getting awfully close to that line beyond which they're not likely to lead to discovery of relevant evidence.

MR. LOBSENZ: Fine.

Q Are you going to take the 5th to the question of "Who do

that time.

Q At that time? You don't remember that you applied at what time?

A At the time when I was in contact with the FBI.

Q Well, you were in contact with the FBI through the trial, right?

A Through the trial, yes, I was in contact with the FBI.

Q Right. So, the trial was in January and February of 2011. You were in contact with the FBI then because that's when the trial occurred. So, your citizenship application, was it pending then?

A I don't remember.

Q You don't remember?

A I don't remember when I filed it.

Q Do you remember when you first met anybody from the FBI?

A I don't remember.

Q Who's the first person in the FBI that you can remember meeting?

A Hmm... I can't say for sure because theoretically it's possible that I've met people that were from the FBI.

Q Who do you remember meeting from the FBI?

A I remember meeting Dt. Carr. I remember meeting Dt. Carver from the FBI.

Q Okay. And I don't mean to confuse you or trick you up here, but you thought Carver was with the FBI; that's

APPENDIX F

Rogers, Ethan

26A

From: Storey, Susan
Sent: Thursday, December 17, 2009 11:56 AM
To: Geissinger-Rodarte, Dani
Subject: Mockovak Cert
Attachments: Certification (Mockovak).pdf; Bail hearing.docx

Dani: I am very grateful to have you on board on this case! My direct and cell numbers are below. I try to "sleep with my phone," so you should be able to reach me just about any time, if necessary.
206-296-9077 dir [redacted] cell

[redacted]

Thanks again,
Susan

JKR

66