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NO. 94109-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

KING COUNTY and KING COUNTY PROSECUTING ATTORNEY'S OFFICE,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

None of the five issues in Mockovak's petition for review justifies further consideration under RAP 13.4 criteria. Allegations of significant constitutional interest or case law conflict are neither borne out by the record nor reflective of the decision made by the Court of Appeals in its unpublished opinion.

II. STATEMENT OF THE CASE

A. Public Records Act Request and Response

Inmate Michael Mockovak sent a broad public records request to the King County Prosecuting Attorney (PAO) seeking copies of any documents in the PAO's possession that referred to Daniel Kultin, an informant who testified at Mockovak's criminal trial.

In response, Mockovak was provided access to tens of thousands of PAO attorney file documents. CP 54-70. The overwhelming majority of the documents provided were unredacted. Most had previously been provided to Mockovak as part of his criminal case discovery. CP 55, 62, 68. Certain responsive email and letter communications were redacted to protect privileged attorney work product. The basis of each redaction was set forth in an October 29, 2014, exemption log. CP 71 – 131.

Mockovak filed this PRA lawsuit against King County and the King County Prosecuting Attorney's Office (collectively "the PAO"). CP 1. He asserts that the PAO: (1) unlawfully delayed its PRA response; and (2) improperly redacted or withheld documents identified on its exemption log. *Id.*

In December of 2014, Mockovak accepted an Offer of Judgment from the PAO settling all matters in this case except for one: his "claim that defendants improperly redacted or withheld certain documents identified on defendants' October 29, 2014 exemption log." CP 346-48. The remaining redaction challenge was directed at work product exemptions asserted for 81 attorney email and letter communications.[1] CP 355 - 406 and 756 – 870.

B. Summary Judgment Cross-motions

The PAO moved for summary judgment on the remaining exemption claim. CP 18. In conjunction with its motion, unredacted copies of the challenged documents were provided under seal for the Court's *in camera* review. CP 1958 – 2082.

[1] Only one challenged exemption was based on non-work product grounds: an NCIC report, exempt from disclosure by 28 U.S.C. §534. PAO's Appeal Brief at 39-42. Because the petition does not seek review of that matter, this answer includes no further discussion of the NCIC report.

Mockovak cross-moved for summary judgment, arguing that work product protection did not apply because: (1) protections were allegedly overridden by criminal discovery obligations under *Brady v. Maryland,* Appendix A documents, CP 756; (2) work product protection had allegedly been waived, Appendix B documents, CP 809; and (3) documents were purportedly not prepared in anticipation of litigation. Appendix C documents, CP 842.

The Superior Court granted summary judgment in favor of the PAO and dismissed Mockovak's remaining exemption claim. That decision was affirmed in a forty-five page, unpublished opinion by the Court of Appeals. Based upon its "careful review of the unredacted and sealed documents in the record," the Court of Appeals held that each of the challenged redactions: (1) constituted mental impressions, conclusions, opinions or legal theories of counsel; (2) contained no immigration-related detail that was not previously provided to Mockovak in advance of his criminal trial; and (3) did not include matters of substantial need that would justify overriding the work product protection. Opinion at 35 – 38.

No review of the foregoing determinations has been sought. Rather, Mockovak's two PRA exemption issues are directed at whether PAO correspondence with the DOJ waived work product

protection and whether DOJ communications were prepared in anticipation of litigation for work product purposes. Both arguments were considered and rejected by the Court of Appeals.

C. Mockovak's Discovery Request of Agent Carver

Separate and apart from his PRA exemption challenge, Mockovak has sought to utilize his PRA case as a vehicle for undertaking discovery of an investigator involved in his prosecution. Agent Carver is a Seattle police detective who, at all times pertinent to the Mockovak investigation, served full time on a Federal Bureau of Investigation ("FBI") violent crimes task force as a duly appointed FBI Officer and Special Deputy U.S. Marshal. CP 298, 464, 966, 1277. With respect to the Mockovak matter, Carver received his assignments from and was under the day-to-day supervision and control of the FBI. CP 1277, 1376.

In accordance with federal *Touhy* regulations[2], Mockovak sought permission from the United States Department of Justice (DOJ) to depose and compel documents from Carver. As part of

[2] 28 C.F.R. §§ 16.21 - 16.28 sets forth procedures for obtaining DOJ file material or information acquired as part of a DOJ employee's official duties or status. *See* CP 1266-68 (describing the source and scope of *Touhy* requirements).

that request, Mockovak submitted a letter identifying the scope and purported relevance of his proposed discovery. CP 920–24.

Not surprisingly, nothing in Mockovak's scope letter was directed at the remaining exemption issues.[3] *Id.* Indeed, nothing Carver says would bear on whether PAO redactions were justified on work product grounds. Applicability of such protection to the challenged redactions is readily determined by simply viewing the unredacted documents provided to the Court. While Mockovak asserts that he should have been allowed to ask Carver who advised him not to appear for deposition, who he gave the subpoenaed documents to and where the documents are being stored, such inquiry has no bearing on the sole unsettled issue of whether challenged redactions constituted exempt work product.

On September 23, 2015, the DOJ denied Mockovak's *Touhy* request.[4] CP 1261-62.

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[3] Mockovak's pursuit of Carver discovery in this PRA case is a transparent effort to sidestep RAP 16.12 discovery thresholds that govern in his pending PRP matters. *See e.g.* CP 1134-36 (Motion to Stay PRP based on PRA case).

[4] Mockovak's footnote 8 assertion that the DOJ's decision not to yield to his discovery demand constituted criminal witness tampering is reckless vitriol. The DOJ followed applicable discovery procedures by timely objecting. CP 1228, 1240. The deposition was then deferred pending review of Mockovak's *Touhy* submittal and motion to compel, both of which were denied.

> As a matter of federal law, the Department's regulations require a threshold showing of relevancy. None of the information set forth in your "Intended Scope of Inquiry" appears to be relevant to the state court public disclosure action, which, as noted, is limited to the records King County produced to Mr. Mockovak in response to his public records request to the County and whether King County's withholdings are justified.

CP 1262. While 5 U.S.C. Chapter 7 (APA) provides the sole remedy for seeking review of a DOJ Touhy determination, *see* *Puerto Rico v. United States*, 490 F.3d 50, 61 n.6 (1st Cir. 2007), Mockovak did not avail himself of that exclusive APA remedy. *See* DOJ's Appeal Brief at pp. 3–4. Rather, on October 19, 2015, he filed a Superior Court motion to compel Carver discovery of Carver. CP 1180.

The PAO opposed Mockovak's discovery motion. The DOJ also appeared on behalf of Carver for the limited purpose of opposing Mockovak's motion on grounds that: (1) such discovery was not material to the remaining PRA exemption claim; (2) a subpoenaed federal agency employee could not be compelled to disobey applicable *Touhy* regulations; and (3) sovereign immunity precluded a state court from ordering discovery of federal employees. CP 1263-74. The Superior Court rejected Mockovak's motion to compel discovery, and the Court of Appeals affirmed.

Mockovak's statement of the case includes a number of disparaging misrepresentations regarding the FBI that have no bearing on the review issues presented. For example, he claims that Kultin recordings at the direction of the FBI constituted "criminal" conduct in violation of Washington's Privacy Act. Mockovak does not reveal that this very assertion was previously raised and was flatly rejected in one of his personal restraint petitions.[5] *See In the Matter of Personal Restraint of Michael Mockovak, No. 69390-9-I. May 8, 2015 Order at pp. 2–4, attached at* Appx. A.

Mockovak likewise falsely asserts that the FBI deprived him of *Brady* material relating to Kultin immigration matters. This accusation is both readily belied by the record in his criminal and PRA cases and contrary to multiple pretrial acknowledgments made to the Court by his own criminal trial counsel, confirming that all relevant Kultin immigration related detail had been provided. *See* PAO's Appeal Brief at pp. 1-3 and 25-28.

[5] Mockovak's related Petition Appendix D submittals are not part of the Superior Court's record.

III. ARGUMENT

A. Discovery Arguments Do Not Warrant Review.

The bulk of Mockovak's petition focuses on the denial of his motion to undertake discovery of Agent Carver. He argues that this denial: (1) violated Tenth Amendment anti-commandeering principles; (2) was unwarranted because Carver was not a federal employee subject to *Touhy* regulations; and (3) was improper because FBI Task Force documents were City records given Carver's status within the Seattle Police Department.

1. Review of Tenth Amendment Argument is Not Warranted.

Mockovak's Tenth Amendment argument fundamentally mischaracterizes both the Court of Appeals' decision and the authorities he relies upon. The Court did not hold that Mockovak lacked standing to raise a Tenth Amendment argument. Rather, it rejected his constitutional argument for lack of merit. Mockovak's assertion that the Court's decision conflicts with the standing decision in *Bond v. United States*, 564 U.S. 211 (2011) is incorrect.

Mockovak's effort to suggest conflict with *Bond* on substantive grounds is likewise off the mark. *Bond* simply affirms that an individual may have standing to challenge their criminal

prosecution on Tenth Amendment grounds because federal laws commandeering state government may jeopardize the interests of private citizens as well as the states themselves. *Bond*, 564 U.S. at 222 (individuals as well as states are the beneficiaries of federalism). The decision includes no suggestion whatsoever that the Tenth Amendment precludes states from undertaking consensual arrangements with the federal government.

Likewise, Mockovak inaccurately portrays the Court of Appeals as having ruled that the absence of an individual officer's personal objection to federal standards was sufficient to overcome Tenth Amendment objections, Petition at p. *14;* and that "an individual officer had power to consent to a violation of the PRA." *Id* at p. 16. To the contrary, the Court expressly rejected insinuations that Carver's individualized consent was of such legal consequence. *See e.g.* Decision at 16 (Carver did not merely agree to assist but rather acted pursuant to a consensual joint task force arrangement between the United States, Washington and the SPD). In keeping with *Lomont v. O'Neill*, 285 F.3d 9 (D.C.Cir. 2002), the Court affirmed that no Tenth Amendment conscription of state and local government occurs when officers undertake federal

obligations pursuant to such collaborative arrangements.[6] In these consensual collaborations, state officers are "neither 'impressed,' 'dragooned,' nor made congressional puppets" within the meaning of Tenth Amendment conscription principles articulated in *Printz v. United States,* 521 U.S. 898, 928-29 (1997). Opinion at p. 14.

2. Review of *Touhy* Argument is Not Warranted.

Mockovak's *Touhy* argument fundamentally distorts the content of the DOJ's letter to the Court of Appeals regarding Carver's federal employee status. The DOJ did not concede that Carver was not a federal employee, as Mockovak indicates. Petition at p. 21. The DOJ's letter addressed the term "employee" within the meaning of 5 U.S.C. §2105(a) -- and not the meaning of "employee" in the applicable *Touhy* regulation, 28 C.F.R. 16.21(b). For reasons articulated by the Court, the definition of "employee" in that regulation remains valid regardless of how the statutory term "employee" is construed. Because Carver's full time official duties were devoted to federal investigations for which he was under the day to day supervision and control of the FBI, the DOJ determined

[6] *See also, United States v. Wakefield*, 2009 WL 3335597, at *6 (W.D. La. Oct. 14, 2009) (No Tenth Amendment violation where state not conscripted to comply with federal requirements) (citation list omitted); *West Virginia v. HHS*, 145 F.Supp.3d 94, 108-9 (D.D.C. 2015) (referencing *Lomont's* standing and substantive holdings).

that he qualified as an employee under *Touhy* regulations. *See Mayo v. City of Scranton*, 2012 WL 6050551 (M.D.Pa. 2012) (City of Scranton FBI task force officer is "employee" subject to *Touhy* requirements). Well-reasoned justification for the determination Carver was an "employee" subject to federal *Touhy* requirements is set forth in the Court's decision. Opinion at pp. 7-12. Mockovak's strained argument to the contrary does not warrant further review.[7]

3. Review Not Warranted for Argument That *Touhy* Restrictions Do Apply Given Carver's Status as a City Police Detective.

For the same reasons, Mockovak cannot justify review of his related argument that *Touhy* restrictions should not apply to Carver discovery because of his Seattle Police Department status. As a federal employee within the meaning of DOJ regulations, discovery of Carver was subject to *Touhy* requirements.

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[7] Mockovak's petition also includes a conclusory and nonsensical allegation of conflict with *United States v. Logue*, 412 U.S. 521 (1973). *Logue* addressed whether county jail employees were federal employees for purposes of the Federal Tort Claims Act when, under their particular operating agreement, the United States had no authority to physically supervise their conduct. 412 U.S. at 526 and 530. The case does not decide any constitutional issue; considers an altogether different regulatory framework than that presented here; and, in marked contrast to the FBI's day to day supervision and control of Carver (CP 298, 1277), involved no authority for physical supervision of employees by the federal government. *Id.*

Mockovak erroneously argues that denial of his discovery demand to Carver conflicts with the broad scope of discovery discussed in *Neighborhood Alliance v. Spokane,* 172 Wn.2d 702 (2011). *Neighborhood Alliance* addressed discovery in the context of a case with a wide range of unresolved issues, including questions regarding the adequacy of the agency's search for responsive records, agency motivations and the scope and amount of penalties owing under *PRA* culpability factors. 172 Wn.2d at 717-19. By contrast, here, there were no search adequacy, motivation or penalty[8] issues remaining. The sole unsettled issue was whether 81 challenged documents were properly redacted on attorney work product grounds. Mockovak has not explained how discovery of Carver would having bearing on that remaining issue. Rejection of Mockovak's discovery demand in this context is in keeping with the well-established principle, affirmed in *Neighborhood Alliance,* that a trial court has discretion to narrow discovery to information relevant

[8] RCW 42.56.565 bars inmate PRA penalties absent an agency's bad faith. CP 33-34. Mockovak agrees that no penalties are owing as a result of the redactions at issue. Record of Proceedings at p. 62 ("Mr. Lobsenz: I mean, everything they've said in their brief about penalties was correct. If we couldn't make a showing of bad faith, we're not entitled to penalties and I'm not claiming that we have made such a showing.")

to the issues arising in the particular PRA lawsuit, 172 Wn.2d at 717.

Mockovak incorrectly suggests that Court of Appeals decision conflicts with *Worthington v. WestNET*, 182 Wn.2d 500 (2015). Notably, Mockovak did not cite to or make any argument based on *WestNET* in proceedings below. *WestNET* addressed whether a PRA claim could be maintained against a group of agencies that coordinated law enforcement efforts by interlocal agreement. By contrast, here there is no issue presented regarding the FBI task force's amenability to suit. No public records request was made to and no public records claim is raised against the FBI task force. *WestNET* does not purport to consider any PRA exemption or discovery issue presented in this case.

4. Discovery Denial Also Rests on Independent Sovereign Immunity Grounds

Finally, review of Mockovak's discovery dispute on any of the foregoing three grounds would not affect the decision to deny his motion to compel discovery of Carver. This is because denial of the discovery motion was also based on independent sovereign immunity grounds for which Mockovak has not sought review. Opinion at p. 19 (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….”). Because Mockovak does not set forth a basis for review that would afford the discovery relief he seeks, his petition should be denied. *See State v. Korum*, 157 Wn.2d 614, 624 (2006) (RAP 13.4(c)(5) requires a concise statement of the issues presented for review, and RAP 13.7(b) limits review only to those issues properly raised in the petition as directed in RAP 13.4(c)(5)).

B. Neither Work Product Argument Justifies Review.

Neither of the two PRA work product exemption issues asserted by Mockovak justifies further review by this Court.

First, Mockovak incorrectly argues that the Court of Appeals misapplied the applicable burden of showing that redacted correspondence between PAO and DOJ attorneys was prepared in anticipation of litigation. On this issue, Mockovak both misstates the Court of Appeals’ burden allocation and ignores the overwhelming weight of record evidence that was provided to demonstrate the litigation-based focus of each challenged document. The Court did not impose a burden on Mockovak to disprove work product applicability. It simply held that the context and content of the redacted material itself clearly evidenced that such communications

had been prepared by counsel in anticipation of litigation, and that Mockovak's submittals were insufficient to create any material issue of fact regarding this issue. Opinion at pp. 21-22, 34. *See also* PAO's Appeal Brief at pp. 18-20. This approach follows long-settled PRA/summary judgment principles and in no sense conflicts with review standards specified in *Limstrom v. Ladenburg,* 136 Wn.2d 595 (1998).

Second, Mockovak erroneously suggests a case law conflict that does not exist regarding the Court of Appeals' application of well-established work product waiver principles to PAO communications with DOJ attorneys. Unlike the attorney client privilege, it is only in cases where material is disclosed in a manner inconsistent with keeping it from an adversary that work-product is waived. *See e.g., Harris v. Drake*, 152 Wn.2d 480, 495 (2004); *Limstrom v. Ladenburg,* 110 Wn.App. 133, 145 (2002) ("If a party discloses documents to other persons with the intention that an adversary can see the documents, waiver generally results"). None of the contested communications here was made in a manner likely

to result in its disclosure to an adverse party.[9] PAO's Appeal Brief at pp. 21-22. This alone is sufficient to affirm the Court's determination that work product protection was not waived. Opinion at p. 28.

Work product protection to PAO communications with DOJ attorneys in this case is independently justified on related[10] common interest grounds. *Id.* Following initiation of state court prosecution, DOJ counsel continued their active engagement in Mockovak's criminal case. DOJ attorneys played an ongoing, significant role in producing core discovery documents, representing federal witnesses, submitting briefing, and proving argument before the Court regarding discovery of federal documents and witnesses. CP 301-43, 1108-16, 1145-50. The

[9] Mockovak's petition targets his waiver argument at communications between PAO and DOJ attorneys. "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 federal attorneys." Petition at p. 26

[10] Where, as in this case, only work product (and no attorney client privileged material) is involved, the common interest rule largely overlaps protections that would otherwise apply under ordinary waiver principles. This is because, as noted above, work product waiver is generally limited to disclosures that are inconsistent with keeping protected material from an adversary. Where work product material is shared among parties with a common interest, waiver does not occur because the disclosure to adversaries is unlikely.

"common interest" doctrine protects such confidential communications shared among multiple parties pertaining to their common claim or defense. *Sanders v. State*, 169 Wn.2d 827, 853-54 (2010).

Mockovak's petition misplaces reliance on *Kittitas County v. Sky Allphin,* 195 Wn.App. 355 (2016). *Sky Alphin*'s broad common interest understanding is clearly supportive of the narrowly focused common interest discussion of this case. To be sure, the identity of interests between PAO and DOJ counsel at issue is significantly more direct, active and integral to ongoing litigation than the relationship between county attorneys and consulting regulatory agency employees in *Sky Allphin.* In any event, while the common interest rule provides clear justification for the protection of work product in this matter, the PAO did not rely on *Sky Allphin* in its briefing below. Nondisclosure in this case is supported on both straightforward waiver principles and application of common interest principles set forth in *Sanders v. State*, 169 Wn.2d 827 (2010).

IV. CONCLUSION

For reasons set forth above, King County respectfully requests that Mockovak's request for further review be denied.

DATED this 15th day of March 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Certificate of Service

Today I directed via the method indicated below addressed to the attorneys listed below, a copy of the *Respondents' Answer to Petition for Review* in MICHAEL MOCKOVACK V. KING COUNTY, ET AL., Cause No. 94109-2, in the Supreme Court of the State of Washington.

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

Margaret Flickinger
Done in Seattle, Washington

3/15/2017
Date

NO. 94109-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MOCKOVAK,

Petitioner,

v.

KING COUNTY and KING COUNTY PROSECUTING ATTORNEY'S OFFICE,

Respondents.

APPENDIX TO RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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APPENDIX

Pages

APPENDIX A

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

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 69390-5-I
MICHAEL EMERIC MOCKOVAK,	)	ORDER REFERRING IN PART AND DISMISSING IN PART
Petitioner.	)	

Dr. Michael Mockovak challenges his jury convictions for attempted first degree murder, solicitation to commit first degree murder, first degree theft and conspiracy to commit first degree theft in King County Superior Court Cause No. 09-1-07237-6 SEA. In order to obtain relief by means of a personal restraint petition, a petitioner must establish either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

In reviewing the records and files before this court, it appears that this petition raises a nonfrivolous issue regarding whether trial counsel was ineffective for failing to present evidence demonstrating Mockovak was particularly vulnerable to entrapment. Accordingly, this portion of the petition should be referred to a panel of this court for a determination on the merits. RAP 16.11(b), (c). However, the remaining issues in Mockovak's petition lack merit and are accordingly dismissed.

The charges arose from Mockovak's attempt to hire Russian hitmen to murder Dr. Joseph King, his business partner in a chain of refractive eye surgery centers called Clearly Lasik, Inc. Over the course of several months, Mockovak plotted with Daniel Kultin, the information technologies director at Clearly Lasik, to arrange King's murder

and thereafter collect on a $4 million insurance policy. Unbeknownst to Mockovak, Kultin was working as an informant for the FBI and wore a concealed recording device during several of his conversations with Mockovak in which the two men discussed the plan to murder King. Mockovak was arrested after he delivered a $10,000 payment for the murder along with a photograph of King and his family.

Mockovak contends that trial counsel was constitutionally ineffective for (1) failing to move to suppress the recorded conversations; (2) proposing a flawed instruction on the defense of entrapment; and (3) failing to adequately impeach Kultin. He also claims that the recording of the conversations violated due process, article I, section 7 of the Washington Constitution and the 10th Amendment to the U.S. Constitution.

INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, a petitioner must demonstrate (1) deficient performance by counsel and (2) resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, the petitioner must show that trial counsel's performance fell "below an objective standard of reasonableness." Strickland, 466 U.S. at 688. A petitioner is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reviewing court strongly presumes that trial counsel's representation was effective. Strickland, 466 U.S. at 689.

1. Recorded Conversations

Mockovak argues that trial counsel was ineffective for failing to suppress the recorded conversations with Kultin. When an ineffective assistance of counsel claim is

based on a failure to move to suppress evidence, the defendant must demonstrate that the trial court would have likely granted such a motion. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Mockovak fails to meet this burden.

The record reflects seven recorded conversations between Mockovak and Kultin: (1) a conversation at a teriyaki restaurant on August 11, 2009; (2) a conversation at the Clearly Lasik Office on October 20, 2009; (3) a conversation at the Bellevue Athletic Club on October 22, 2009; (4) a conversation at Maggiano's Diner on November 6, 2009; (5) a telephone conversation on November 7, 2009; (6) a conversation at Starfire Soccer Fields on November 7, 2009; and (7) a telephone conversation on November 11, 2009. The first three conversations were recorded by the FBI without Mockovak's consent. For the remaining four conversations the State sought and obtained court authorization.

The parties stipulated to the admissibility of all of the recorded conversations. While the State sought to introduce only portions of the recordings, Mockovak moved to have the recordings admitted in their entirety pursuant to ER 106.

Mockovak claims that trial counsel could have successfully suppressed first three conversations because they were recorded in violation of Washington's Privacy Act, chapter 9.73 RCW, which prohibits recording of any "[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(l)(b). As a general rule, evidence obtained in violation of the Privacy Act is inadmissible at trial. RCW 9.73.050. However, only one party's consent is necessary when the conversation "convey[s] threats of extortion, blackmail, bodily harm, or other unlawful requests or demands". RCW 9.73.030(2)(b).

The word "convey" as used in RCW 9.73.030(2)(b) is broadly defined as "to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance." State v. Caliguri, 99 Wn.2d 501, 507-08, 664 P.2d 466 (1983).

All three of the one-party recordings between Mockovak and Kultin convey threats of bodily harm. During the August 11 conversation at the teriyaki restaurant, Mockovak and Kultin discussed the murder of Brad Klock, Clearly Lasik's former chief executive officer, who was suing Clearly Lasik for wrongful termination.[1] Kultin told Mockovak that he "made some calls...[a]bout Brad...and, uh, I told them that you're interested." Kultin proceeded to explain how he knew the "hitmen" and how they operated, stating that they would "make it look like a street robbery...or a car-jacking" and then leave the country.

> KULTIN: But, uh, they can do it. I mean, they'll...and they'll make sure they'll kill him.
> MOCKOVAK: Yeah.
> KULTIN: They'll, I mean, make sure the guy's dead.
> MOCKOVAK: Yeah.
> KULTIN: You know, even if he cooperates, they'll kill him, you know, even if he gives us his wallet and watch, whatever, they'll kill him.
> MOCKOVAK: Yeah.
> KULTIN: Control shot, remember?
> MOCKOVAK: No, what do you mean? So they just...
> KULTIN: So...
> MOCKOVAK: ...he just like right...right in the head?
> KULTIN: Well, yeah.
> MOCKOVAK: Yeah.
> KULTIN: Unless...
> MOCKOVAK: Unless that's not requested
> KULTIN: Unless he has any specifics...
> MOCKOVAK: (Laughs) I don't care.
> KULTIN: ...like, he wants him to know what's happening, why...
> MOCKOVAK: No, no, no, no, no, I don't...You know what, I honestly (pause) don't care.

[1] Mockovak was also charged with solicitation to commit first degree murder involving Klock. He was acquitted on this count.

KULTIN: Okay. I'll tell him.
MOCKOVAK: I don't...don't have any...
KULTIN: Okay.
MOCKOVAK: Then he'll just disappear.
KULTIN: Yeah. But he'll be dead.
MOCKOVAK: Yeah.

Ex. 54. Kultin and Mockovak proceeded to discuss the cost of the murder and strategies for Mockovak to obtain the cash without rousing suspicion. Kultin asked Mockovak "when do you want it done" and Mockovak stated he wanted to wait until after depositions in Klock's lawsuit "because it may just go away at that point."

During the October 20 conversation, Mockovak reported that the depositions had been "outstanding" and there was nothing urgent about Klock, whom he described as nothing more than a "fly on the wall," but that the situation with King was different because Mockovak believed King was attempting to force him out of the business. Mockovak told Kultin that King would be travelling to Australia in November and showed Kultin some flight information he had discovered. Kultin told Mockovak that the cost of a murder would "[p]robably be cheaper in Australia" because "Australia's a wild country." Mockovak replied, "Really? That's good." Kultin said "They got a lot of Russians there too" and Mockovak said "That's what I'm thinking." Mockovak said that he would call the airline and pretend to be King to confirm the dates and times of the flight. Mockovak told Kultin that he had secreted enough cash to pay for the murder and said "I can't figure out what else to do, my friend...I just can't."

The October 22 conversation consisted of the following exchange:

KULTIN: Well I'll tell you what. I spoke with my friend
MOCKOVAK: Yep.
KULTIN: Australia is easy.
MOCKOVAK: Oh, really!
KULTIN: Australia is actually very easy.

MOCKOVAK: Good, because you know what...
KULTIN: There's a lot of Russians in Australia.
MOCKOVAK: ...it's, it's far away.
KULTIN: It's far away.
MOCKOVAK: And it's never gonna come back here ever.
KULTIN: It's a big country. Big and wild country.
MOCKOVAK: Good!
KULTIN: And Joe can basically be killed as a robbery.
MOCKOVAK: Good, good.
KULTIN: As an accident.

Mockovak asked what information the hitmen would need and Kultin asked for a photo of King. Kultin asked Mockovak if he wanted King's wife killed as well and Mockovak said no. Mockovak requested Kultin access King's email to verify King's hotel.

Mockovak contends the August 11 conversation did not convey a threat of bodily harm because he was clear that he did not want Klock killed unless the depositions went well for Klock. This argument is not persuasive. "[T]he statute states that all conversations conveying a threat of bodily harm may be recorded, thereby demonstrating that the legislature did not intend to limit the threat exclusion to conversations where the defendant expressly states the threat of bodily harm." State v. Babcock, 168 Wn. App. 598, 609, 279 P.3d 890 (2012). During the August 11 conversation Mockovak and Kultin planned how Klock could be killed and the murder disguised as a robbery, which clearly conveyed a "threat" of bodily harm. Moreover, even assuming the August 11 conversation was not admissible pursuant to the "bodily harm" exception, that conversation involved the murder of Klock, for which Mockovak was acquitted. Mockovak does not appear to dispute that the October 20 and October 22 conversations conveyed threats of bodily harm to King.

Mockovak argues that the remaining four conversations could have been suppressed as "fruit of the poisonous tree" because the application for authorization to record the conversations was based on the first three conversations. Because the first

three conversations were admissible, this argument is unavailing. In the alternative, Mockovak claims, the remaining four conversations would have been suppressed because the application for authorization to record the conversations was deficient.

A law enforcement officer may apply for and obtain an order authorizing a recording with only one party's consent "if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony." RCW 9.73.090(2). The application must include "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f). "Circumstances sufficient to show a likely failure of normal investigative procedures include: an inherently dangerous situation for the undercover agent, inherent proof difficulties, or proof of the defendant's actual knowledge is required and difficult to otherwise convey without the recording." Babcock, 168 Wn. App. at 610. "The latter encompasses the situation where the investigation has turned up circumstantial evidence that points to the defendant but is insufficient to convict, and a recording is needed to avoid a 'one-on-one swearing contest' between defendant and undercover agent." Babcock, 168 Wn. App. at 610.

The application complies with the requirements of the statute. The application contains the affidavit of Detective Len Carver of the Seattle Police Department, who specified that officers had considered other methods of investigation, such as eavesdropping on the conversations, but determined this would be impossible because they could not predict with enough advance notice where the conversations would take place and because Mockovak was likely to take precautions against being overheard.

Detective Carver stated that "If KULTIN were to insist on a particular time or location for a meeting, MOCKOVAK could become suspicious of KULTIN'S cooperation with law enforcement. This could place KULTIN's safety at risk." Moreover, Detective Carver stated:

> There is simply no other investigative method that will afford the fact finder the opportunity to hear the emotion and determination in the voice of MOCKOVAK when he discusses the plan for the murder, yet that is the very information that will best allow the fact finder to understand MOCKOVAK's true intent in this matter. The actual content, tone, inflection, speech patterns and volume of MOCKOVAK's voice may contain meaning outside that contained in the spoken words themselves and will be a critical determination of MOCKOVAK's involvement in these crimes. Additionally, it is unlikely there will be physical or documentary evidence which, standing alone, will significantly link MOCKOVAK to the crimes.

The application was sufficient to meet the requirements of RCW 9.73.130(3)(f).

Because Mockovak fails to show that the recordings would have been suppressed, he cannot show trial counsel's performance was deficient and he was prejudiced as a result.

2. Entrapment Instruction

Mockovak argues that trial counsel was ineffective for proposing a jury instruction regarding the defense of entrapment. Trial counsel proposed the following instruction, which, except for Mockovak's name, was identical to WPIC 18.05:

> Entrapment is a defense to each of the charges in this case if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and Michael Mockovak was lured or induced to commit a crime that he had not otherwise intended to commit.
>
> The defense is not established if the law enforcement officials did no more than afford Michael Mockovak an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.
>
> Michael Mockovak has the burden of proving this defense by a

> preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that Michael Mockovak has established this defense, it will be your duty to return a verdict of not guilty.

Mockovak contends that because the underlined sentence is not a component of an entrapment defense as stated in RCW 9A.16.070, it was error to include it in the instruction.[2] But this court rejected the identical argument in Mockovak's direct appeal. "A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby." In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 487, 789 P.2d 731 (1990). Nor may a petitioner simply revise a previously rejected argument by alleging different facts or by asserting different legal theories. In re Pers. Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994).

Mockovak argues that reconsideration is necessary based on State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996). He contends that Lively holds that a jury may only consider a defendant's subjective state of mind in determining whether the defendant has been entrapped, and that the instruction is erroneous because it includes an objective component: the conduct of the State to induce or entice the defendant. But Lively states merely that the focus of the defense is the defendant's mental state. It did

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[2] RCW 9A.16.070 provides:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

not hold that objective elements may not be considered.[3] Mockovak fails to establish that this claim warrants reconsideration.

3. Impeachment of Kultin

Kultin testified that in 2009 Mockovak approached him and told him that Klock would be traveling to Germany and "[i]t would be a good time maybe to have something happen." Kultin testified this statement concerned him because it showed Mockovak must be spying on Klock.

Mockovak argues that trial counsel was ineffective for failing to present evidence that Klock had previously accused an ex-girlfriend of hacking into his computer and had given Kultin access to his email to investigate this claim. He argues this evidence would have lent support for his theory that Kultin discovered Klock's planned trip and used it to frame Mockovak. But during cross-examination, trial counsel attempted to impeach Kultin with the fact that Kultin was in contact with Klock's business partner and could have learned of Klock's travel plans that way. Therefore evidence showing that Kultin could have accessed Klock's email to learn about the trip was cumulative at best. It is not ineffective assistance to fail to present evidence that is merely cumulative. State v. Peyton, 29 Wn. App. 701, 718, 630 P.2d 1362 (1981).

REMAINING CLAIMS

Mockovak contends that because the conversations were recorded in violation of Washington's Privacy Act, they violated due process, article I, section 7 of the Washington Constitution and the 10th Amendment to the U.S. Constitution. Because, as discussed above, there was no violation of the Privacy Act, these claims are without merit.

[3] "While it is true that in cases involving entrapment the State's action is integrally involved, predisposition of the defendant is the focal element of the defense." Lively, 130 Wn.2d at 13.

Mockovak also claims cumulative error entitles him to relief. Because Mockovak fails to identify any error as to the claims addressed, this claim must fail.

Now, therefore, it is hereby

ORDERED that the issue regarding whether trial counsel was ineffective for failing to present evidence demonstrating Mockovak was particularly vulnerable to entrapment is referred to a panel of judges for a decision on the merits; and, it is further

ORDERED that the clerk of this court shall set a briefing schedule and thereafter set the date for the hearing on the merits; and it is further

ORDERED that the remaining claims in this petition are dismissed under RAP 16.11(b).

Done this 8th day of May, 2015.

Acting Chief Judge