Supreme Court No. 94109-2

Court of Appeals No. 74459-3

DIVISION ONE
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

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

Respondents, and

UNITED STATES OF AMERICA,

Intervenor/Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Mockovak seeks review of the Court of Appeals' decision rendered on December 19, 2016 (Appendix A). The Court denied motions for reconsideration and for publication on January 13, 2017 (Appendix B).

B. INTRODUCTION

The Public Records Act ("PRA") "is a 'strongly worded mandate' aimed at giving interested members of the public wide access to public documents to ensure governmental transparency." *Worthington v. WestNET*, 182 Wn.2d 500, 506, 341 P.3d 995 (2015). The PRA, RCW 42.56.030, expressly declares:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

In this case, federal public servants have decided what is not good for the people to know about the operation of a joint federal and state task force. Federal public servants have not simply refused to produce records from their files, but also have instructed state public servants to refuse to produce their documents and to refuse to comply with a state-court subpoena.

The underlying records request seeks documents concerning promises or assistance provided to a Russian immigrant who served as an undercover informant. At his deposition in this PRA case, the Russian immigrant asserted his Fifth Amendment right not to answer questions

about the basis for his original application for asylum, a fact that bears directly upon his motive to seek assistance from the federal government in exchange for his testimony in a state-court criminal proceeding against the Petitioner here. The scant documents that have been produced show that federal agents provided him with "victim assistance," even though he was an undercover informant and not a victim. The informant did confirm that he was granted citizenship ***after*** he testified at the criminal trial. The PRA requests seek documents to shed light on what the state public servants knew about any of this, when they knew it, and what role they played.

From the documents already produced, we know that federal public servants directed, during the operation of the task force, that the Seattle Police Department ("SPD") detective and the undercover informant should participate in secret recordings of private conversations. Under Washington State law, that conduct is criminal. Brushing that aside, a federal public servant simply completed a printed form to authorize "Otherwise Illegal Activity." The disputed PRA requests here seek to uncover what other illegal conduct state public servants knew about or participated in as part of the joint federal and state task force.

The appellate court concluded that the presence of the federal government is, under the Supremacy Clause, sufficient to shield from disclosure documents that state public servants possess — in this case the Seattle police detective possessed the documents until he handed them over to an unnamed attorney, presumably a federal attorney, while the PRA request was pending. The appellate court concluded that evasion of

the PRA was permissible because the Seattle police detective did so voluntarily. The concept of consent by the State actor is essential to the appellate court's decision, but rests upon the mistaken proposition that State public servants can consent to follow federal direction and thereby waive the public's right to know what the State public servants are doing.

The appellate court also concluded that information created by or shared with a joint federal and state task force becomes the property of the federal government, subject to its exclusive control, even if state public servants possess the documents or created them. There is no basis in law or logic for that conclusion. If that proposition were correct, a federal public servant could authorize state public servants to violate Washington State law, and then the federal public servant could determine that it is not good for the people to know about it.

This case deserves this Court's attention because it raises critical issues of government accountability by State public servants who participate in joint federal and state law enforcement task forces:

> Some of the most basic and universal features of American police departments exist to facilitate political accountability . . . . Joint task forces do not share 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 . . . .

R. Harmon, *Federal Programs and the Real Costs of Policing,* 90 N.Y.U.L. Rev. 870, 945-46 (2015). *See also* S. Herman, *Collapsing Sphere: Joint Terrorism Task Forces, Federalism and the War on Terror*, 41 Willamette Law Review 941, 941-42 (2005) (joint state and federal

task forces have "muddled the lines of authority and accountability that have characterized our dual sovereignty model of federalism.").

In *WestNET* this Court held that the statute that authorized local police departments to join such task forces did not exempt them from full compliance with the PRA. Because "the PRA explicitly subordinates all other statutes to its own provisions," the Interlocal Cooperation Act prohibits local police departments from using their membership in a joint task force as a way of avoiding its PRA obligations. *WestNET,* 182 Wn.2d at 510-11. Moreover, any provision of any interagency task force agreement that would "frustrate the purpose of the PRA" is unenforceable under RCW 39.34.030(5). *Id.* at 511.

In *WestNET* the record was "insufficiently developed" so this Court could not "tell . . . whether the [task force] arrangement frustrate[d] the PRA." *Id.* at 511. But in this case the record clearly shows that the purposes of the PRA were deliberately thwarted by the invocation of a federal regulation that on its face applies only to federal "employees." This case involves a federal command issued to a Seattle police detective who worked with an FBI agent on a case that was prosecuted in a Washington State court. The U.S. Attorney's Office ("USAO") forbade the detective from producing records requested under the PRA, ordered him not to appear for a deposition, and had him surrender public records in his possession to a federal attorney. According to the USAO, because the detective was a member of a joint federal/state task force, Washington State lost the power to regulate the records generated by the detective, and

the power to elicit testimony from him regarding those records.

In *WestNET* this Court recognized how easy it would be to use the form of a task force to defeat the public policy of political accountability that the PRA is designed to serve:

> It is also conceivable that the affiliate agencies could use this [joint task force] arrangement to strategically move documents among the multiple agencies or that WestNET could even keep documents with those affiliate agencies that are not subject to the PRA . . . in which case the affiliate agencies could avoid their PRA obligations entirely.

WestNET, at 511. This case shows that this scenario is no longer simply "conceivable," it is real and it is happening.

Petitioner respectfully submits that the interrelated issues – both constitutional and non-constitutional – are of great public importance and should be decided by this Court. RAP 13.4(b)(4).

C. ISSUES PRESENTED

1. In a PRA case, does a local federal official have the power to prohibit a city police officer from producing records he created and used in the course of a joint federal/state investigation that culminated in a State-court criminal prosecution?

Subsidiary questions

a. Under the Tenth Amendment, can a Seattle police detective or even the SPD "consent" to follow a federal public servant's direction not to comply with the PRA?

b. Does a federal regulation governing the conduct of a Department of Justice ("DOJ") "employee" apply to a city police officer who is also sworn as a Special U.S. Deputy Marshal, even though the DOJ concedes that the police officer is not a federal "employee" as that term is defined

by Congress in the statute that authorizes promulgation of regulations governing federal "employees"?

c. Who owns a document created by a Seattle police detective who is a member of a joint task force that includes federal officers? Does the document belong to the federal government, the city government, or both? For purposes of the PRA, so long as it is clear that a document was used by a Seattle police officer for a governmental purpose, does the question of ownership matter?

2. Did the Court of Appeals err in holding that a records requester has the burden of producing evidence to show that requested records were *not* prepared in anticipation of litigation, and thus are not exempt as work product? Alternatively, is the burden on the agency to come forward with evidence that the records *were* prepared in anticipation of litigation, and that such a belief was objectively reasonable?

3. Does the "common interest" exception to waiver apply when one agency, which already has commenced a prosecution, thereafter discloses work product to a second prosecuting agency which has decided ***not*** to prosecute, and which has invoked its decision not to prosecute as a basis for refusing to produce exculpatory *Brady* information it possesses?

D. STATEMENT OF THE CASE

Petitioner Mockovak made a PRA request to the King County Prosecuting Attorney ("KCPA") for records related to an investigation conducted by members of a joint task force (the Puget Sound Safe Streets Violent Crimes Task Force) composed of both state and federal law enforcement officers. *Op.* at 1. Two Task Force members, SPD Detective Leonard Carver and FBI Agent Larry Carr, worked together on the investigation. Carver was sworn in as a Special Deputy U.S. Marshal. In that capacity, he had the authority to investigate and arrest for violations of federal law as well as State law. *Id.* Their joint investigation

culminated with the filing of criminal charges against Mockovak in King County Superior Court.

The Task Force employed a Russian immigrant, Daniel Kultin, as a confidential informant. For several months, Kultin recorded his conversations with Mockovak without Mockovak's knowledge. Initially, Carver and Carr thought that the case they were building would be prosecuted in federal court. CP 1216. Knowing that the Washington Privacy Act made it a crime to record private conversation without the consent of all parties, they obtained the "permission" of an FBI official to violate Washington State law pursuant to the FBI's "Otherwise Illegal Activity" procedures. CP 1216.

Later, when they decided they might want the case prosecuted in state court, Detective Carver sought Superior Court approval to continue secretly recording Kultin's conversations with Mockovak. CP 1206-1223. In support of his request, Carver told the Superior Court that he was "familiar with all the files and records pertaining to this investigation" and he relied upon them in making his application for judicial authority to record these conversations. CP 1206-07.

Ultimately, the KCPA prosecuted Mockovak in state court. In his state court Certificate for Determination of Probable Cause, Carver again stated that he had reviewed the records contained in the Task Force's investigation file. CP 1199, 1204.

Four years later, in response to his PRA request, the KCPA produced heavily redacted records that included letters and emails sent

back and forth between State court prosecutors and federal attorneys employed by the USAO and the FBI. Detective Carver possessed additional records but at the direction of some unidentified lawyer, he did not produce them and turned them over instead to "the lawyer." CP 1201. Those records were not produced in any form — redacted or unredacted. Carver's documents never were tendered to the Superior Court for *in camera* review.

1. Informant Kultin's assertion of the Fifth Amendment raises the inference that he lied to obtain entry into the U.S. as an asylee, that he faced a risk of deportation, and that he had a powerful motive to curry favor with the federal government by participating in the criminal proceedings. Instead of deportation, Kultin was granted citizenship after the criminal trial concluded. The PRA requests here seek to uncover what the State public servants knew about this conduct, when they knew it, and what role they played in it.

After charging and prior to trial, both the KCPA and Mockovak's defense attorneys repeatedly asked the FBI and the USAO to provide them with *Brady* material regarding informant Kultin. CP 560, 566-67, 572-73, 577-78, 582-86, 593, 700-01, 706-07. In particular, they sought to discover whether joint task force agents or federal attorneys had led Kultin to expect assistance in obtaining citizenship or immunity from prosecution for violations of immigration law. CP 560, 566-67, 572-73. But the USAO flatly refused to produce anything. CP 577-78, 582-86, 588-89. An Assistant U.S. Attorney stated that Mockovak had no right to any discovery from the U.S. because "[t]the United States is not prosecuting Mockovak." CP 595.

Similarly, the KCPA tried to obtain the Task Force's investigative file on Kultin to ascertain what prompted the INS to arrest Kultin. The KCPA reported to Mockovak's attorneys that "the FBI had denied our requests for further information." CP 570. Detective Carver complained to the FBI, and predicted that such refusals would cause "serious problems." CP 725-26.[1] He suggested that if task force documents could not be turned over to state prosecutors, then "the only other option, as I see it, is to ask the United States Attorney to file all bank robbery and other task force cases . . . ." CP 726.

In his Certificate of Probable Cause, Carver erroneously stated that Kultin was a U.S. citizen. CP 410, 421. A State court prosecutor later informed Mockovak's counsel that Kultin had once been the subject of an INS investigation, but did not disclose what the investigation was for or the fact that the INS had arrested him. CP 570. Nearly one year after Mockovak was charged, Carver informed the KCPA that Kultin was ***not*** a U.S. citizen. The KCPA then told Mockovak's counsel that Carver's prior statement was incorrect. CP 598. However, the KCPA never disclosed that Kultin either had a citizenship application pending when Mockovak's criminal trial started, or else he intended to file one as soon as he finished

[1] "As a Seattle police detective assigned to work cases on behalf of the FBI and Seattle police, I am concerned about future criminal filings . . . I anticipate serious problems as we go forward and wanted to bring them to your attention. . . . In State v. Mockovak, a murder-for-hire case, the prosecutor has submitted at least two Touhy letters, both of which have been denied. The Touhy requirement, as I see it, precludes a filing of formal charges in state court following an arrest, given the 72 hour mandated timeframe for prosecutors to file their charges. . . ."

testifying for the prosecution. *See Br. of Appellant*, at 7-22.

Although Kultin was never the victim of any crime, redacted documents show that the KCPA directed Kultin to a "Victim Specialist" employed by the FBI and told him to "expect her assistance." There was no disclosure of what kind of assistance was offered, sought, or actually obtained. CP 676, 678, 680, 682, 684. *See Br. of Appellant* at 22-28.

Mockovak's criminal trial took place in January and February of 2011. Five years later, Mockovak's counsel deposed Kultin in this PRA case. CP 466. When asked about his initial entry into the United States and his claim that he had faced persecution in Russia, Kultin repeatedly asserted the Fifth Amendment privilege. CP 484-85, 495-96. He refused to answer whether anyone in Russia had ever threatened him. CP 487. He said, "I have a feeling you're trying to make me guilty of something so I'm not going to answer this . . . ." CP 486. He said he could not remember if he had been granted asylee status. CP 495-96. In a civil case, it is permissible to draw an adverse inference from a witness' assertion of the Fifth Amendment privilege;[2] therefore, one can infer that Kultin obtained asylee status illegally. A person who obtains entry into the country or citizenship by means of fraud can be prosecuted, his citizenship can be revoked, and he can be deported.[3] Kultin's vulnerability to deportation gave him an undisclosed motive to curry favor

[2] *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) & *Brief of Appellant*, at 67-72.

[3] *See Knauer v. United States*, 328 U.S. 654, 671-72 (1946).

with the state court prosecutors by incriminating Mockovak.[4]

At his PRA deposition, Kultin also testified that he ***applied*** for U.S. citizenship ***after*** the criminal trial ended. CP 491-92, 501-502. He also testified that he was ***granted*** citizenship sometime in 2011. *Id.* Thus, Kultin had another reason to curry favor with law enforcement and to incriminate Mockovak; by helping to convict Mockovak, he stood to please law enforcement officers who could then support his application for citizenship. *See Br. of Appellant* at 18-20, 23-26, & 65-66.

Kultin's deposition testimony also contradicted an FBI agent's report that Kultin told him he had a citizenship application much earlier in 2009. CP 533. Kultin denied that was true, insisting that it was not until 2011 that he applied for citizenship. CP 491-92, 501-02, 510-11.

2. Carver's initial willingness to appear for deposition; the USAO's subsequent direction not to appear, and Carver's surrender of documents he possessed to an unnamed attorney.

The Court of Appeals' held that the Tenth Amendment prohibition against controlling state officers comes into play only if a State officer objects to being told what to do by the federal government. *Op.* at 13-14. The appellate court assumed that neither the SPD nor Detective Carver objected to being told not to produce documents and not to testify, stating that "Carver acted pursuant to a consensual joint task force arrangement between the United States, Washington and the SPD." *Id.* at 16.

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[4]This is *Brady* information that must be disclosed. *See, e.g., United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004).

The record shows that the ***only*** party that objected to Carver's deposition was the USAO. A paralegal in the USAO sent a letter to Mockovak's counsel asserting that without DOJ permission Carver could not be deposed because he was a Task Force Officer. CP 1240-1241. Similarly, an AUSA asserted that Task Force Officers were "considered to be employees of the Department [of Justice]" and Mockovak could not depose Carver without the DOJ's permission. CP 1243. The Chief Counsel for the FBI also objected. CP 880, 1246-50. He suggested that Mockovak make a written request for permission to depose Carver, and predicted that such a request would be granted. CP 881. Mockovak made such a request. CP 1246-50.[5] But one month later, another AUSA ***denied*** the request, stating that "Carver is not authorized by the Department of Justice to testify." CP 1261-62. The record shows that the ***only*** people who objected to the deposition of Carver were federal public servants.[6]

Detective Carver never said he objected to being deposed. He telephoned Mockovak's counsel to politely notify him that he was not going to appear for the deposition because he was "caught in the middle" between the lawyers. CP 1201. Carver also disclosed that he had "given

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[5] At the same time, Mockovak informed the Superior Court that such a request had been made and that he had been told that it most likely would be granted. CP 875, 882.

[6] Initially, Detective Carver was perfectly willing to be deposed and to furnish the requested public records in his possession. He telephoned Mockovak's attorney to request a change in the date of the deposition, and counsel rescheduled the deposition. CP 1234-1238. Although the Superior Court granted Mockovak's CR 56(f) motion to continue the hearing on the parties' summary judgment motions so that Carver's deposition could take place (CP 871-77, 1007), the rescheduled deposition never occurred because the USAO refused to permit Carver to appear and testify.

over the papers that he had" to an unidentified attorney. CP 1201.

E. REASONS WHY REVIEW SHOULD BE GRANTED

- The decision below involves issues of substantial public interest that should be determined by this Court. See *Worthington v. WestNET, supra* and *Kittitas County v. Sky Allphin,* 195 Wn. App. 355, 381 P.3d 1202 (2016), review granted, 2017 WL 363362 (January 4, 2017).
- The decision below involves important questions of constitutional law and conflicts with the decisions in *Printz v. United States,* 521 U.S. 898 (1997); *Bond v. United States,* 131 S.Ct. 2355 (2011); and *United States v. Logue,* 412 U.S. 521 (1973).
- The decision below conflicts with this Court's decisions in: *Worthington v. WestNET, supra*; *Neighborhood Alliance v. Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Limstrom v. Ladenburg,* 136 Wn.2d 595, 963 P.2d 869 (1998); and *Concerned Ratepayers v. PUD No. 1,* 138 Wn.2d 950, 983 P.2d 635 (1999).

1. This Court should decide the Tenth Amendment issues and reject the contention that a police officer can "consent" to federal control and thereby forfeit a citizen's right to have state law (like the PRA) enforced.

"It is incontestable that the Constitution established a system of 'dual sovereignty.'" *Printz*, at 918. There are two sovereigns, "one state and one federal, each protected from incursion by the other." *Id.* at 920. "[D]irect[ing] state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme," or "compelling state officers to execute federal laws is unconstitutional." *Id.* at 903-905. *Accord United States v. Logue*, 412 U.S. 521, 529-30 (1973) (federal/state housing agreement "gives the United States no authority to physically supervise the conduct of the jail's employees."); *Randolph v. Donaldson*, 13 U.S. 76, 86 (1815). The same

Tenth Amendment issues have recently arisen in the context of conflict between the federal government and the States over whether State officers must enforce federal immigration laws. It is especially timely for this Court to address the Tenth Amendment limits on federal incursion into a State's sovereign power to guarantee its citizens the ability to know what their State public servants are doing when they participate in a joint federal and state task force.

The Court of Appeals held that Petitioner cannot complain of a Tenth Amendment violation because Detective Carver was a "consenting state officer," unlike the deputy sheriff in *Printz.*[7] *Op.* at 13-14. According to the court below, Carver did not object to the federal instruction to refuse to comply with the PRA or to disobey the deposition subpoena served upon him.[8] *Id.* The Court reasoned that so long as an individual police officer does not personally object to a federal order to disobey state laws, there is no Tenth Amendment violation. *Id.*[9]

Relying upon *Bond v. United States*, 131 S.Ct. 2355 (2011) (*Bond*

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[7] Sheriff Printz objected to having to help administer a federal gun control law.

[8] Ordinarily a person who induces another person "whom he has reason to believe is about to be called as a witness in any official proceeding . . . to . . . withhold any testimony" or "to absent himself . . . from such proceedings" commits the felony offense of Tampering With a Witness. RCW 9A.72.120. The Court of Appeals' opinion implies that the federal attorney who directed Detective Carver not to appear at his deposition is constitutionally immune from prosecution under this statute because Carver joined a joint federal and state task force. *See Op.* at 19 ("federal sovereign immunity precluded the state court from enforcing the subpoena").

[9]Petitioner submits that the record provides no support for the conclusion that Carver "consented" to abide by the federal direction not to comply with the PRA or the State-court deposition subpoena. But even assuming *arguendo* that Carver did consent, as *Bond I* demonstrates such consent is legally irrelevant.

I), Petitioner argued below that the Tenth Amendment and federalism holdings of *Printz* are not limited to cases where a state officer voices an objection to federal control of his conduct. *Bond I* held that ***citizens*** have standing to assert violations of the Tenth Amendment because the Tenth Amendment protects them, not just the States and State officials: "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 (emphasis added).

The issue in *Bond I* was whether an individual had standing to complain about a Tenth Amendment violation when no State officer was making any such complaint. The Court held that she did because the rights secured by the Tenth Amendment belonged to her, and were not lost simply because a State officer failed to object. *Bond I* clearly holds that state officers cannot "waive" a citizen's Tenth Amendment rights:

> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. "State sovereignty is not just an end in itself: 'Rather, ***federalism secures to citizens the liberties that derive from the diffusion of sovereign power.***'" [Citations].
>
> . . . ***Federalism secures the freedom of the individual.*** It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . . **[T]*he individual liberty secured by federalism is not simply derivative of the rights of the States.***
>
> Federalism . . . protects the liberty of all persons within a State . . . By denying any one government complete jurisdiction over all the concerns of public life, ***federalism protects the liberty of the***

> *individual from arbitrary power* . . . .
>
> ***The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism.*** [Citation]. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. ***Fidelity to principles of federalism is not for the States alone to vindicate.***

Bond I at 2364 (emphasis added).

The Court of Appeals ignored Petitioner's discussion of *Bond I* and in a footnote relied instead upon a pre-*Bond I* lower court decision.[10] But no court may ignore a controlling decision of the Supreme Court on a question of federal constitutional law. Although the Court of Appeals cited to *Lormont v. O'Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002), for the proposition that the Tenth Amendment allows federal regulation of state officers executing a consensual state-federal program, *Lormont* ***was decided 9 years before Bond I***, thus *Lormont* clearly is not good law.

The decision below eviscerates the PRA. According to the Court of Appeals, a city police officer has the power to consent to the violation of the PRA with respect to any records that he generates or uses while working for a joint federal and State task force. The opinion below holds

[10] The *Bond* case went to the Supreme Court twice. Mockovak discussed *Bond I* in his reply brief at 8-14. *Bond I* held that an individual has standing to complain about a Tenth Amendment violation, but did not decide whether the Tenth Amendment had been violated. In *Bond v. United States*, 134 S.Ct. 2077 (2014) (*Bond II*), the Supreme Court held that Congress ***had*** violated the Tenth Amendment. The appellate court never mentions the first *Bond* decision. In footnote 59, the appellate court cites the second *Bond* decision, acknowledging the federal government has no general police power to make criminal laws.

that each such officer can make his own decision whether to consent to a violation of state sovereignty. If the city officer consents, then it simply does not matter whether the Police Chief, the City Council, the State Legislature, or the people consent.

This holding directly conflicts with the decision in *Bond.* To paraphrase the opinion in *Bond I*, "The public policy of" Washington State to provide access to the records of its police officers, "enacted in its capacity as sovereign, has been displaced by that of the National Government. . . . " *Bond I,* 131 S.Ct. at 2366. This Court should decide whether the Court of Appeals correctly held that an individual State officer's "consent" is sufficient to displace the people's rights under the PRA. That is contrary to the express language of the PRA, which unambiguously provides that the people "do not give their public servants the right to decide what is good for the people to know and what is not good for the people to know." RCW 42.56.030.

2. This Court should decide whether the PRA applies to a record created and/or used by a State law enforcement officer who also is a member of a joint task force.

The Court of Appeals recognized that the effect of the Superior Court's summary judgment order was to place certain public records beyond the scope of the PRA by making it impossible for Washingtonians to obtain them. Citing *Concerned Ratepayers Ass'n v. Dist. No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999), the appellate court acknowledged that because Detective Carver "used them," the documents "likely qualify as public records under the state act." *Op.* at 20. Nevertheless, the appellate

court held that Mockovak was not entitled to them because they "belong[ed]" to a federal agency. *Id.* at 20-21.

The Court of Appeals' conclusory assertion that the documents "belonged" to the federal government

(1) is not supported by anything in the record;[11]

(2) begs the question of who "owns" the records generated by a state law enforcement officer working for a ***joint*** State and federal task force;

(3) ignores that in *Ratepayers* this Court explicitly ***rejected*** the idea that legal "ownership" of a document by someone other than the State places a document outside the scope of the Public Records Act;

(4) ignores that joint task force documents can be created by a task force member like Carver who is both a state officer and a "special" federal officer; and

(5) ignores that Detective Carver himself created many documents, and that at least some of them ***were*** produced to Mockovak in response to his PRA request.

This Court should decide these important legal questions. To decide them, this Court should remand for the elicitation of testimony. In *Neighborhood Alliance v. Spokane*, *supra*, this Court held that "relevancy in a PRA action includes why documents were ***withheld***, destroyed or

[11] The Court of Appeals did not identify any record evidence to support the assertion of ownership. Moreover, because a DOJ attorney instructed Detective Carver not to appear for his deposition, there was never any opportunity to ask Carver whether there is any contractual agreement between the City of Seattle and the DOJ which spells out who owns or who may possess documents created by joint task force members. Nor is there anything in the record about where such documents are kept; whether they are stored in more than one place; or whether both the FBI and SPD maintain copies of the same records. *See WestNET*, 182 Wn.2d at 508-09. However, because Carver told Petitioner's counsel that he had "given over the papers that he had" to some unidentified attorney, we know Carver ***did*** possess ***some*** task force records before relinquishing possession to the unknown attorney. CP 1201.

lost." 172 Wn.2d at 718 (italics added). This Court concluded that the Superior Court erred in allowing a county employee to refuse to answer deposition questions regarding the destruction of her computer and remanded with directions to re-depose the employee thereby completing the record with testimony as to why the requested computer-stored records were not preserved.

Citing to *Neighborhood Alliance*, Petitioner argued below that this case should be remanded with directions that the deposition of Detective Carver should take place so that the record could be fleshed out.[12] The Court of Appeals did not address this issue, and never mentioned this Court's decision in *Neighborhood Alliance.*

The unequivocally declared public policy that underlies the PRA is clear: "The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Washington citizens must be able to make informed decisions about whether they wish to allow their police officers to participate in joint federal and state task forces. *WestNET* holds that the records documenting the conduct of city police officers who are also task force members are ***not*** beyond the reach of the PRA. 182 Wn.2d at 510-11. Washington cities and Washington citizens do not lose their ability to know what the officers are

[12] At the very least, Carver should be required to answer questions on such subjects as: who told him not to obey his subpoena; to whom did he give the documents in his possession; where were the documents being stored when he retrieved them; and whether any written contractual agreement exists between SPD (or the city of Seattle) and the DOJ regarding control of joint task force documents.

doing simply because they are working with federal officers and the federal officers don't want the people to know.[13]

3. This Court should decide whether the Court of Appeals erred when it declined to accept the DOJ's concession that Carver is not a federal "employee" under the DOJ's regulation, created its own interpretation of the federal regulation, and used that interpretation to narrow the reach of the PRA.

28 C.F.R. §16.22(a) was promulgated pursuant to 5 U.S.C. §301, which authorizes the heads of Executive departments to "prescribe regulations for the government of his department" and for "the conduct of its employees."[14] Unless the local United States Attorney grants permission to do so, "no employee" may testify in "any federal or state case . . . in which the United States is not a party," and "no employee" may disclose any information or produce any material contained in the files of the DOJ. *See* Appendix E.

In the Superior Court, the United States argued that once Detective Carver joined a joint task force, he became a federal DOJ "employee" subject to the DOJ regulations.[15] Mockovak disagreed, arguing that Carver never became a DOJ "employee." On the eve of oral argument in

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[13] As noted above, Detective Carver participated in the violation of the Washington Privacy Act, but presumably he felt he was "authorized" to do so because an FBI agent granted permission for Carver and his FBI colleague to engage in "Otherwise Illegal Activity." (See Appendix D).

[14] These regulations, set forth in 28 C.F.R. Part 16, Subpart B, are referred to as the *Touhy* regulations because the Supreme Court considered their application to a subpoenaed FBI agent in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

[15] The United States filed an amicus brief in the Superior Court. When the case was appealed, the United States was granted leave to intervene and is now a party to this case.

the Court of Appeals, in a RAP 10.8 letter citing additional authority, the United States suddenly ***conceded*** that for purposes of 5 U.S.C. §301, Detective Carver was ***not*** a DOJ employee because by statute, 5 U.S.C. §2105, an employee is defined as a civil service appointee, and Carver was not such an appointee. (Appendix C, Letter of 10/31/16).[16]

Despite this concession, the Court of Appeals held that Carver ***was*** a federal employee. *Op.* at 8 ("We disagree.").[17] The Court purported to rely on *Touhy* as authority for this conclusion. The Court seemed unaware of the conflict between its own statement that the *Touhy* regulations "bar federal employees from testifying" and the United States' concession that Detective Carver was ***not*** a federal employee.

Moreover, the Court's reliance upon *Touhy* and other lower court cases[18] is clearly misplaced because:

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[16] "[I]n the course of preparing for oral argument, it has come to our attention that another statutory provision, 5 U.S.C. §2105(a), contains a definition of "employee" that applies "***[f]or the purpose of this title***" unless the term is "specifically modified." Under the terms of this general definition, ***an individual must be "appointed in the civil service" in order to be an employee.*** Officer Carver's designations as Special Deputy U.S. Marshal and a Special Federal Officer in the FBI do not entail civil-service appointments." (emphasis added).

[17] The Court of Appeals held that under the common law a person can have two employers, even if he is paid only by one, so long as he is under the supervision or control of both. *Op.* at 10-11. The Court concluded that Carver was "simultaneously" employed by both the state and federal governments. *Id.* The appellate court did not explain how common law doctrine would affect the definitions expressly set forth in the federal regulations that the DOJ conceded did not make Carver a federal employee.

[18] In a footnote, the Court of Appeals quoted from the unpublished decision of a federal district court in *United States v. Threet*, 2011 WL 5865076, *1 (E.D. Mich. Nov. 22, 2011). The Court modified the quoted passage to make it appear as if the district court had held that a ***state*** court was jurisdictionally barred from enforcing a subpoena against a ***state*** law enforcement officer. But the decision actually ***only*** addressed a ***federal court's power*** to enforce a subpoena to ***federal officers*** by holding the federal officers in contempt before the criminal defendant had exhausted available administrative

(Footnote continued next page)

1. *Touhy* did not involve an employee of a city police department, or any other kind of state or local police officer;[19]

2. No Tenth Amendment or federalism arguments were raised or addressed in *Touhy*;[20]

3. *Touhy* was litigated in federal court, so there was no occasion to consider whether a State court could exercise jurisdiction over a State officer who had joined a joint task force;

4. In *Touhy* the Court held that a federal agency like the DOJ could "centralize" the decision whether to permit a federal employee to respond to a court subpoena by reserving that decision to the head of the department (the Attorney General). But the Court expressly ***refused*** to decide the constitutional question of whether a court could order the Attorney General to permit a DOJ employee to appear and to testify in a court proceeding. *Touhy*, 340 U.S. at 467.

In sum, the Court below purported to resolve the Tenth Amendment and federalism issues raised by Petitioner by relying upon cases that did not (and could not possibly) consider those constitutional questions.[21]

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procedures. In *Threet* the defendant attempted to raise a Sixth Amendment compulsory process challenge to a federal agency's refusal to allow its agents to testify. The district court ruled that the Sixth Amendment issue could not be decided yet because the defendant had not pursued the administrative remedy provided by the *Touhy* regulations. "If Defendant is not satisfied with the DEA's response to his *Touhy* request, his remedy is an action against the DEA pursuant to the Administrative Procedures Act, and not pursuant to a motion to compel." *Id.* at *1.

[19] The only officer in *Touhy* was FBI agent George McSwain. Unlike Carver, McSwain was not a member of any joint task force and he held no state office.

[20] Since no State law enforcement officer and no State agency were involved in *Touhy*, it was impossible for any federalism or Tenth Amendment issue to arise.

[21] Petitioner submits that the Court of Appeals also erred in its statutory construction of 5 U.S.C. § 2105. The Court of Appeals held that the DOJ had complete freedom to modify Congress' definition of the term "employee" because *Touhy* regulations which are "otherwise proper under the statute . . . may define their own terms." *Op.* at 9. But a construction of 5 U.S.C. §2105 that recognizes such an unlimited delegation of legislative power would simply create a new constitutional problem. *See generally Loving v. United States*, 517 U.S. 748, 758 (1996). There is, moreover, no reason to ignore the DOJ's interpretation of the federal regulation — especially when the DOJ's interpretation avoids narrowing the reach of the PRA.

4. The Court below erroneously placed the burden of proof on Mockovak to show that the federally authored documents were prepared *without* anticipation of litigation. But the burden of proof is on the party asserting work product protection to show that they were created *with* a subjective belief in future litigation and that such a belief was objectively reasonable.

The work product doctrine protects documents from discovery if they "were prepared in anticipation of litigation." *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985). The KCPA asserted work product protection for several documents created by federal attorneys working for the USAO and the FBI. All of these documents were created ***after*** the decision had been made to prosecute Mockovak in State court, and ***after*** State court charges had been filed.[22] There is ***no evidence*** that the federal attorneys ever contemplated bringing charges against him ***after*** he had been charged in state court. Indeed, the federal attorneys claimed they need not supply exculpatory *Brady* materials to Mockovak because the federal government was not prosecuting him. CP 595. And a King County Prosecutor stated on the record that even if the Superior Court dismissed the State court charges, she thought the federal government would still decline to prosecute. CP 307-08.[23]

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[22] These documents are referred to in the record as the Category C documents. *See Op.* at 33. All of the Category C documents were created after the KCPA filed criminal charges against Mockovak in State Court on November 17, 2009. CP 411, 464.

[23] The Court of Appeals seems to have believed that it was unclear who would be prosecuting Mockovak (the KCPA or the USAO) at the time the federal attorneys created the Category C documents. *See Op.* at 34 ("the USAO prepared the documents within Appendix C in anticipation of prosecuting Mockovak. That it ultimately agreed with the KCPA that the State should prosecute is irrelevant.") The Court's opinion states that the federal "emails speak for themselves as all concern an ongoing criminal investigation with the intent to seek prosecution." *Op.* at 34. But this is simply incorrect. All of the

(Footnote continued next page)

The Court of Appeals rejected Mockovak's argument that the Category C documents were not entitled to work product protection because he did not demonstrate that "the United States attorneys prepared the documents ***without*** anticipation of litigation." *Op.*at 34 (emphasis added). But Mockovak has no such burden of proof. This Court held long ago that "Under the public records act, the party seeking to prevent disclosure bears the burden of proof." *Limstrom v. Ladenburg,* 136 Wn.2d at 612. "Where records sought are claimed to be work product and protected under RCW 42.17.310(1)(j), ***the agency has the burden of proving the records requested are work product."*** *Id.* (emphasis added).

A party may satisfy this burden "in any of the traditional ways in which proof is produced . . . such as affidavits made on personal knowledge, depositions, or answers to interrogatories . . . ." *Toledo Edison v. G.A. Techs.,* 847 F.2d 335, 339 (6th Cir. 1988). The party opposing production must prove the existence of "a subjective belief that litigation was a real possibility," and that such a belief was "objectively reasonable." *In re Sealed Case,* 146 F.3d 881, 884 (D.C. Cir. 1998). *Accord Morgan v. Federal Way*, 166 Wn.2d 747, 755, 213 P.3d 596 (2009) (holding the "Report was not prepared in reasonable anticipation of litigation and is not protected by the work product doctrine."). In this case the Respondents produced ***nothing*** to show that the federal attorneys had

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federally authored emails were written well after the KCPA started the State court prosecution. When the federal attorneys created the Category C documents, there was no "intent to seek prosecution" in federal court.

either a subjective belief that they would be involved in future litigation with Mockovak or that any such belief would have been objectively reasonable. By placing the burden of proof on Mockovak to show that the documents were created ***without*** any anticipation of litigation the opinion issued below conflicts with this Court's decision in *Limstrom* and *Morgan.*

5. This Court should decide whether the "common interest" exception to waiver applies when one agency, which has already commenced a prosecution, thereafter discloses work product to a second prosecuting agency which has decided *not* to prosecute.

After the KCPA commenced the State court prosecution, the KCPA sent documents containing work product to federal attorneys working in the local U.S.A.O. (and they also sent a few documents to the informant Kultin). CP 753.[24] Mockovak contends that these disclosures constituted a waiver of the work product privilege. *See Limstrom*, *supra* at 145.[25] The Court of Appeals responded that "the United States" had not "lost" its interest in prosecuting Mockovak:

> Aligned counsel, even counsel within the same office may disagree. Such tension may be greater when counsel must function under different governmental systems. This tension does not preclude counsel from sharing common investigative and prosecutorial interests. ***The United States did not lose those shared interests because it chose to assist the State in prosecuting Mockovak rather than bring charges itself.***[26]

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[24] Mockovak collected all those documents and referred to them as "Category B" documents. They can be found in the record at CP 809-841. The documents the KCPA sent to Kultin are the last four pages of these clerks' papers.

[25] "[A] party can waive the attorney work product privilege as a result of its own actions."

[26] The opinion below does not explain how the USAO "assisted" the KCPA. The record does show, however, a consistent pattern of noncooperation by *refusing* to supply

(Footnote continued next page)

Op. at 28.

The Court of Appeals misunderstood the waiver argument. Mockovak was not arguing that the federal attorneys waived (or "lost") the work product privilege by disclosing documents to the KCPA; he was arguing that the KCPA waived (or "lost") the privilege by disclosing documents to the federal attorneys. By then the USAO had already declined to prosecute. In fact, the USAO justified its refusal to provide exculpatory *Brady* material by expressly stating that "[t]he United States is not prosecuting Mockovak." CP 595. And the KCPA stated on the record that if the State charges did not proceed, the KCPA did not believe that the United States would proceed with federal charges. CP 307-08.

Mockovak relied upon *Kittitas County v. Allphin*, *supra*. There Division III held that the common interest exception applied to disclosures by a county Public Health Department to the State Department of Ecology because the two agencies were jointly pursuing "a civil enforcement action" against a company that was violating Washington laws governing the disposal of moderate risk waste materials. Division III held that the disclosures 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.'" 195 Wn. App. at 367. "[T]he County and Ecology shared a common interest in the enforcement of state and local environmental regulations." *Id.* at 364. Moreover, the

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requested documents regarding the informant, and disavowing any obligation to produce *Brady* material.

Department was "statutorily required" to assist local governments in enforcing regulations pertaining to moderate risk wastes. *Id.* at 369, n. 6.

In this case, the two agencies were ***not*** both State agencies. They did ***not*** undertake a joint prosecution. The federal attorneys ***refused*** to supply the KCPA with exculpatory *Brady* documents[27] and justified their refusal simply by stating that "[t]he United States is not prosecuting Mockovak." CP 595.[28] And no law — state or federal — required the USAO to assist the state prosecutors. Given the differences between his case and *Allphin*, Mockovak argued that his case was distinguishable; that the KCPA failed to prove the applicability of the common interest exception; and thus his case was governed by "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 368.

The Court of Appeals held that *Allphin* "never limited the [common interest] rule" to cases where two government agencies were collaborating in a joint prosecution. *Op.* at 29. The appellate court also held that the common interest exception did apply, despite the "tension" between the State and federal prosecutors. *Id.* Mockovak disagrees. He maintains there must be a showing that two agencies are conducting a joint prosecution and that they have agreed to keep exchanged information

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[27] As Prosecutor Storey said in her letter to Mockovak's defense attorneys, she 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).

[28] The opinion below merely states that there was "occasional tension" between the State and federal prosecutors. *Op.* at 3.

confidential, before the common interest exception can apply.[29]

This Court recently granted discretionary review in *Allphin* to decide "whether emails exchanged between county prosecuting attorneys and Department of Ecology employees relating to the Chem-Safe NOVA litigation are exempt from public records production as attorney work product under the common interest doctrine." *Order of 1/4/17,* Sup.Ct. No. 93562-9. Regardless of how this Court decides the *Allphin* case,[30] it should grant review in this case because the application of the common interest rule in the context of disclosure by a State agency to a federal agency is a question of considerable public importance.

F. CONCLUSION

This Court should grant review and decide all of the questions raised herein. Moreover, because one issue concerns the common interest exception to the waiver of work product protection, this Court should consider linking this case with the *Allphin* case, which involves the "joint prosecution" of a civil enforcement action by a state agency and a county agency.

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[29] The decision below also conflicts with *Hunton v. Williams*, 590 F.3d 272, 286 (4th Cir. 2010), a FOIA case that held that the common interest privilege did *not* apply and that DOJ waived any privilege through disclosure to a third party.

[30] If it was error to apply the common interest doctrine in a case like *Allphin* — where two State agencies were allegedly corroborating — then *a fortiori* it was error to apply the common interest doctrine in this case where the two agencies were ***not*** subdivisions of the same sovereign government, and one agency was flatly refusing to cooperate with the other. And even if *Allphin* was correctly decided, Petitioner submits that his case is clearly distinguishable: the common interest exception cannot possibly apply when one agency is refusing to cooperate with the other and is invoking the difference between the two agencies as a basis for refusing to disclose exculpatory *Brady* information.

Respectfully submitted this 9th day of February, 2017.

CARNEY BADLEY SPELLMAN, P.S.

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

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:

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DATED this 9th day of February, 2017.

Deborah A. Groth, Legal Assistant

NO. 74459-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

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

Respondents and

UNITED STATES OF AMERICA,
Intervenor/Respondent

APPENDICES TO PETITION FOR REVIEW

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APPENDICES

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:

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Deborah A. Groth, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK, Appellant, v. KING COUNTY, a political subdivision of Washington State; and the KING COUNTY PROSECUTING ATTORNEY'S OFFICE, a local public agency, Respondents.	No. 74459-3-I DIVISION ONE UNPUBLISHED FILED: December 19, 2016

Cox, J. — Michael Mockovak appeals the trial court's summary judgment order and the order denying his motion to compel discovery. There are no genuine issues of material fact regarding the first order. And King County and the King County Prosecutor are entitled to judgment as a matter of law. As for the second order, the trial court did not abuse its discretion in denying discovery. We affirm.

In 2010, a jury found Michael Mockovak guilty of soliciting and attempting to murder his business partner among other charges.[1] This court affirmed the judgment and sentence on appeal[2] and later denied his personal restraint petition.[3]

Mockovak's convictions arose out of a joint federal-state investigation conducted by the Puget Sound Safe Streets Violent Crimes Task Force (the "Task Force"). This body includes both federal and state law enforcement officers specially appointed to federal positions. Leonard Carver was a Detective with the Seattle Police Department (SPD), appointed as a Federal Bureau of Investigation (FBI) Task Force Officer and Special Deputy U.S. Marshal. In this capacity, he had investigatory and arrest authority for violations of federal law.[4]

The task force employed a confidential informant in its investigation named Daniel Kultin, a Russian émigré and Mockovak's employee. Kultin contacted the FBI after Mockovak told him "maybe in a joke way," but not as a "funny joke" that he wanted his business partner killed.[5] In the following months,

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[1] State v. Mockovak, No. 66924-9-I, slip op. at *1 (Wash. Ct. App. May 20, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/669249.pdf.

[2] Id. at *2.

[3] In re Mockovak, No. 69390-5-I, slip op. at *15 (Wash. Ct. App. June 6, 2016) (published), http://www.courts.wa.gov/opinions/pdf/693905.pdf.

[4] As discussed, the parties dispute whether Leonard Carver was only an SPD Detective or a federal Officer as well. We will refer to him only by last name.

[5] In re Mockovak, No. 69390-5-I, slip op. at *2.

Kultin entertained such entreaties, which grew increasingly serious. The two arranged for Kultin to hire someone who was supposed to be a hitman in the Russian mafia to perform the murder. Soon after they made this deal, law enforcement arrested Mockovak.

The King County Prosecuting Attorney (KCPA) and the United States Department of Justice (DOJ) agreed that the State should prosecute Mockovak under state law. In preparing for trial, the KCPA and United States Attorney's Office (USAO) consulted regularly about the process to obtain and release federal investigation documents. This complex process for release led to occasional tension in their communications.

While incarcerated following his convictions, Mockovak brought this public records case against King County and the KCPA. He sought all documents in the KCPA's possession referring to Kultin's immigration status.

The County and the KCPA soon began providing records, many heavily redacted to protect work product, along with an exemption log sheet. The County and the KCPA also refused to disclose Kultin's National Crime Information Center (NCIC) Report, arguing they were barred from doing so by federal statute.

In June 2015, the County and KCPA moved for summary judgment. Along with the motion, the KCPA filed sealed and unredacted copies of 130 documents for in camera review. Mockovak argues that these were improperly redacted.

Mockovak moved for partial summary judgment. The effect of his motion was to reduce the number of contested document redactions to 81. He organized the challenged documents into three categories, which we describe in more detail later in this opinion.

The trial court granted summary judgment to the County and KCPA, denying Mockovak's partial summary judgment motion. This order was entered on November 23, 2015.

In August 2015, Mockovak sought to depose Carver. The USAO responded and explained that Carver could not testify or provide documents without the approval of the U.S. Attorney because he was a federal employee. Mockovak moved for an order compelling Carver's deposition. The United States appeared and opposed the motion, arguing that the court lacked jurisdiction to compel a federal employee to testify. The trial court denied the motion to compel in an order, entered on November 25, 2015.

Mockovak appeals by a notice of appeal filed on December 22, 2015.

TIMELINESS

As a preliminary matter, the County and the KCPA argue that this appeal is untimely. We disagree.

RAP 2.2(a) generally bars a party from appealing rulings in a case until after entry of a final judgment. The question is how that applies in this case.

The parties agree that Mockovak filed his notice of appeal in this case after the court entered orders granting the County's and the KCPA's motion for summary judgment, denying Mockovak's and denying his discovery motion. The

trial court had yet to enter an order to finalize an offer of judgment disposing of claims already settled between the parties. But that fact does not preclude our review.

When a party appeals a trial court order before the trial court has fully disposed of the case, "substance controls over form and [we] look[] to the content of a document rather than its title."[6]

Our decision in Rhodes v. D & D Enterprises, Inc. is illustrative.[7] In that case, certain vendors brought a declaratory action, asking the court to construe a provision in a contract for the sale of real property.[8] The trial court issued a Decree construing the provision and terminating the contract.[9] It also issued a "Final Judgment" ordering conveyance of the land.[10] In doing so, it adjudicated all issues save identification of the specific land to be conveyed.[11] We held that, under such circumstance, the Decree and Final Judgment were final even if the land remained unidentified.[12] Although we concluded that the appeal from the

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[6] Rhodes v. D & D Enterprises, Inc., 16 Wn. App. 175, 177, 554 P.2d 390 (1976).

[7] 16 Wn. App. 175, 554 P.2d 390 (1976).

[8] Id. at 176.

[9] Id. at 176-77.

[10] Id. at 177.

[11] Id. at 178.

[12] Id.

Decree was defective for other reasons, we found the documents otherwise appealable.[13]

Here, Mockovak filed his notice of appeal on December 22, 2015, following entry of the November 23, 2015 summary judgment order that disposed of all substantive issues in dispute. Likewise, the notice of appeal also designates the order denying the motion to compel, entered on November 25, 2015. Both orders were entered within 30 days prior to filing of the notice. All that remained for the trial court was to finalize the offer of judgment concerning matters already settled earlier in the litigation. In looking to the substance of the orders appealed, we conclude they are analogous to the decree and final judgment in Rhodes. Thus, we hold they are final and appealable.

DISCOVERY OF TASK FORCE MEMBER

The United States argues that the trial court correctly denied Mockovak's discovery motion because it lacked authority to compel Carver to testify. We hold that the trial court properly exercised its discretion in doing so.

Discovery decisions are within the trial court's sound discretion.[14] A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons.[15]

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[13] Id.

[14] State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998).

[15] State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (internal citation omitted).

Touhy Regulations

The United States argues first that 5 U.S.C. § 301 provides it with authority to oppose discovery of Carver, a member of its joint task force. We agree.

5 U.S.C. § 301 authorizes each federal department head to "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." The DOJ has prescribed such regulations, included within 28 C.F.R. § 16.

28 C.F.R. § 16.22(a) provides:

> [i]n any federal or state case or matter in which the United States is not a party, no 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.

Whenever a DOJ employee receives such a demand, he must immediately notify the local U.S. Attorney.[16] Similarly, the party seeking discovery may make a request to the U.S. Attorney.[17] In both instances, the U.S. Attorney then decides whether the relevant employee will testify.[18]

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[16] 28 C.F.R. § 16.22(b) (2015).

[17] 28 C.F.R. § 16.22(c).

[18] 28 C.F.R. § 16.22(a); 16.24(b).

We review de novo the meaning of statutes.[19]

In United States ex rel. Touhy v. Ragen, the U.S. Supreme Court upheld these regulations, explaining that the "necessity[] of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious."[20] The regulations have taken the name of that case and are known as the Touhy regulations. When these regulations apply to bar federal employees from testifying, they "operate as a jurisdictional limitation on the [state court's] authority."[21]

Here, the parties dispute whether the regulations actually apply to Carver and, if so, whether they violate the anti-commandeering principle of the Tenth Amendment.

Turning to the first argument, Mockovak argues that Carver was not an "employee" within the meaning of 5 U.S.C. § 301 or the Touhy regulations. We disagree.

For the purposes of Title 5 of the United States Code, an "employee" is a person appointed to the civil service.[22] The DOJ has informed the court that

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[19] Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 482, 258 P.3d 676 (2011).

[20] 340 U.S. 462, 468, 71 S. Ct. 416, 95 L. Ed. 417 (1951).

[21] United States v. Threet, No. 09-20523-05, 2011 WL 5865076, *1 (E.D. Mich. Nov. 22, 2011); see Mayo v. City of Scranton, No. 3:CV-10-0935, 2012 WL 6050551, at *2 (M.D. Pa. Dec. 4, 2012); Hickey v. Columbus Consol. Gov't, No. 4:07-CV-096(CDL), 2008 WL 450561, at *3 n.4 (M.D. Ga. Feb. 15, 2008).

[22] 5 U.S.C. § 2105(a).

neither Carver's designation within the FBI nor within the United States Marshal Service qualify as civil service appointments.[23]

But 5 U.S.C. § 301 reaches further. As noted above, it empowers the DOJ to prescribe more general regulations for departmental administration, including the "distribution and performance of its business" and the "custody, use, and preservation of its records, papers, and property." Thus, we conclude that the DOJ may govern the conduct of those under its supervision who perform its business. 28 C.F.R. § 16 is a permissible expression of this authority.

Further, the statutory definition noted above does not control whether Carver is an employee under the Touhy regulations. Because those regulations are otherwise proper under the statute, they may define their own terms. The definition of "employee" for such purposes rests in 28 C.F.R. § 16.21(b). There, "employees" are "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." As discussed below, Carver is subject to such "supervision, jurisdiction, or control." And regulation of such persons is permissible under 5 U.S.C. § 301. The DOJ's use of the word "employee" to describe such persons does not alter our conclusion.

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[23] Letter from Michael Shih, Appellate Staff, Civil Div., U.S. Dep't of Justice, to Richard D. Johnson, Court Administrator/Clerk, WA State Court of Appeals – Div. I (Oct. 31, 2016).

Further, the DOJ's use of the word "employee" tracks the common law. Mockovak argues that, under the common law, Carver can only be an employee of the agency that pays his salary. He cites to the Supreme Court's reference to the *American Heritage* dictionary definition of an employee as any "person who works for another in return for financial or other compensation."[24] He thus argues that Carver could only be the employee of the agency paying his salary. This is inconsistent with the law of agency.

As the Third Restatement of Agency explains, "the fact that work is performed gratuitously does not" preclude the formation of an agency relationship.[25] Similarly, the common law allows the employer who pays an employee's salary to loan him to another employer. The Second Restatement of Agency explains that a "servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services."[26] Thus, employment by one entity does not preclude simultaneous employment by another entity.

The Supreme Court concluded likewise in N.L.R.B. v. Town & Country Electric, Inc.[27] The issue in that case was whether certain electricians who

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[24] N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85, 90, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995).

[25] RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(b) (2006).

[26] RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

[27] 516 U.S. 85, 94, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995).

organized for and were paid by their union could also be employees of the entity hiring them to do electrical work.[28] In holding that they could be, the Court explained that a "person ***may*** be the servant of two masters . . . ***at one time as to one act***, if the service to one does not involve ***abandonment*** of service to the other."[29] The Court concluded that the electricians' compensated organizing work did not constitute abandonment of their service to the company.[30] While performing the "ordinary tasks during the working day," the electricians were subject to the company's control, "whether or not the union also pays the worker" or if the union and company's "interests or control might ***sometimes*** differ."[31]

Our supreme court has explained that "the chief, and most decisive, factor" in forming an employment relationship is the "right of control over the work or thing to be done."[32] The Touhy regulations are consistent with this understanding by stating that one is a federal employee if subject to the "supervision, jurisdiction, or control of the Attorney General."[33]

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[28] Id. at 87-88.

[29] Id. at 94-95.

[30] Id. at 95.

[31] Id.

[32] Hubbard v. Dep't of Labor & Indus., 198 Wash. 354, 359, 88 P.2d 423 (1939).

[33] 28 C.F.R. § 16.21(b).

Whether the SPD pays or also employs Carver is not determinative. If the FBI controls his actions while conducting federal investigations, then he is a federal employee and subject to the Touhy regulations.

Carver's "full-time official duties [are] devoted to the investigation of federal crimes for the purpose of federal prosecution." He receives his assignments from the FBI and "is under the day-to-day supervision and control of the FBI." As such, he must adhere to "the investigative and administrative requirements" of the DOJ and FBI. The DOJ and FBI thus control his actions and render him a federal employee under the Touhy regulations, as interpreted in light of the common law. Thus, the trial court correctly determined that the Touhy regulations apply to Carver.

Tenth Amendment

Turning to Mockovak's second argument, he claims that application of the Touhy regulations to bar the subpoena directed at Carver violates the Tenth Amendment. This is incorrect.

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."[34] The United States Supreme Court has explained that while this language does not prevent the federal government from regulating individual conduct, it bars it from "commandeering" the institutions of

[34] U.S. CONST. amend X.

state government for the fulfillment of its own purposes.[35] This principle protects the system of "dual sovereignty" contemplated by the United States Constitution.[36] That system, along with the checks and balances within the federal government, protect the citizen's individual liberty.[37]

We review de novo constitutional issues.[38]

In Printz v. United States, the Supreme Court considered whether this principle applied to a statute requiring that state police implement federal law.[39] Congress had passed the Brady Handgun Violence Prevention Act, requiring that state police officers conduct background checks on individuals seeking to buy firearms.[40] One such officer, Sheriff Printz, "object[ed] to being pressed into federal service" and argued that such impressment violated the Tenth Amendment.[41] The Court agreed, concluding that it would contravene the

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[35] Printz v. United States, 521 U.S. 898, 902, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

[36] Id. at 919.

[37] Id. at 921.

[38] State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012).

[39] 521 U.S. 898, 902, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

[40] Id. at 902.

[41] Id. at 905.

constitutional system, allowing the United States to "reduc[e]" state officers to mere "puppets of a ventriloquist Congress."[42]

But, as the United States argues in this case, the Tenth Amendment provides "merely that the federal government may not conscript nonconsenting state executive . . . officers to enforce federal laws." It does not bar regulation of consenting state officers.

Printz supports this distinction. That case identified the "critical point here –that Congress could [not] impose these responsibilities ***without the consent of the States.***"[43] In contrast, the Court recognized the legitimacy of previous statutes which did not "***mandate*** those duties, but merely empowered the [United States] to ***enter into contracts*** with such State . . . officers as ***may be designated*** for that purpose ***by the governor*** of any State."[44] Such consensual collaborations were unlikely to provoke the "federal-state conflict[s]" that offended the Tenth Amendment.[45] Within such collaborative arrangements, state officers are neither "impressed," "dragooned," nor made congressional puppets.[46]

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[42] Id. at 928.

[43] Id. at 910-11.

[44] Id. at 916 (internal citation omitted).

[45] Id. at 919.

[46] Id. at 928-29; see also Lomont v. O'Neill, 285 F.3d 9, 14 (D.C. Cir. 2002) (holding that the Tenth Amendment allows federal regulation of state officers executing a consensual state-federal program).

Here, Mockovak argues that a longstanding principle holds that "state officers [a]re not stripped of their state sovereignty just because they work[] cooperatively with federal agencies." He cites for this proposition the Supreme Court's decision in Randolph v. Donaldson, but that case does not aid his argument.[47]

In Randolph, a state prison held federal inmates based on two congressional statutes passed in 1789.[48] The first recommended that the states legislate to allow their jails to rent out space to the United States to house federal prisoners.[49] The Printz court would later point to such a law as a legitimate example of consensual federal-state cooperation.[50] The second statute authorized the federal Marshals to appoint deputies for whose misfeasance they would bear responsibility.[51] Virginia passed a law allowing the U.S. Marshal to rent space in its jails for federal prisoners, and the U.S. Marshal for Virginia did so.[52]

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[47] 13 U.S. (9 Cranch) 76, 3 L. Ed. 662 (1815).

[48] Id. at 84-85.

[49] Id.

[50] Printz, 521 U.S. at 909.

[51] Randolph, 13 U.S. at 84-85.

[52] Id.

A federal prisoner then escaped from a Virginia state jail.[53] An unidentified plaintiff sued the U.S. Marshall in vicarious liability for the state jailer's negligence.[54] Thus, the Court had to determine if the state jailer's incidental involvement in the jail sharing scheme made him an agent of the U.S. Marshal.[55] The Court held that it did not and that the mere rental of jail cells did not render the state jailer the Marshal's deputy.[56] The United States had not appointed the state jailer to such a position, and the Marshal had no authority to command or direct the jailer.[57]

Here, in contrast, the FBI and the U.S. Marshal Service appointed Carver to this task force. Neither Carver nor the state jailer in Randolph merely "agreed to assist" the United States. Carver acted pursuant to a consensual joint task force arrangement between the United States, Washington, and the SPD. The state jailer in Randolph never held any federal position and always remained an exclusively state employee working pursuant to a federal-state cooperative arrangement.[58] The only commonality between that case and this case is that

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[53] Id. at 84.

[54] Id.

[55] Id.

[56] Id. at 86.

[57] Id.

[58] 13 U.S. at 14-15.

both involve legitimate consensual cooperation between the United States and a state body.

Thus, the trial court correctly denied Mockovak's motion to compel Carver's deposition. It lacked authority under the Touhy regulations to compel Carver to testify.

Mockovak's arguments suggest an unwillingness to accept Carver's status as an officer within the FBI and U.S. Marshall Service. He interprets the United States' brief to argue "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 makes no such claim. Outside DOJ regulations and applicable principles of sovereign immunity, Carver remains subject to Washington law.

Mockovak mounts two other arguments on how the application of the Touhy regulations offends the Tenth Amendment. They are unpersuasive.

First, he argues that 5 U.S.C. § 301 cannot apply to a state law police officer in a criminal proceeding because the "federal government does ***not*** have a general police power to make criminal laws." Mockovak's legal argument is correct.[59] But the statute and the Touhy regulations are not directed at criminal conduct. They serve, rather, to regulate the ***employment*** conduct of federal employees and disclosure of evidence.

[59] Bond v. United States, 134 S. Ct. 2077, 2086, 189 L. Ed. 2d 1 (2014).

Second, Mockovak argues that the U.S. Attorney inappropriately sought to "overrule the Superior Court's determination that the deponent may have relevant testimony to give." He argues that "[n]o 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." The Supremacy Clause proves otherwise.

The United States cannot "commandeer" state legislative or executive branches. But the Supremacy Clause provides that "the laws of the United States . . . shall be the supreme law of the land; and the ***judges*** in every state shall be bound thereby."[60] This provision requires judges to conform to the requirements of federal law.[61]

Discovery to "compel an official of a federal agency to testify contrary to the agency's duly enacted regulations clearly thwarts the purpose and intended effect of the federal regulations."[62] This "plainly violates both the spirit and the letter of the Supremacy Clause."[63] Thus, the Touhy regulations properly limit the discovery sought in this case. The court did not abuse its discretion in denying the motion to compel Carver to testify at a deposition.

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[60] U.S. CONST. art. 4, cl. 2 (emphasis added).

[61] Testa v. Katt, 330 U.S. 386, 394, 67 S. Ct. 810, 91 L. Ed. 967 (1947).

[62] Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989).

[63] Id.

Sovereign Immunity

The United States also argues that its sovereign immunity precludes the enforcement of discovery orders directed against federal employees like Carver. We agree.

Division Two of this court has explained that a subpoena directed "against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to the governmental privilege of sovereign immunity."[64] Unless the United States waives its immunity, "a state court lacks jurisdiction to compel a federal employee to testify in a state court action to which the United States is not a party, concerning information acquired during the course of his or her official duties."[65]

Because Mockovak seeks information from Carver that Carver learned in the course of his duties as a task force member, federal sovereign immunity precluded the state court from enforcing the subpoena.

PUBLIC RECORDS ACT

Mockovak next argues that even if the trial court cannot require Carver to testify, it has authority to compel production of documents that Carver relied upon in testifying. We disagree.

The Public Records Act (PRA) defines as records within its purview "any writing containing information relating to the conduct of government or the

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[64] State v. Vance, 184 Wn. App. 902, 916, 339 P.3d 245 (2014), review denied, 182 Wn.2d 1020 (2015).

[65] Id.

performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[66]

We review de novo interpretations of the PRA.[67]

In Concerned Ratepayers Association v. Public Utility District No. 1 of Clark County, Washington, the supreme court explained that a state or local agency "used" a record otherwise possessed or owned by a different person when the record is "(1) employed for; (2) applied to; ***or*** (3) made instrumental to a governmental end or purpose."[68] Thus, in that case, the designs for an electrical turbine became a public record when reviewed by state utility employees for implementation.[69]

Here, Mockovak argues that certain task force documents became public records subject to the PRA when Carver used them. While we agree that such documents likely qualify as public records under the state act, that alone does not entitle Mockovak to them.

The United States argues that even if Carver relied upon these documents in his earlier investigation and testimony, "nothing in Concerned Ratepayers suggests that the Public Records Act requires Washington State agencies to

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[66] RCW 42.56.010(3).

[67] Nissen v. Pierce County, 183 Wn.2d 863, 872, 357 P.3d 45 (2015).

[68] 138 Wn.2d 950, 960, 983 P.2d 635 (1999).

[69] Id. at 962.

acquire and turn over documents created by and belonging to a federal agency in contravention of that agency's Touhy regulations." We agree.

WORK PRODUCT

The County and the KCPA argue that the trial court properly granted summary judgment dismissing Mockovak's challenge to the redaction of the 81 challenged documents as protected work product. We agree.

The PRA exempts from disclosure "records [that] would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts."[70] CR 26(b)(4) establishes two tiers of work product protection. First, an attorney's documented "mental impressions, conclusions, opinions, or legal theories" are always immune from discovery.[71] Second, other documents "prepared in anticipation of litigation or for trial by or for another party" are not exempt for disclosure when the party seeking disclosure demonstrates a substantial need for them and an inability without undue hardship to procure their equivalent by other means.[72]

We review de novo summary judgment orders.[73] Summary judgment is proper "only when there is no genuine issue as to any material fact and the

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[70] RCW 42.56.290.

[71] CR 26(b)(4).

[72] Id.

[73] Neigh. Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

moving party is entitled to judgment as a matter of law."[74] "A genuine issue of material fact exists if 'reasonable minds could differ on the facts controlling the outcome of the litigation.'"[75] This court considers "the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party."[76]

Mockovak advances numerous challenges to the trial court's conclusion on summary judgment that the documents at issue were protected from disclosure as work product. He argues first that he is entitled to documents within Appendix A because attorney work product protection was allegedly overridden by criminal discovery requirements under Brady v. Maryland.[77] He argues second that the KCPA waived the protections of the work product doctrine to documents within Appendix B. He argues third that the work product doctrine does not apply to documents within Appendix C because they were prepared by the USAO and thus not prepared in anticipation of litigation. He argues lastly that even if the work product doctrine protects these documents, he

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[74] Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014); see also CR 56(c).

[75] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)), review denied, 181 Wn.2d 1023 (2014).

[76] Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

[77] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

has made a sufficient showing to overcome its protection. We disagree with all of these arguments.

Brady Rights

Mockovak argues the County and KCPA must disclose unredacted versions of documents in his Appendix A because he is constitutionally entitled to these documents under Brady. We disagree.

The Supreme Court held in Brady that the "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[78] Such evidence includes evidence that may be used to impeach a witness's credibility.[79]

Federal Circuit Courts of Appeals have concluded that Brady obligations extend to evidence suggesting an implied or "tacit understanding[s]" between the government and witnesses to exchange cooperation for some benefit.[80] The government must provide such evidence whether or not the defense requests it.[81]

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[78] Id. at 87.

[79] Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

[80] Wisehart v. Davis, 408 F.3d 321, 323-24 (7th Cir. 2005); see also Douglas v. Workman, 560 F.3d 1156, 1186 (10th Cir. 2009).

[81] Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

We review de novo constitutional issues.[82]

Here, Mockovak argues that Brady requires disclosure of any document showing a tacit understanding between the KCPA or USAO and Kultin to assist Kultin in his immigration application. He argues that the trial court erred in rejecting this argument because it balanced his interest in securing Brady material against the County and the KCPA's interests in protecting their work product. Instead, he argues that Brady rights should always trump work product protection.

We agree that a balancing test is inapplicable to this case. Nevertheless, Mockovak cannot raise his Brady claims in this case.

In concluding that the PRA required such a balancing test, the trial court relied upon the D.C. Circuit Court of Appeals' decision in Roth v. United States Department of Justice.[83] In that case, the D.C. Circuit Court of Appeals considered Lester Bower's Freedom of Information Act (FOIA) suit for evidence he argued to be exculpatory.[84] The United States argued that such evidence was protected from disclosure under a privacy exemption specific to the FOIA.[85]

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[82] McCuistion, 174 Wn.2d at 387.

[83] 642 F.3d 1161 (D.C. Cir. 2011).

[84] Id. at 1166-68.

[85] Id.

Analysis of that exemption required the court to balance the public's interest in disclosure against the privacy interests at stake.[86]

But this court held that approach to be improper in considering PRA challenges in King County v. Sheehan.[87] William Sheehan was a critic of law enforcement and had made public records requests for the names, job titles, and pay scales of every police officer employed by King County.[88] The County sued and moved to enjoin Sheehan from investigating these records.[89] The trial court granted the County's motion, in part, after balancing the interests of disclosure against the County's in effective law enforcement.[90]

This court found that balance inappropriate.[91] While that analysis was proper in the federal courts' consideration of FOIA's privacy exemption, the PRA was "more severe."[92] It required that the agency resisting disclosure show both a privacy interest and a lack of legitimate public interest.[93] As such, "the use of a

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[86] Id. at 1174.

[87] 114 Wn. App. 325, 57 P.3d 307 (2002).

[88] Id. at 331.

[89] Id.

[90] Id. at 334.

[91] Id. at 344.

[92] Id.

[93] Id. at 342.

test that balances the individual's privacy interest against the interest of the public in disclosure is not permitted."[94]

The controlling rule here is that a litigant may only assert his Brady rights in an appeal of or collateral attack on a criminal conviction.[95] Numerous federal courts have held that Brady claims are "proper only in connection with a criminal proceeding," not a suit for the disclosure of public records.[96] The Supreme Court has instructed that Brady is "the wrong framework" for evaluating the government's post-trial disclosure obligations.[97] Similarly, Roth held that a public records request is "not a substitute" for a proper Brady request in a criminal case.[98]

Mockovak argues that Roth held differently. He argues that the D.C. Circuit Court of Appeals ordered disclosure of the documents Bower sought under Brady. This is incorrect. As stated, the Roth court balanced the public interests at stake against the United States' interest in withholding documents. In arguing for the public's interests, Bower argued that the public had an "interest in knowing whether the federal government complied with its Brady obligation," so

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[94] Id. at 344.

[95] Roth, 642 F.3d at 1177.

[96] Stimac v. U.S. Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985); accord Roth, 642 F.3d at 1176.

[97] Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).

[98] Roth, 642 F.3d at 1177.

as to prevent unfair convictions.[99] He did not argue he had a constitutional due process right to the documents.

Noting this distinction, the D.C. Circuit explained that while Bower "certainly has an intense personal interest in obtaining whatever information might bolster the Brady claims he is presenting in his collateral attacks on his conviction, [his] personal stake in the release of the requested information is 'irrelevant' to the balancing of public and third-party interest required."[100] The court ultimately concluded that the public interests at stake outweighed the government's interest, not that Bower was entitled to disclosure under Brady.[101]

Here, Mockovak attempts to raise Brady claims in a PRA action. He cannot do so. As the County correctly explains, "[t]his is not to say that the PRA trumps or otherwise limits what Brady allows. It simply means that the issue must be litigated in the proper forum."

Work Product Waiver

Mockovak argues that the County waived the work product protection attached to communications made to the U.S. Attorney in his Appendix B documents. We disagree.

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[99] Id. at 1175.

[100] Id. at 1177.

[101] Id. at 1181.

Waiver occurs when "a party discloses documents to other persons with the intention that an adversary can see the documents."[102] Thus, mere disclosure is insufficient if the party who allegedly waived the protection did not do so in a way that would disclose the documents to an adverse party.

We review de novo evidentiary issues underlying a summary judgment order.[103]

Relatedly, the County and the KCPA claim that the "common interest" rule protects communications to the U.S. Attorney. Under this rule, "communications exchanged between multiple parties engaged in a common defense remain privileged" and do not lose their protection by waiver.[104]

Mockovak argues this rule is not met because the KCPA and the USAO frequently came to tension over what evidence to disclose in the original prosecution. Tensions alone do not waive the protection.

Aligned counsel, even counsel within the same office may disagree. Such tension may be greater when counsel must function under different governmental systems. This tension does not preclude counsel from sharing common investigative and prosecutorial interests. The United States did not lose those shared interests because it chose to assist the State in prosecuting Mockovak rather than bring charges itself.

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[102] Harris v. Drake, 152 Wn.2d 480, 495, 99 P.3d 872 (2004).

[103] Neigh. Alliance of Spokane County, 172 Wn.2d at 715.

[104] C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 716, 985 P.2d 262 (1999).

Mockovak responds by citing a recent case from Division Three where the court concluded that multiple agencies cooperating in joint litigation satisfied the common interest rule.[105] But that case never limited the rule to such contexts. Mockovak provides no authority for the argument that two parties cannot share a common interest when only one ultimately litigates the matter. As such, his argument is unpersuasive.[106]

Mockovak also argues that the County waived work product protection in documents 100, 109, 110, and 111 by disclosing them to Kultin.

The County and the KCPA point to the Third Circuit Court of Appeals' persuasive opinion in Sporck v. Peil as authority for the proposition that disclosure to a friendly witness does not constitute waiver.[107] In that case, shareholders brought a securities fraud class action against National Semiconductor Corporation.[108] Class representatives deposed Charles Sporck, President of the company.[109] In preparation for his deposition, Sporck's counsel

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[105] Kittitas County v. Allphin, 195 Wn. App. 355, 368, 381 P.3d 1202 (2016).

[106] See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248, 350 P.3d 647 (2015).

[107] 759 F.2d 312 (3d Cir. 1985).

[108] Id. at 313.

[109] Id.

prepared him by showing him numerous documents, already produced to the class representatives.[110]

At the deposition, Sporck referred to the documents.[111] Class attorneys then asked if he had examined any documents in preparation for the deposition.[112] When he answered in the affirmative, the class attorneys moved for defense counsel to identify and produce them.[113] Defense counsel refused to identify them, explaining that defense counsel had already produced the documents and that the selection of documents was itself protected work product.[114] The trial court granted the class's motion, and Sporck petitioned for a writ of mandamus to order non-disclosure.[115]

While the Third Circuit Court of Appeals declined to grant that writ, it directed the trial court to order the document selection protected as work product, even after disclosure to a witness.[116] In doing so, it concluded that defense

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[110] Id.

[111] Id. at 314.

[112] Id.

[113] Id.

[114] Id.

[115] Id.

[116] Id. at 318-19.

counsel's presentation to Sporck of the documents, so selected, was a "proper and necessary preparation of his client's case."[117]

Here, Mockovak points to two cases in response in order to support his argument. He first cites State v. Garcia, where this court considered whether a prosecutor's notes of a witness interview, absent the prosecutor's "opinions, theories or conclusions" constituted protected work product.[118] This court determined that the notes did not.[119] Thus, this court never had the opportunity to consider waiver of protection for actual work product disclosed to a witness.

Mockovak also points to S.E.C. v. Gupta in the District Court for the Southern District of New York.[120] In that case, Rajat Gupta, the defendant in a securities civil enforcement action, deposed Lloyd Blankfein, C.E.O. of Goldman Sachs.[121] Gupta's counsel asked Blankfein if he had met with anyone aside from his own attorneys in preparation for the deposition.[122] Blankfein responded that he had met with attorneys from the USAO and the Securities and Exchange

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[117] Id. at 316.

[118] 45 Wn. App. 132, 138, 724 P.2d 412 (1986).

[119] Id.

[120] 281 F.R.D. 169 (S.D.N.Y. 2012).

[121] Id. at 170.

[122] Id.

Commission (SEC).[123] Counsel asked him if those attorneys had shown him any documents at those meetings, to which the SEC objected, claiming that such documents were protected work product.[124]

Gupta moved to compel production of those documents.[125] The court granted that motion, concluding that the SEC and USAO had waived the documents' work product protection.[126] But it did so because those agencies shared no common interest with Blankfein.[127] Blankfein was represented by his own attorneys and took no position in the civil enforcement action.[128]

Here, by contrast, Kultin participated not only in the prosecution of Mockovak but in the earlier investigation. The investigation began with his call to the FBI.[129] As such, he certainly took a position in this case, sharing a common interest in seeing Mockovak tried for his crimes. Thus, Mockovak cannot demonstrate a genuine issue of material fact whether the United States, the

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[123] Id.

[124] Id. at 170-71.

[125] Id. at 171.

[126] Id. at 173.

[127] Id. at 172.

[128] Id.

[129] In re Mockovak, No. 69390-5-I, slip op. at *2.

County, or the KCPA waived work product protection by disclosing documents to Kultin related to their common interest with Kultin.

Anticipation of Litigation

Mockovak argues that the documents within his Appendix C are not protected work product because federal attorneys prepared them and could not have done so in anticipation of litigation because the United States did not ultimately prosecute Mockovak. We disagree.

In Dever v. Fowler, this court concluded that the "protection under the work product doctrine extends to documents prepared in anticipation of ***any*** litigation, regardless of whether the party from whom it is requested is a party in the present litigation."[130] In that case, the State had earlier charged George Dever with arson.[131] After the earlier trial court dismissed that charge, Dever sued the investigating fire department and its investigator.[132]

In the course of litigation, Dever demanded disclosure of certain documents prepared by his earlier prosecutor.[133] The King County prosecutor, not party to the suit, claimed that the sought after documents were protected work product.[134] Dever rebutted that work product protection did not apply to

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[130] 63 Wn. App. 35, 47, 816 P.2d 1237 (1991).

[131] Id. at 38.

[132] Id. at 39.

[133] Id. at 46.

[134] Id.

documents prepared by non-party witnesses.[135] This court rejected that argument and concluded that the documents prepared in anticipation of litigation may be protected even when the preparer is not a party to the present litigation.[136]

Relatedly, our supreme court has held that a party may effectively claim work product protection on behalf of a non-party.[137]

In this case, the USAO prepared the documents within Appendix C in anticipation of prosecuting Mockovak. That it ultimately agreed with the KCPA that the State should prosecute is irrelevant. The rule in Dever allows the protection of these documents as work product.

Nonetheless, Mockovak argues that neither the United States nor the County ever provided affirmative evidence that the e-mails were prepared in anticipation of litigation. This argument is unpersuasive. The e-mails speak for themselves as all concern an ongoing criminal investigation with the intent to seek prosecution. Thus, Mockovak cannot demonstrate a genuine issue of material fact whether the United States attorneys prepared the documents without anticipation of litigation.

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[135] Id.

[136] Id. at 47.

[137] Harris, 152 Wn.2d at 492.

Overcoming Work Product Protection

Whether or not the County or the KCPA waived the work product protection in this case, Mockovak argues that he has overcome that protection by demonstrating a substantial need for disclosure and an undue hardship in acquiring the documents by other means. We again disagree.

As discussed above, there are two tiers of work product protection.[138] First, an attorney's documented "mental impressions, conclusions, opinions, or legal theories" are always immune from discovery.[139] Second, other documents "prepared in anticipation of litigation or for trial by or for another party" are not exempt from disclosure when the party seeking disclosure demonstrates a substantial need for them and an inability without undue hardship to procure their equivalent by other means.[140]

The County and the KCPA argue that the documents are "opinion" product. We agree.

As the County and the KCPA state, the document redactions "consist of attorney perceptions and analysis relating to case preparations and plans, evidence, witnesses and strategy in Mockovak's criminal trial." Based on our careful review of the unredacted and sealed documents in the record on appeal, this characterization is accurate. Such content represents the "mental

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[138] CR 26(b)(4).

[139] Id.

[140] Id.

impressions, conclusions, opinions, or legal theories" of the drafting attorneys.[141] Such work product is always immune from disclosure.[142] As such, these documents are absolutely immune from disclosure.

Even if the documents are only regular work product, the documents are protected from disclosure unless Mockovak can show a "substantial need" for them and an inability to procure them otherwise without "undue hardship."[143]

"'Substantial need' in the litigation context means that the information is vital to the preparation of the party's case."[144] But a party does not demonstrate substantial need "simply because he does not have them."[145]

The County and the KCPA do not contest that Mockovak would face an undue hardship in seeking to acquire the documents through other means. Rather, the County and the KCPA argue that the documents at issue contain no information about Kultin's immigration status that Mockovak did not know already. Specifically, they highlight five factual matters for which Mockovak seeks evidence. First, Kultin was a lawful permanent resident at the time of trial rather than a U.S. citizen. Second, Kultin was in the United States on asylum

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[141] Id.

[142] Id.

[143] Id.

[144] Soter v. Cowles Publ'g Co., 131 Wn. App. 882, 899, 130 P.3d 840 (2006).

[145] Kleven v. King County Prosecutor, 112 Wn. App. 18, 25, 53 P.3d 516 (2002).

status. Third, the Immigration and Naturalization Service (INS) arrested Kultin in 1997. Fourth, the United States never offered Kultin immigration assistance for his help as an informant and witness. Fifth, Kultin had an application for citizenship pending at the time of trial.

The record shows that the State provided evidence of the first three facts to Mockovak. On October 28, 2010, the State forwarded an e-mail between the KCPA and Carver indicating that Kultin was a lawful permanent resident at that time. The same e-mail indicated his asylum status. The KCPA also provided an FBI report to Mockovak during criminal discovery that indicated that Kultin had been "once arrested by [an] immigration official[] who believed [that] his immigrant paperwork was not in order. However, it was discovered that his papers were in order and the case was dismissed." Thus, Mockovak cannot show substantial need for documents evidencing these facts. Only the questions of when Kultin filed for citizenship and whether he received immigration assistance from the United States or the County remain at issue.

On May 26, 2010, the State provided documentation to Mockovak showing that Kultin had an immigration application pending in April 2009. Later, during this case, Kultin testified by deposition that he filed for citizenship again during 2011. Mockovak points to the crucial gap between the two dates and argues that the State never informed him whether Kultin had a citizenship application pending at the time of the criminal trial.

But Mockovak's theories on the nature of that gap are all speculative. He speculates that Kultin may have intended to file a new application after trial,

capitalizing on the assistance he rendered the FBI and State. He also speculates that the 2009 application may have remained pending during trial or been denied before. He further speculates that Kultin may have lied in the deposition and that the County, the KCPA, or the United States might have known it. His theories all fail because they do not suggest that the County, the KCPA, or United States have any information beyond what they provided.

Regarding the possibility that Kultin obtained assistance from the DOJ or King County, the County and the KCPA argue that they already gave Mockovak complete information about any potential immigration assistance offered to Kultin. Specifically, they point to Carver's declaration of December 3, 2010 and a letter from the KCPA to defense counsel on May 10, 2010. Carver and the author of the letter averred that Kultin did not receive any promise of immigration assistance for his testimony. The County and the KCPA also highlighted Kultin's testimony that he had participated in the investigation to do the right thing. Again, Mockovak can only speculate that these statements were disingenuous but his speculation falls below the substantial need he must demonstrate.

Mockovak also argues that the County must disclose documents 26, 77, and 99 in full. The County concedes that these documents involve "immigration-related fact[s] concerning Kultin." Mockovak speculates that they may detail some immigration assistance offered by the United States. The documents contain no such information but only incidental facts already disclosed to Mockovak well before the criminal trial. As such, he cannot show substantial need for them because they are not vital to his case.

Mockovak argues in reply that two federal cases show that he has demonstrated substantial need. Neither are persuasive in this case.

The first, Benn v. Lambert,[146] is inapposite to this case. There, the Ninth Circuit Court of Appeals considered whether a habeas corpus petitioner made a sufficient showing of substantial need to overcome work product protections of documents he was entitled to under Brady.[147] But as discussed earlier, Brady claims are only applicable in such a collateral attack on a conviction or in the direct appeal itself. This case is thus irrelevant to the court's determination here because this is a PRA action, the improper forum for Brady claims.

In the second case, Doubleday v. Ruh, county sheriffs arrested Allison Doubleday for assault of a police officer, but a state trial court found her not guilty.[148] She then brought a 42 U.S.C. § 1983 challenge and sought the prosecutor's file on her criminal case.[149] The defendant sheriff's officers refused, asserting that the documents were protected work product.[150] The District Court for the Eastern District of California concluded otherwise, holding that the documents were not work product for reasons not relevant here.[151] But it

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[146] 283 F.3d 1040 (9th Cir. 2002).

[147] Id. at 1054.

[148] 149 F.R.D. 601, 604 (E.D. Cal. 1993).

[149] Id.

[150] Id.

[151] Id. at 605.

considered in arguendo whether Doubleday could show substantial need to overcome the work product protection if it applied.[152] It held that she could show sufficiently substantial need to justify disclosure of witness statements contemporaneous with her arrest.[153]

Here, in contrast, Mockovak does not seek witness statements but rather communications between attorneys. Even the documents for which he argues the KCPA waived work product protection by disclosing to Kultin come from the attorneys, not the witnesses. As such, Doubleday is neither analogous nor persuasive. Mockovak still cannot show a genuine issue of material fact showing he has substantial need for the documents.

NCIC REPORT

Mockovak argues that the County and the KCPA improperly withheld Kultin's NCIC report and that the County and the KCPA waived any protection of the report when Carver summarized the information he learned from the report. We disagree.

The PRA permits agencies to not disclose records when "[an]other statute . . . exempts or prohibits disclosure."[154] The County and the KCPA argue that 28 U.S.C. § 534 satisfies this exemption. That statute governs the DOJ's acquisition, preservation, and exchange of criminal identification records with

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[152] Id. at 607-08.

[153] Id.

[154] RCW 42.56.070(1).

other federal, state, tribal, and municipal agencies.[155] Pursuant to subsection (b) of that statute, such exchange "is subject to cancellation if dissemination is made outside the receiving departments or related agencies."

Here, Mockovak argues that Carver waived the "other statute" exemption when he testified in his declaration that he had learned certain information from the report. But, a federal statutory bar on disclosure cannot be waived.[156]

Two FOIA cases are instructive. In the first, Dow Jones & Co. v. United States Department of Justice, the District Court for the Southern District of New York explained that "[v]oluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption."[157] But it also explained that the party seeking that document must show that "the withheld information has already been ***specifically*** revealed to the public and that it appears to ***duplicate*** that being withheld."[158] As a result, "neither general discussions of topics nor partial disclosures of information constitute waiver of an otherwise valid FOIA exemption."[159]

In that case, the plaintiffs, as owners of the Wall Street Journal, sought disclosure of an FBI investigation report pertaining to the alleged suicide of a

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[155] 28 U.S.C. § 534 (2011).

[156] S.E.C. v. Yorkville Advisors LLC, 300 F.R.D. 152, 167 (S.D.N.Y. 2014).

[157] 880 F. Supp. 145, 150-51 (S.D.N.Y. 1995).

[158] Id. at 151.

[159] Id.

White House counsel.[160] They argued that the government had waived the exemption when the Deputy Attorney General disclosed certain basic information about the scene of the suicide and the preliminary investigation.[161] Such preliminary information included initial conclusions as to the nature of death and the presence of certain evidence at the scene of the crime.[162] It also included the counsel's recent mental health history.[163] Yet the court held this "limited, general, and cursory discussion[]" to be insufficient to waive the FOIA exemption.[164]

Mockovak also cites, without avail, New York Times Co. v. United States Department of Justice to support his argument. In that case, the New York Times sought disclosure under the FOIA of a memorandum drafted by the DOJ and Department of Defense justifying the Obama Administration's use of drone strikes.[165] The Second Circuit Court of Appeals held that the DOJ had waived the FOIA exemption for attorney-client privilege when it released a 16 page white paper that shared "substantial overlap" with the memorandum, largely

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[160] Id. at 146.

[161] Id. at 147, 150-51.

[162] Id. at 147.

[163] Id.

[164] Id. at 151.

[165] 756 F.3d 100 (2d Cir. 2014).

"parallel[ing]" the longer document's legal analysis.[166] Such a disclosure mirrored the specific disclosure that duplicates the withheld document contemplated in Dow Jones & Co.

Washington law is consistent with these cases. In Soter v. Cowles Publishing Co., Division Three of this court concluded that while "[d]ocuments released to a civil litigation adversary may lose their [work product and attorney-client] privileged status[,] disclosing facts contained in privileged documents (in interrogatories, for instance) does not mean the other party gets the document itself."[167] That case concerned a newspaper's PRA suit for records of a school district investigation of a student's death.[168] The District had released certain information to the public and the deceased child's family.[169] The newspaper argued that in doing so, the District waived the privilege in the reports.[170] The court held that while they might have waived privilege as to the disclosed information, the documents themselves remains protected.[171]

Here, by contrast, Carver merely declared that he was "familiar with Kultin's criminal and arrest history report, which reflects only one arrest. That

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[166] Id. at 116.

[167] 131 Wn. App. 882, 907, 130 P.3d 840 (2006).

[168] Id. at 889.

[169] Id.

[170] Id. at 906.

[171] Id.

arrest was on January 17, 1997, by U.S. Customs, Immigration and Naturalization (INS) Service. Kultin has no known criminal convictions."

This information is limited, general, and cursory. Aside from the date and arresting agency, it provides no further specifying information such as location, crime charged, or disposition. In no way does it resemble the substantial overlap found in New York Times Co. As such, this disclosure was not sufficient to waive the protections of the PRA's "other statute" exemption and 28 U.S.C. § 534.

ATTORNEY FEES

Mockovak argues that he is entitled to fees pursuant CR 37(a)(4) and RCW 42.56.550(4). We deny his request.

CR 37(a)(4) entitles a prevailing party in a discovery dispute to the reasonable expenses incurred in obtaining that order, including attorney fees. RCW 42.56.550(4) permits the prevailing party in a PRA dispute to receive reasonable attorney fees incurred in litigating the dispute. "[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal."[172]

As discussed, Mockovak does not prevail in either his discovery dispute or the merits of his PRA claim. Thus, an award to him of reasonable attorney fees is unwarranted under either CR 37(a)(4) or RCW 42.56.550(4).

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[172] Sharbono v. Universal Underwriters Ins. Co., 139 Wn. App. 383, 423, 161 P.3d 406 (2007).

We affirm the summary judgment order and the order denying the motion to compel discovery. We deny Mockovak's request for an award of reasonable attorney fees.

Cox, J.

WE CONCUR:

Spearman, J.

Leach, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL MOCKOVAK, Appellant, v. KING COUNTY, a political subdivision of Washington State; and the KING COUNTY PROSECUTING ATTORNEY'S OFFICE, a local public agency, Respondents.	No. 74459-3-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

Appellant, Michael Mockovak, has moved for reconsideration and publication of the opinion filed in this case on December 19, 2016. The court having considered the motions has determined that the motion for reconsideration and motion to publish should be denied. The court hereby

ORDERS that the motion for reconsideration and motion to publish are denied.

Dated this 13th day of January 2017.

For the Court:

Cox, J.

Judge

APPENDIX C

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm. 7268
Washington, D.C. 20530

SRM:MShih

Tel: (202) 353-6880
Email: michael.shih@usdoj.gov

October 31, 2016

Richard D. Johnson
Court Administrator/Clerk
The Court of Appeals of the State of Washington
Division I
600 University Street
One Union Square
Seattle, WA 98101

Re: *Mackowak v. King County*, No. 74459-3-I

Dear Mr. Johnson:

The above-captioned case is scheduled to be argued on November 3, 2016. The government respectfully submits this statement of additional authorities pursuant to RAP 10.8.

The government's amicus brief and the appellant's brief advise the Court that the federal housekeeping statute, 5 U.S.C. § 301, does not define the term "employee." Gov't Br. 17; Appellant's Br. 41. In the course of preparing for oral argument, it has come to our attention that another statutory provision, 5 U.S.C. § 2105(a), contains a definition of "employee" that applies "[f]or the purpose of this title" unless the term is "specifically modified." Under the terms of this general definition, an individual must be "appointed in the civil service" in order to be an employee. Officer Carver's designations as a Special Deputy U.S. Marshal and a Special Federal Officer in the FBI do not entail civil-service appointments.

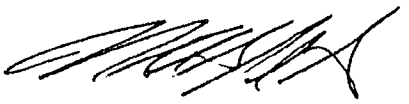
As the government's brief explains, § 301 "contains multiple fonts of rulemaking authority" that allow the Attorney General to "prescribe regulations for the government of [the] department," "the distribution and performance of its

business," and "the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301; *see* Gov't Br. 20-23. Accordingly, the statutory definition of "employee" in 5 U.S.C. § 2105(a) does not limit the authority of the Department of Justice to regulate when and how individuals under its supervision respond to subpoenas seeking access to information belonging to the Department.

None of the parties in this case mentioned 5 U.S.C. § 2105(a) in their briefs. Once we became aware of this provision, however, we felt an obligation to bring it to the attention of the Court and the parties.

Please bring this letter to the immediate attention of the Court. Thank you for your assistance.

Sincerely,



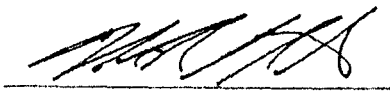
MICHAEL SHIH
U.S. Department of Justice
Appellate Staff, Civil Division

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at lobsenz@carneylaw.com, and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent, at mike.sinsky@kingcounty.gov, containing a copy of the foregoing statement of additional authorities in *Mockovak v. King County*, Cause No. 74459-3-I, in the Court of Appeals, Division I, of the State of Washington.

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

Dated this 31st day of October, 2016.



MICHAEL SHIH
Counsel for the United States

APPENDIX D

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: SE	Date: 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

FD-759 Revised 07-17-2009 Page 2	FEDERAL BUREAU OF INVESTIGATION **Notification of Authority Granted for Use of Electronic Monitoring Equipment - Not Requiring a Court Order**

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.

04188 MEM

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

FD-759 Revised 07-17-2009 Page 4	FEDERAL BUREAU OF INVESTIGATION **Notification of Authority Granted for Use of Electronic Monitoring Equipment - Not Requiring a Court Order**

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:	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:

04190 MEM

APPENDIX E

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.

CARNEY BADLEY SPELLMAN

February 09, 2017 - 1:51 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Trial Court Case Title:

The following documents have been uploaded:

- PRV_20170209134137SC825255_1357_Exhibit.PDF
  This File Contains:
  Exhibit
  The Original File Name was Appendices to Petition for Review.PDF
- PRV_20170209134137SC825255_3903_Motion.PDF
  This File Contains:
  Motion 1 - Overlength Petition for Review
  The Original File Name was Motion for Leave to File Overlength Petition for Review.PDF
- PRV_20170209134137SC825255_6391_Petition_for_Review.PDF
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review .PDF

A copy of the uploaded files will be sent to:

- lobsenz@carneylaw.com
- mike.sinsky@kingcounty.gov
- Michael.shih@usdoj.gov
- micki.brunner@usdoj.gov

Comments:

$200 filing fee check being mailed today

Sender Name: Deborah Groth - Email: groth@carneylaw.com
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