

NO. 84691-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
UP

SEATTLE TIMES CO., *et al*,

Petitioners,

v.

THE HONORABLE SUSAN K. SERKO, *et al*,

Respondents.

BRIEF OF RESPONDENT DARCUS ALLEN

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A. INTRODUCTION

The Sixth and Fourteenth Amendments of the United States Constitution require a trial court to proactively protect a defendant's ability to receive a fair trial. This obligation allows, and requires, a court to act to restrict the speech of other parties where there is a reasonable likelihood that it may prejudice the defendant's ability to obtain a fair trial. Here, faced with the petitioners' request for disclosure of investigatory records under the Public Records Act (PRA), the trial court concluded its constitutional obligation to ensure Darcus Allen a fair trial required it to enjoin release.

The petitioners contend the trial court was wrong, asserting Mr. Allen's constitutional rights must yield to their claimed entitlement to access under the PRA. The Petitioners' arguments fail to meaningfully acknowledge the constitutional framework governing the trial court's decisions and this Court review of that decision, or the supremacy of those constitutional concerns to their statutory claim. The trial court properly balanced the constitutional concerns to enjoin release of the documents.

B. ISSUES PRESENTED

1. A writ of mandamus is only available where a petitioner can demonstrate the subject of the writ had a clear duty to act and

has not done so. The petitioners cannot demonstrate the trial court had a "duty" to disclose the requested material. Instead, the petitioners only claim the trial court misapplied a relevant authority. Is a mandamus action proper as a means for seeking appellate review of a lower court ruling?

2. A writ of mandamus is only available where a petitioner can demonstrate there is no other adequate remedy. Where the petitioners are free to file declaratory action but have not done so, can they demonstrate no other remedy is available?

3. The Sixth and Fourteenth Amendments to the United States Constitution compel a trial court to take steps to protect a defendant's ability to obtain a fair trial. This duty includes the ability to limit the speech and conduct of parties where necessary to protect the defendant's rights. Must the trial court's constitutional obligation yield to the petitioners' statutory rights under the PRA?

4. The PRA exempts from disclosure investigatory materials necessary to effective law enforcement as well as material within the civil work-product privilege. Where the material to which the petitioners seek access is covered by these exemptions, did the trial court properly enjoin release under RCW 46.52.540?

C. STATEMENT OF THE CASE

Mr. Allen has been charged with aggravated first degree murder in Pierce County Superior Court. The prosecutor has until November 15, 2010, to decide pursuant to RCW 10.95.040 whether to seek the death penalty in this case.

Pursuant to the PRA, Petitioners The Seattle Times and Michael Hanbey sought disclosure of the investigatory file of the Pierce County Sheriff's Office. CP 205. Neither the Pierce County Sherriff not the Pierce County Prosecutor asserted the available exemptions under the PRA. Mr. Allen, however, asked the court to enjoin the release asserting release of the information would deny him the ability to obtain a fair trial. CP 495, 508-11. In addition, Mr. Allen asserted the information was exempt from disclosure under a variety exemptions provided in the PRA. CP 505-08.

The Honorable Susan Serko reviewed the documents in camera as required by this Court's decisions and the PRA. CP 207. After her review, Judge Serko concluded release of the materials would endanger Mr. Allen's ability to receive a fair trial and was not required under the PRA. CP 211, 225.

D. ARGUMENT

1. MANDAMUS IS NOT AN APPROPRIATE VEHICLE FOR APPELLATE REVIEW OF A DECISION WHICH THE PETITIONERS DO NOT LIKE.

A writ of mandamus may only issue where the party seeking the writ meets the high burden of showing: (1) the party subject to the writ is under a clear duty to act, (2) the applicant has no "plain, speedy and adequate remedy in the ordinary course of law," and (3) the applicant is "beneficially interested." RCW 7.16.160; RCW 7.16.170. Conceding for purposes of argument that the paper has demonstrated that it has a beneficial interest, it does not satisfy either of the remaining elements.

a. The newspaper cannot demonstrate the trial court had a "duty" to rule in the newspaper's favor. The paper has not demonstrated the superior court is under a clear duty to provide it materials which the court found are exempted from disclosure. "In terms of duty, mandamus, if appropriate, tells the respondent what to do, but not how to do it." Eugster v. City of Spokane, 118 Wn.App. 383, 405, 76 P.3d 741 (2003), review denied, 151 Wn.2d 1027 (2004); see also, Peterson v. Dep't of Ecology, 92 Wn.2d 306, 314, 596 P.2d 285 (1979). If this Court issues a writ of

mandamus to a superior court it does so "to compel [the lower court] to exercise its judicial function and powers, not to direct or control their exercise." State ex el. Fleischman v. Superior Court of Spokane County, 117 Wash. 500, 501, 201 Pac. 739 (1921).

The court engaged in the review contemplated by the PRA. It is clear the paper does not agree with the conclusion the trial court reached. Specifically, the paper asks this Court to direct disclosure of certain records. But the PRA does not require a trial court to grant every request for disclosure. Instead, it merely requires a court to determine whether or not disclosure is required by the act. As part of that duty the court must examine the request for an injunction and determine whether disclosure was proper. See e.g., RCW 42.56.540. The court conducted an in camera review as required by the PRA and this Court's decisions. CP 207. Following that review and after considering the arguments of the parties the court concluded the PRA did not require disclosure. The trial court carried out its duty under the statute.

If the paper wishes a writ of mandamus to direct the court to engage in a process the paper believes has not occurred, the paper has not asked for that. The superior court did what it was obligated to do, the paper merely disagrees with the outcome.

To the extent the paper believes the court's legal conclusions are erroneous, a petition for writ of mandamus is not the proper avenue to address such claims. Because judges are fallible there are any number of criminal and civil cases in which the judge reaches the wrong legal conclusion, and an even greater number where a party believes the court did so. If mandamus were available in each instance in which the petitioner believed the court reached the wrong legal conclusion, it would cease to be an extraordinary remedy and become instead a substitute for appeal. The superior court "may have committed error in [its ruling], but if it did so the error is not . . . reviewable by an original writ of mandamus issued out of this court." Fleischman, 117 Wash. at 502. The newspaper cannot demonstrate that the superior court had a duty to do something it did not do. Thus, the newspaper is not entitled to a writ of mandamus.

b. The newspaper has not demonstrated it lacks adequate alternative remedies.

The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy.

Ex parte Rowland, 104 U.S. 604, 617, 26 L.Ed. 861, 14 Otto 604 (1881). The remedy question requires a finding that the duty the plaintiff seeks to enforce "cannot be directly enforced" by any means other than mandamus. Bd. of Liquidation v. McComb, 92 U.S. 531, 536, 23 L.Ed. 531, 2 Otto 531 (1875).

The paper cites to Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) as holding a mandamus action is appropriate in every circumstance in which media access is curtailed. Petition at 3-4. But the Court only said that "mandamus by an original action in this court is a proper form of action for third party challenges to closure orders in criminal proceedings." 97 Wn.2d at 35. Ishikawa addressed whether mandamus was proper only in a single paragraph involving an entirely different issue, whether the defendant in the criminal case could intervene in an untimely manner.

The mere recognition, in passing, that mandamus is an available remedy does not suggest it is the exclusive remedy nor that the media is excused from demonstrating no other adequate remedy exists. State v. Bianci, which is also cited in the petition and Ishikawa, simply held that the paper could not intervene in criminal matter and instead must find another means to address its

concerns, such as a "separate action for declaratory judgment, mandamus, or prohibition." 92 Wn.2d 91, 93, 593 P.2d 1330 (1979). In fact, the paper could seek relief by declaratory action and appeal an adverse ruling. RCW 42.56.550. The paper has not demonstrated why such declaratory action is inadequate here. The recognition that a mandamus action may be an appropriate vehicle relief in one case does not suggest the media may select it as a preferred remedy.

A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.

Eugster, 118 Wn.App. at 414. (citing inter alia State ex rel. O'Brien v. Police Court, 14 Wn.2d 340, 347-48, 128 P.2d 332 (1942)). The paper has an adequate alternative remedy and thus mandamus is improper.

Because a writ of mandamus is an inappropriate vehicle for obtaining review of a trial court's legal ruling, this Court should dismiss the present action.

2. THE TRIAL COURT PROPERLY COMPLIED WITH ITS DUTY TO PROTECT MR. ALLEN'S SIXTH AND FOURTEENTH AMENDMENTS.

a. The trial court has an ongoing obligation to protect

Mr. Allen's ability to receive a fair trial.

[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

(Citations omitted) Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Essential to that right is that jurors' decisions are based solely on the evidence presented at trial. Turner v. Louisiana, 379 U.S. 466, 471, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). Pretrial publicity may negatively affect jurors' abilities to decide cases fairly. Estes v. Texas, 381 U.S. 532, 545, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). Accordingly, trial courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); see also Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); Sheppard v. Maxwell, 384 U.S. 333, 363, 86

S.Ct. 1507, 16 L.Ed.2d 600 (1966); United States v. Noriega, 917

F.2d 1543, 1549 (11th Cir.) (per curiam), cert. denied sub nom.

Cable News Network v. Noriega, 498 U.S. 976 (1990).

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the trial' process.

Estes, 381 U.S. at 561 (Warren, C.J., concurring) (citing Craig v.

Harney, 331 U.S. 367, 377, 67 S.Ct. 1249, 91 L.Ed. 2 1546

(1947)); State v. Jamie, 168 Wn.2d 857, 862, 233 P.3d 554 (2010).

A jury's verdict must rest entirely upon evidence presented at trial as a "public courtroom" is the only place "where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner, 379 U.S. at 473.

[B]ecause of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

Gannett Co., 443 U.S. at 378.

b. The trial court properly exercised its obligation to protect Mr. Allen's ability to obtain a fair trial. The United States

Supreme Court has held that states have a legitimate interest in restricting the speech where it poses the danger of denying a defendant a fair trial. Courts have a duty in the first instance to ensure the fairness of the proceedings. A court need not, and indeed cannot, wait until a defendant is actually prejudiced by the pretrial publicity.

Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991).

Consistent with that legitimate state interest, and the court's duty to ensure a fair trial, the trial court has limited the conduct and speech of parties to the litigation, the Pierce County Prosecutor's Office and its investigatory arm the Pierce County Sheriff's Office. The court has done so by barring release of investigatory documents the release of which the court found to pose a risk of prejudice to Mr. Allen's ability to receive a fair trial. CP 211. That is

a proper exercise of the court's obligations under the Sixth and Fourteenth Amendments

The newspaper contends, however, its statutory entitlement to access documents under the PRA takes precedence over the court's constitutional obligations to Mr. Allen, and in fact over Mr. Allen's constitutional rights. The paper contends that rather than employ the standard set forth by the United States Supreme Court on such matters, this Court must instead apply a standard developed to address statutory exemptions to the PRA. The newspaper's response suggests the paper's unyielding belief that the PRA preempts the federal constitution.

The sum of the newspaper's analysis of the trial court's obligation to ensure a fair trial is its reliance upon the Court's recent decision in United States v. Skilling, __ U.S. __, 130 S.Ct. 2896, __ L.Ed.2d __ (2010). Brief of Petitioner Times at 32-34. The paper fundamentally miscasts Skilling. Skilling did not address any limitation upon the trial court's obligation to ensure the defendant a fair trial. Instead, the issue in Skilling was whether a trial court properly denied a change of venue motion in light of the pretrial publicity generated by a case. Id. 130 S.Ct. 2907. Rather than impose new limitations upon the defendant's right to a fair trial, the

Supreme Court concluded the trial court provided sufficient protection of the defendant's right through its structured and searching voir dire of potential jurors.

The Court did not hold that a court could not have taken other steps to alleviate the potential impact of publicity prior to trial. In fact, Gannett Co. and Gentile both allow courts to do so and in some instances require trial courts to take proactive steps prior to voir dire. Gentile, 501 U.S. at 1075. Skilling did not overturn either case and provides no support for the newspaper's argument that courts lack the ability or duty to act to protect the defendant's rights under the Sixth and Fourteenth Amendments.

As Gannett Co. and Gentile demonstrate, the Supreme Court has steadfastly recognized the duty of a trial court to ensure the fairness of a criminal trial. Nothing in Skilling suggests a retreat from that view.

The First Amendment rights of parties may be abridged where there is a "a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial." State v. Bassett, 128 Wn.2d 612, 616, 911 P.2d 385 (1996). But the Petitioners contend their entitlement under the PRA may only be abridged upon a more specific finding "that release of a record . . . will in fact pose a serious risk of

interfering with a pending trial. Brief of Petitioner Times at 28 (citing Cowles Publishing Co. v. Spokane Police Dep't., 139 Wn.2d 472, 987 P.2d 620 (1999)).¹ Cowles Publishing Co. v. Spokane Police Dep't. did not address, and in fact cites neither the Sixth nor Fourteenth Amendments. Nor is there any indication that the criminal defendant, the subject of the arrest records, ever appeared in much less asserted such a claim in Cowles Publishing Co. v. Spokane Police Dep't. Nonetheless, petitioners rest their argument on a passing reference in Cowles Publishing Co. v. Spokane Police Dep't. that pretrial disclosure will rarely deny a defendant a fair trial. See Brief of Petitioner Times at 27 (citing Cowles Publishing Co. v. Spokane Police Dep't., 139 Wn.2d at 479).

Nowhere in the single paragraph touching on this point does Cowles Publishing Co. v. Spokane Police Dep't. discuss any of the controlling precedent of the United States Supreme Court nor cite to the Sixth and Fourteenth Amendment. In the absence of any

¹ In addition the petitioners suggest the records are presumptively available. See e.g., Brief of Petitioner Times at 27 (citing Cowles Publishing Co. v. Spokane Police Dep't.). Assuming for purposes of argument that is true under the PRA, neither petitioner provides any authority that suggests this is true when that statutory entitlement conflicts with a defendants assertion of his constitutional rights.

discussion of controlling caselaw, it is difficult to imagine this Court crafted a new constitutional standard. In any event, this court could not adopt such a standard to the detriment of a defendant's Sixth and Fourteenth Amendment rights.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI; see also, State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d. 250 (2008) ("When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings.")

The holding in Cowles Publishing C v. Spokane Police Dep't. is nothing more than that when a prosecutor asserts the investigatory records exemption of former RCW 42.17.310(1)(d) after the case has been referred by police, the agency must establish nondisclosure is essential to effective law enforcement.²
139 Wn.2d at 479-80

² Pursuant to Laws 2005 ch.247, RCW 42.17.310 was recodified as RCW 42.56.290 without substantive change.

Here, the trial court found a likelihood of prejudice existed should these documents be released. CP 211. That is exactly what the First Amendment requires where the defendant's Sixth and Fourteenth Amendment are at stake. To require a greater finding under the PRA (1) elevates the PRA beyond the First Amendment itself, and (2) does so at the expense of the defendant's Sixth and Fourteenth Amendment rights. Certainly the statutory rights granted by the PRA cannot take precedence over Mr. Allen's constitutional rights.

The newspaper asserts "Judge Serko found that pretrial prejudice had **not** resulted in pretrial prejudice to these defendants." (Emphasis in original) Brief of Petitioner at 25. But Judge Serko's finding is actually a finding that if the status quo is maintained, a fair trial can be had. Put another way Judge Serko found that the harm caused to date could be adequately addressed through other available procedures – such as a change of venue motion or searching voir dire. Of course the publicity to date has not included full disclosure of the materials at issue here. Certainly Judge Serko did not find that prejudice would not occur should these documents be released. What the paper would have the trial court do is allow the media to level the full force of pretrial publicity,

and then determine whether a fair trial could be had. Gannett Co. and Gentile, make clear that neither the Sixth nor Fourteenth Amendments requires nor allows this wait-and-see approach, and the ramifications of such an approach would certainly not serve the interests of society's interest in prosecuting a case or having a fair trial. Instead, the trial court has an affirmative obligation to act proactively to ensure the defendant will not be prejudiced and that a fair trial may occur.

Moreover, the wait-and-see approach advocated by the newspaper also puts Mr. Allen in a position of having to waive additional constitutional rights in order to ameliorate potential prejudice. Permitting the State to release this information gives the State the power to force Mr. Allen into giving up his right to be tried in Pierce County. Article I, § 22 of the Washington Constitution gives Mr. Allen the right to "have a speedy and public trial in by an impartial jury in the county in which the offense is charged to have been committed." As this Court is well aware, one remedy to inflammatory pretrial publicity is to order a change of venue. The petitioners advocate this alone as Mr. Allen's remedy.

The petitioners have not asserted a competing constitutional right. Instead, they base their claim upon the statutory entitlement

provided by the PRA. Whatever the PRA provides, where it conflicts with the provisions of the United States Constitution it is the terms of the statutes that must yield.

3. THE PRA DOES NOT REQUIRE DISCLOSURE OF THE RECORDS IN THIS CASE.

A central premise of the petitioners' arguments is that the records at issue here are not exempt from disclosure under any of the exemptions set forth in RCW 42.56. But the records are in fact investigatory records exempt from disclosure under RCW 42.56.240 and are work product exempt from disclosure under RCW 42.56.290.

a. The requested records are exempt from disclosure as investigatory records under RCW 42.56.240. RCW 42.56.240 provides:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy . . . ;

An "investigative record" is one "compiled as a result of a specific investigation focusing with special intensity upon a particular party."

Dawson v. Daly, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993)

(quoting Laborers Int'l Union of N. Am., Local No. 374 v. City of

Aberdeen, 31 Wn.App. 445, 448, 642 P.2d 418 (1982)). Further,

"[t]he investigation involved must be "one designed to ferret out criminal activity or to shed light on some other allegation of

malfeasance.'" Dawson, 120 Wn.2d at 793, 845 P.2d 995 (quoting

Columbian Publishing Co. v. City of Vancouver, 36 Wn.App. 25, 31, 671 P.2d 280 (1983)).

In any case in which a charge of aggravated first degree murder is filed, RCW 10.95.040 requires the elected to prosecutor to consider whether any circumstances mitigate against seeking the death penalty.

The court may assume that prosecutors exercise their discretion in a manner which reflects their judgment concerning the seriousness of the crime or insufficiency of the evidence. Consequently, the prosecutor's decision not to seek the death penalty, in a given case, eliminates only those cases in which juries could not have imposed the death penalty. We believe that this analysis accurately portrays the function prosecutorial discretion plays in our death penalty statute.

State v. Cross, 156 Wn.2d 580, 625, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006) (quoting State v. Rupe, 101 Wn.2d 664, 700, 683 P.2d 571 (1984), reversed on other grounds, Rupe v. Wood, 863 F.Supp. 1315 (W.D.Wash. 1994)).

While an investigation is ongoing there is no duty under the PRA to disclose any material within the investigatory file, as “the ongoing nature of the investigation naturally provides no basis to decide what is important.” Newman v. King County, 133 Wn.2d 565, 574-75, 947 P.2d 712 (1997). As a general rule, once police refer a case to the prosecutor for charging, the records are no longer categorically exempt from disclosure as investigatory files for purposes of the RCW 42.56.240. Cowles Publishing Co. v. Spokane Police Dep’t, 139 Wn.2d at 479-80. Where, however, a prosecutor is reviewing a case pursuant to the RCW 10.95.040 that review is appropriately termed “investigation” for purposes of RCW 42.56.290. Cowles Publishing Co. v. Pierce County, 111 Wn.App. 502, 508, 45 P.3d 620 (2002). In that circumstance, the fact gathering process is not complete as the prosecutor must make an individualized determination based upon the facts of the case and any fact which merits leniency. State v. Pirtle, 127 Wn.2d 628, 642, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

The trial court properly found the investigation in Mr. Allen's case was ongoing. CP 209. In the present case, Mr. Allen has until September 20, 2010, to submit a mitigation package. The prosecutor, in turn, has until November 15, 2010, to make the determination required by RCW 10.95.040. Records establishing the prosecution's view of the crime are a necessary part of that investigation. Mitigation evidence is extraordinarily broad category of facts and circumstance and includes any individual circumstances which would argue against imposition of the death penalty. See Eddings v. Oklahoma, 455 U.S. 104, 112-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It is, therefore, impossible to know what piece or pieces of evidence may prove crucial to the prosecutor's decision to seek or not seek the death penalty against Mr. Allen. As in Newman, the presumption of access to these investigatory records cannot apply. 133 Wn.2d at 574-75.

The prosecutor must be able to engage in a review of those documents free of potentially corrupting outside influence. The public interest in effective law enforcement is not served by an improper determination to seek the death penalty which merely opens a subsequent conviction to attack on appeal. Thus, the

records are necessary to effective law enforcement and must be exempt from disclosure under RCW 42.56.240.

b. The requested materials are exempt as work

product RCW 42.56.290 provides:

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

Thus, the work product of an agency's attorney is exempt.

Limstrom v. Ladenburg, 136 Wn.2d 595, 605, 963 P.2d 869 (1998).

This exemption applies the common-law definition of work. Id.

(citing Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

Cowles Publishing Co. v. Spokane Police Dep't, without any analysis, dismissed the notion that the files of police investigators are covered by the work-product exception. 139 Wn.2d at 478.

However, that is not consistent with this Court's interpretation of the work-product privilege.

As a constitutional matter, the police are merely the investigatory arm of the prosecutor. Kyles v. Whitely, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995). Because they are constitutionally the same entity, under Kyles the prosecution's

duty to disclose material evidence to the defendant reaches information in the hands of the investigating agency as well as other members of the prosecution team. Thus, , the requested materials are the prosecution's file.

Beyond the constitutional dimension, the civil work-product privilege is not limited to material generated by an attorney herself. The work-product privilege "is designed to keep a party's trial preparation materials away from adversaries." Limstrom v. Ladenberg 110 Wn.App. 133, 142, 39 P.3d 351 (2002) (citing *Developments in the Law-Discovery*, 74 Harv. L. Rev., 940 (1961)). Work product "is reflected . . . in interviews, statements, memorandum, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and other intangible ways." Hickman, 329 U.S. at 511; see also, United States v. Nobles, 442 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 145 (1975). "[M]emoranda of witnesses' oral statements to the investigator and notes by lawyers of their own pretrial preparations [are] 'classic' work product." Soter v. Cowles Publishing Co., 131 Wn.App. 882, 894, 130 P.3d 840 (2006), affirmed, 162 Wn.2d 716, 714 P.3d 60 (2007); see also, Limstrom, 136 Wn.2d at 618. Thus, the civil work-product exception can apply to an investigator's materials.

The exemption under RCW 42.56.290 similarly protects investigative files.

c. Where the prosecutor has failed to assert available exemptions despite his constitutional and ethical obligations, the trial court properly permitted the defendants to do so and properly enjoined release under RCW 42.56.540. The Pierce County Prosecutor has refused to assert available exemptions to disclosure under the PRA. The Pierce County Prosecutor's Office stands to improve its litigation position, at Mr. Allen's expense, should this Court grant the request for a writ.

Information in the hands of the police agency is the same as information in the hands of the prosecutor himself and both act on the government's behalf to advance the same prosecutorial goal. Kyles, 514 U.S. at 437. Moreover, that relationship is why the prosecutor's ethical obligations with respect to the pretrial disclosure of information reaches the investigating police agency as well.

RPC 3.8(f) provides:

The prosecutor in a criminal case shall:

. . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law

enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

RPC 3.6 provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The Pierce County Prosecutor has refused to assert available exemptions to the release of this information. To the extent pretrial disclosure prejudices Mr. Allen's right to a fair trial and ultimately his ability to prevail at trial, it correspondingly improves the Pierce County Prosecutor's litigation position.

Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*

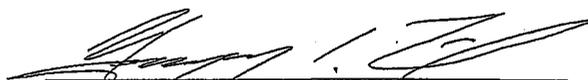
(Emphasis in original.) Gentile 501U.S. at 1072 (quoting Sheppard, 384 U.S. at 363).

The trial court properly found that disclosure of this information, the course taken by the prosecutor's office, frustrates its ability to ensure Mr. Allen a fair trial. Its order is consistent with and required by the Sixth and Fourteenth Amendments. In addition, specific exemptions exist to enjoin disclosure under RCW 42.56.540. See Soter v. Cowles Publishing Co., 162 Wn.2d 716, 755, 714 P.3d 60 (2007). Because the trial court order is consistent with both its constitutional obligations and the PRA the petitioners are not entitled to relief.

E. CONCLUSION

The trial court has properly enjoined release of the material in question in order to ensure Mr. Allen receives a fair trial.

Respectfully submitted this 6th day of August 2010.



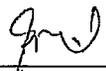
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