

66924-9

66924-9

NO. 66924-9-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

*Respondent,*

v.

MICHAEL EMERIC MOCKOVAK,

*Appellant.*

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BRIEF OF APPELLANT

---

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
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**A. ASSIGNMENTS OF ERROR**

Appellant assigns error to:

1. Jury Instruction No. 29 (Appendix A). CP 595.
2. That portion of the prosecutor's closing argument which misinformed the jury that in order to prove the defense of entrapment the defendant had to prove that law enforcement used an unreasonable amount of persuasion in order to get the defendant to commit his crimes.
3. Defense counsel's failure to object to those portions of the prosecutor's closing argument noted above.
4. Defense counsel's submission of a proposed jury instruction on entrapment, which became the Court's Instruction No. 29, and which was misleading and highly susceptible to the erroneous interpretation that the trial prosecutor gave to it in her closing argument.
5. Denial of the appellant's motion to dismiss Count II.
6. Denial of the appellant's motion to dismiss Count V.
7. Count IV of the second amended information, for failure to adequately charge a crime.
8. The Judgment & Sentence entered below.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A government informant told the defendant (falsely) that he had contacts with Russian hit men who could kill the defendant's ex-employee. After the defendant refused to proceed with that plot, the informant suggested the hit men could kill the defendant's business partner instead. He eventually persuaded the defendant to make a down payment for the second proposed hit and the defendant was arrested

shortly thereafter. This appeal raises the following issues:

1. Was a due process violation barring prosecution on grounds of outrageous governmental conduct established where the informant persuaded the defendant to hire hit men (who did not really exist) to kill the business partner by suggesting that:
  - The business partner might be planning to kill the defendant;
  - It would be easy for the defendant to kill his partner while he was traveling in Australia;
  - Killing the partner was “the cheapest” way to solve all his business problems; and
  - If the defendant backed out and failed to hire the hit men, they would be angry and would come after him and harm him?
2. The entrapment instruction stated that “a reasonable amount of persuasion” did not constitute entrapment. Did this instruction violate Due Process because it misled jurors into erroneously thinking that proof of an unreasonable amount of persuasion was *required* to establish the defense?
3. Does this case fall within the *Kyllo* ineffective assistance of counsel exception to the invited error rule, where defense counsel overlooked case law which made it clear that the amount of persuasion used by government agents was irrelevant to an entrapment defense?
4. Did defense counsel’s failure to object to the prosecutor’s closing argument remarks constitute ineffective assistance of counsel where the prosecutor incorrectly told the jurors that entrapment required the defendant to establish *three* elements of the defense – when there are only *two* – and erroneously argued that to prevail on entrapment *the defendant had to prove* that the informant employed an *unreasonable* amount of persuasion to overcome the defendant’s reluctance to commit his crime?
5. Do the convictions for Solicitation of Murder 1° and Attempted Murder 1° merge because the solicitation is “an attempt to attempt” and the legislature did not intend to impose punishment for both offenses where attempt was committed?
6. Do convictions for both Solicitation of Murder 1° and Attempted Murder 1° constitute multiple punishment for the same offense in

violation of the Double Jeopardy Clause of the Fifth Amendment?

7. Does conviction for both Attempted Theft 1° and Conspiracy to Commit Theft 1° constitute multiple punishment in violation of the Double Jeopardy Clause?
8. Does Attempted Theft 1° merge into the Conspiracy to Commit Theft 1° where both crimes are part of a continuous course of conduct and RCW 10.61.010 demonstrates an intent to prohibit punishment for both?
9. Is Count IV constitutionally defective because it failed to allege the substantial step element of conspiracy?
10. Is Count IV constitutionally defective because it failed to identify any specific person as the defendant's co-conspirator as required for any conspiracy conviction?
11. Does the 1997 amendment to the conspiracy statute, which extends criminal liability to a "unilateral conspiracy" where the defendant only "conspires with" himself, violate due process, or the cruel and/or unusual punishment clauses of the state and federal constitutions, for the reasons noted by the Court in *State v. Pacheco*, 125 Wn.2d 150, 155, 882 P.2d 183 (1994)?
12. Is the evidence produced at trial insufficient to establish the agreement element of the crime of conspiracy, because there was no evidence that a government agent even feigned or faked agreement to help the defendant commit the "intended" crime?

## **C. STATEMENT OF THE CASE**

### **1. PROCEDURAL HISTORY**

On November 16, 2009, Dr. Michael Mockovak was charged with two counts of Solicitation of Murder 1° for soliciting the murders of Dr. Joseph King (Count I) and Brad Klock (Count II). CP 1-2.

Over one year later, on December 7, 2010, the State filed an amended

information with five offenses. CP 266-267. In addition to charging the solicitation of the murders of Klock (now Count I) and King (now Count II), the amended information also charged the Attempted Murder 1° of King (Count III), Conspiracy to Commit Theft 1° (Count IV), and Attempted Theft 1° (Count V). CP 268-270. On January 26, 2011, after trial had begun but before the State had rested, the State filed a second amended information which contained the same five charges as the first amended information, but which modified the dates of alleged commission of the offenses charged in Counts III, IV, and V. CP 412-16.

The case was tried to a jury in January and February of 2011. On February 3, the jury *acquitted* Mockovak of soliciting the murder of Brad Klock (Count I) and convicted him of the remaining four counts regarding the planned murder of Dr. King and the planned theft of life insurance proceeds covering Dr. King's life. CP 605, 606, 607, 608, & 604.

On March 17, 2011, the trial court denied the defendant's motions for arrest of judgment on Counts II and V. RP XVIII, 64.<sup>1</sup> However, the trial judge ruled that Counts II and III were the same criminal conduct, and that Counts IV and V were the same criminal conduct. RP XVIII, 65; CP 873. Without any explanation of any accompanying findings of fact, the trial court also denied the defendant's post-trial motion to dismiss the criminal

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<sup>1</sup> A key to the indexing of the verbatim report of proceedings is set forth in Appendix B.

charges on grounds of outrageous governmental conduct. CP 647-650; RP XVIII, 42.

For Attempted Murder 1° and Solicitation of Murder 1° (Counts II and III) Mockovak was sentenced to 240 months in prison. CP 875.<sup>2</sup> On Counts IV and V he received sentences of 4 months in jail. CP 875. All sentences were run concurrently. CP 875. Timely notice of appeal was filed on April 4, 2011. CP 923-932.

## **2. STATEMENT OF THE FACTS**

### **a. Civil Suit Brought Against CLI By Former CEO Brad Klock.**

Drs. King and Mockovak were equal co-owners of a Lasik eye surgery business called Clearly Lasik, Inc. ("CLI"). RP IV, 6; RP V, 126.<sup>3</sup> CLI had surgery centers in both Canada and the United States. RP IV, 7, 11, 13; RP V, 128. In 2005, Brad Klock was hired to be the CEO. RP V, 175. When Klock came to CLI the company was debt free and profitable. RP IV, 9. By the time King and Mockovak fired him in November of 2006, CLI had lost \$1.9 million and was \$2.5 million in debt. RP IV, 9, 44, 179.

In January of 2009 Klock filed suit for wrongful termination against CLI, King and Mockovak. RP IV, 9, 54. Klock sought roughly \$750,000 in damages. RP V, 180. Throughout 2009 CLI received large legal bills

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<sup>2</sup> These sentences were towards the high end of the standard range of 187.5 to 249.75 months on Counts I and II and 1.5 to 4 months on Counts IV and V. CP 873.

from the law firm that was defending against Klock's suit. RP IV, 79-81.

When the U.S. economy soured in 2007, Lasik surgery centers across the country started making less money. RP V, 27. To cope with the economic decline, in February of 2009 Christian Monea, the new CEO, proposed the firing of several employees, including Daniel Kultin, the company's Director of Information Technology. RP V, 35-36, 89, 129; RP VII, 107. Kultin, who was born in Russia, came to the United States in 1994 at age 18. RP VII, 105. Monea initially proposed that Kultin be fired as a cost saving mechanism, but ultimately in June of 2009 Kultin agreed to stay on as a part time employee with a salary reduction from \$72,000 to \$48,000, a pay cut of approximately 33% RP V, 21, 39.

**b. Conflict Over King's Demand for More Pay.**

In 2009 relations between Mockovak and King worsened due to King's dissatisfaction with their existing agreement. King was licensed to practice in Canada but Mockovak was not, so King did all the surgeries in Canada. RP IV, 13. In 2009 the two doctors were receiving equal amounts of compensation, but now the Canadian centers were producing more revenue than the U.S. centers. RP IV, 13. King felt that since he was now generating more than half the company revenue, he should be getting paid more than Mockovak. RP IV, 13, 46-47. King felt that he

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<sup>3</sup> For ease of reference, throughout the rest of this brief both doctors will be referred to

had been underpaid and was entitled to an additional \$375,000 to make things right. RP IV, 89. But in 2005 and 2006 before the economy soured, when Mockovak had been producing more than half the company's revenue, the doctors had been paid equal amounts. RP IV, 48. Mockovak thought it was unfair for King to suddenly demand an adjustment of his compensation in 2009 just because the Canadian centers were now producing more than the American centers. RP IV, 48.

Tension between Mockovak and King increased and by September 30, 2009, King said they were "at an impasse." RP IV, 97. King announced that if they did not come to an agreement on the compensation issue by October 31<sup>st</sup>, he would simply stop working at the Edmonton surgery center, and he insisted on doing 50% of all the surgeries at the surgery center in Renton, Washington where he had been working only 1-1/2 days per week. RP IV, 97-98; RP V, 9. In October the two doctors exchanged proposals in an attempt to solve the compensation issue or how to dissolve the company and split up its assets between them. RP IV, 99-101.

**c. Key Man Insurance Policies on The Lives of The Doctors.**

Following a custom that is "pretty standard" in businesses like medical practices, CLI purchased key man life insurance policies insuring the lives of both King and Mockovak. RP IV, 61, 14. Each doctor's life was

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simply by their last names, it being understood that they are both physicians.

insured for \$4 million. RP IV, 14. King was the beneficiary of the policy on Mockovak's life, and vice versa. RP IV, 14-15, 64, 67. If one of the doctors died, the proceeds could then be used to buy out the half interest of the estate of the deceased doctor. RP IV, 14.

**d. Kultin Contacts the FBI and Says That Mockovak Has Been Talking "In a Joke Way" About Getting Someone From the Russian Mafia to Solve His Brad Klock Problem.**

According to Kultin, Mockovak frequently made remarks about the Russian Mafia and teased Kultin by asking him if he was "packing." RP VII, 114-15. While claiming that he did not want to put words in his mouth, Kultin said that in late 2008 or early 2009, Mockovak spoke to him "something like, you know, maybe in a joke way," about Brad Klock and asked him "something like don't you have friends or somebody, you know, some Russian that can just put an end to it or, you know, do something with, you know, rather than the legal way." RP VII, 118-19. Kultin said Mockovak complained that Klock might win a big sum of money from the company in his lawsuit. RP VII, 119.

On another occasion Kultin claimed that Mockovak said to him, "guess what, I found out through my friend that Brad Klock is going to be traveling in Europe in a few months or few weeks, something like that, and wouldn't that be a good place, you know, something would happen to

him kind of stuff.” RP VII, 121.<sup>4</sup> Kultin claimed that this conversation caused him to brood over whether Mockovak was really serious about doing some kind of harm to Klock. RP VII, 121.

Kultin’s father suggested that he talk with George Steuer, an FBI Agent in Portland. RP VII, 126-127. In April of 2009, Kultin spoke to Steuer, and told him that in April of 2008 Mockovak had joked about Kultin being a member of the Russian Mafia, and that he had joked about it again in March of 2009. RP VII, 53. Steuer told Kultin that he needed to speak to a Seattle agent, and shortly after that Kultin was contacted by FBI Agent Larry Carr. RP VII, 127-28.

e. **Agent Carr Met With Kultin And Told Him “Never Ever” To Bring Up the Subject Of the Russian Mafia With Mockovak.**

On May 8, 2009, Carr met Kultin at a Starbucks on Elliott Avenue in Seattle. RP VI, 67; RP VII, 29. At their meeting Kultin told Carr that Mockovak had expressed anger towards Brad Klock because he had filed suit against the company, and that Mockovak had asked him if he knew anyone in the Russian Mafia who could get rid of this problem. RP VI, 68. Kultin said Mockovak “seemed to be serious.” RP VI, 69.

Carr told Kultin that he should “never ever bring up the subject with the doctor again, [and] that the doctor would have to bring the subject up.”

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<sup>4</sup> According to Kultin, Mockovak “didn’t say kill or anything at that meeting, . . . I don’t remember the exact verb that he used . . .” RP VII, 124.

RP VI, 70. He told Carr that if he brought up the subject that would be called entrapment and that if he initiated criminal activity with the doctor it could ruin the case. RP VI, 70. But at trial Kultin testified that as far as he could remember no one ever said the word entrapment to him and claimed that “I still don’t know exactly what it means.” RP X, 55.

**f. A Month Later Carr Changed His Instructions and Told Kultin to Raise the Topic of the Russian Mafia with Mockovak.**

Agent Carr met with Kultin again on June 11<sup>th</sup>. RP VI, 71. Kultin told him that nothing more had happened and that Mockovak had *not* raised the subject of having something happen to Klock. RP VI, 72. Kultin said he was soon going to be taking a trip to Los Angeles to visit friends. RP VI, 72. Ignoring his own previous instruction to “never ever” bring up the subject on his own, Carr instructed Kultin to tell Mockovak that he was going to Los Angeles to visit a friend whom he believed to be a member of the Russian Mafia. RP VI, 73. Carr said he did this in order to “spark some type of conversation” that would enable the FBI “to get a better idea of what Mockovak was really thinking.” RP VI, 73. At this meeting Kultin said he would be willing to formally work for the FBI as a Confidential Human Source (“CHS”) on a long term basis. RP VI, 73.

On June 16<sup>th</sup> Agent Steuer sent an email to Agent Carr and inquired if Carr had ever opened up a case after Steuer had referred Kultin to the Seattle FBI office. RP VII, 48. Carr sent Steuer this response: “Not yet.

It's starting to look like the doctor was just blowing smoke." RP VII, 55. Carr told Steuer he was considering opening up Kultin as a CHS and that he could use Kultin "to operate on other matters." RP VII, 55.

With the exception of one very brief phone conversation at the end of July, Carr did not speak with Kultin again until August 3, 2009. RP VI, 75-76. Kultin advised Carr that throughout May, June and July of 2009, Mockovak never raised the subject of a hit. RP VII, 56. Agent Carr agreed that at this time he "thought the case wasn't going anywhere," but he was interested in using Kultin as a CHS in other cases. RP VII, 56-57.

**g. Kultin's Alleged August 3<sup>rd</sup> Conversation with Mockovak.**

At 11:40 a.m. on August 3, 2009, Kultin got a call from Mockovak. RP VII, 22. At 11:43 a.m., Kultin called Carr, told him that he had just received "a cryptic phone call from Mockovak," who had said that he "wanted to discuss that thing." RP VI, 76. Kultin said that he "felt" that Mockovak was referring to the idea of a murder for hire plot. RP VI, 76.

Carr was *not* the first person that Kultin spoke to after receiving Mockovak's "cryptic call. An inspection of Kultin's cell phone records later revealed that at 11:42 a.m. Kultin had telephoned Brad Klock. RP VII, 24. But Carr was completely unaware of this August 3<sup>rd</sup> telephone

call from Kultin to Klock. RP VII, 26, 28.<sup>5</sup> When Kultin was asked about this call he said he did not remember making it, and that if he did call Klock that day it would have been “work related.” RP IX, 25, 27.

Phone records later revealed that Kultin had been in regular and continuous contact with Brad Klock throughout 2009. Kultin never told Carr that in addition to contacting Carr on August 3<sup>rd</sup> after receiving the “cryptic call” from Mockovak, Kultin had also telephoned Klock. He never disclosed this even though (1) Kultin was working for CLI; (2) Klock was suing CLI, and (3) Kultin was helping the FBI investigate the possibility that Mockovak was considering hiring someone to kill Klock. Nor did Kultin ever tell Carr that on at least 15 occasions from June through November, he spoke to Klock by phone. RP VII, 33-41 & Exhibit 56. At trial Carr acknowledged that it would have been important for him to know that Kultin was having this contact with Klock. RP VII, 24.

At trial Kultin revealed that while he worked for CLI throughout the entire year of 2009, at the same time he was also working part time for Klock and Klock’s business associate Don Cameron. RP VII, 26, 112. Kultin admitted that from the time he first met Carr on May 8, 2009, he

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<sup>5</sup> On August 3<sup>rd</sup>, Kultin said nothing to Carr about having just called Klock. RP X, 11. When asked why he called Klock first, Kultin said, “It’s hard for me to concentrate on my daily work when I have to meet with the Seattle FBI,” so he decided to call Klock first and then Agent Carr. RP X, 15. In late 2010, less than a month before the criminal trial was to start, Kultin *still* had not told Agent Carr that he had been working for (and still was working for) Brad Klock. RP X, 8.

continually kept his employment by Klock a secret from the FBI. RP X, 9, 71-72. Christian Monea, the CEO of CLI, testified that he also was completely unaware that Kultin was working for Klock. RP V, 41. Kultin admitted that he kept his employment with Klock a secret from Monea and King as well. RP X, 29.

Kultin claimed that sometime in early 2009 Mockovak had told him that he had “found out through my friend” that Klock was traveling to Europe soon, and that Europe would be a good place for something to happen to him, RP VII, 121. But Klock himself testified that while he tentatively considered such a trip, he never actually took it, and that the person who could have known that he was thinking about taking a trip to Europe in May was someone who had had access to his e-mail. RP V, 191. This testimony led defense counsel to argue in closing that Kultin lied when he said he found out about Klock’s travel plans from Mockovak. RP XII, 115. The defense suggested that Kultin actually learned about this from Klock himself. RP XII, 130.

When Kultin called Carr on August 3, 2009, he also told Carr that he had followed Carr’s instructions and had told Mockovak that he was going to see a friend in Los Angeles who might be connected to the Russian Mafia; but Kultin said this comment had *not* prompted Mockovak to engage in any talk about murder, and that in the last four months

Mockovak had made no mention of this subject. RP VI, 76-77.

Carr arranged to meet Kultin the next day. RP VI, 79. On August 4<sup>th</sup> Agent Carr, accompanied by Seattle detective Leonard Carver, met Kultin at a Hotel and decided to officially “open him up” as a CHS. RP VII, 57. At this meeting, Kultin told Carr that he was supposed to meet Mockovak on August 5<sup>th</sup>. RP VI, 79. Carr instructed him to find out what Mockovak wanted and to respond by telling him that he would contact his friend in Los Angeles and see if whatever it was the doctor wanted could be arranged. RP VI, 82-83.

**h. The Unrecorded August 5<sup>th</sup> Meeting and Carr’s Instructions to Give Mockovak a False Story About a Russian Crime Lord.**

On August 5<sup>th</sup>, Kultin met with Mockovak and, according to Kultin, this time their conversation was “maybe 75% about his frustration with Brad Klock and maybe 25% of starting frustration with Joe King.” RP VII, 131, 135. Kultin said he did not remember whether Mockovak asked him to do anything, but Kultin got the understanding that Mockovak “wants to find a way to do something illegal to Brad Klock,” and that he “got a sense that he wanted him to disappear,” and to murder him. RP VII, 136-37. Kultin said that he told Mockovak he would contact his friend in Los Angeles, find out how things were done, and then he would get back to Mockovak. RP VI, 85.

Kultin said Mockovak also expressed frustration with King.

Mockovak told Kultin that King wanted to split the business between the two of them and that King was a greedy snake. RP VII, 134, 139-140. Kultin told Carr that Mockovak was “not just interested in Brad Klock, but he’s also interested in Joe King.” RP VII, 141-42.

Carr decided to have all of Kultin’s future meetings with Mockovak tape recorded. RP VI, 85. He provided recording equipment to Kultin so that all his future meetings with Mockovak would be secretly tape recorded. RP VI, 94.<sup>6</sup> He also completed the paperwork necessary to formally “open” Kultin as a CHS for the FBI. RP VI, 86. On the form he used to “open him up,” Carr listed Kultin’s motivation for providing assistance to the FBI as “monetary compensation.” RP VII, 58. Before Kultin, Carr had never recruited anyone to be a CHS; since Carr’s own performance was evaluated periodically, and since an agent “kind of get[s] dinged” for not having a CHS, Carr decided it would be a great opportunity for him to acquire a CHS. RP VI, 86. Carr administered a set of standard “admonishments” to Kultin advising him as to what a CHS could not do. RP VI, 86; Exhibit Nos. 50 & 59 (Appendices C & D). In order to make sure that Kultin did not entrap Mockovak, Carr told Kultin several times to “quit talking so much,” and on August 5<sup>th</sup> Carr had Kultin

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<sup>6</sup> All the transcripts of the five tape recorded meetings between Kultin and Mockovak were admitted into evidence as Exhibit 54. RP VII, 14, RP XII, 33. That exhibit has

acknowledge the receipt of instructions regarding the limits placed on his conduct. RP VII, 48, 50. Similarly, on many occasions Detective Carver discussed the idea of entrapment with Kultin. RP X, 137.

Carr decided that Kultin needed a “backstory” to give to Mockovak. RP VI, 92. Carr told Kultin to do some research, find a Russian crime figure, and to tell Mockovak that his friend in Los Angeles was a member of that crime boss’ organization. RP VI, 93. Kultin came up with the name of Sergei Mikhailov, a real life Russian crime boss. RP VI, 92-93.

**i. August 11<sup>th</sup>: The First Tape Recorded Meeting.**

On August 11<sup>th</sup> Kultin met with Mockovak again. RP VII, 145. During their meeting Mockovak mentioned that “someone took a key” and scratched the hood of his car. *Tr.* 8/11/09, at 28. Kultin said maybe Mockovak’s ex-wife did it; but when Mockovak said he didn’t think so, Kultin suggested that *maybe King did it. Id.* Mockovak said that King was more likely to do something for money and Kultin agreed with him. *Id.* at 29. Mockovak complained that King had been cashing rebate checks related to Mockovak’s shopping at Costco; Kultin asked, “*Are you sure he’s not Jewish?*” and Mockovak did not respond. *Id.* at 30.

Kultin told Mockovak that he had made some calls to discuss “the thing we talked about” concerning Brad Klock and he told “them” that

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been designated for transmittal to the Court of Appeals. In this brief all of these

Mockovak was interested. *Id.* at 34. Kultin told Mockovak that they said “they can do it” and Mockovak replied, “Oh good.” *Id.* Kultin said his connection to the hit men was through his “best friend” from childhood; that he had “dealt with these people before . . . so it was nothing new for him,” and that Kultin himself had “done some things . . . not necessarily murder” but he had “kick[ed] some people’s ass.” *Id.* at 36.

Kultin told Mockovak that his friend said there were two hit men in the U.S. at that time, and that their modus operandi was to make a hit look like a street robbery. *Id.* at 37. He told Mockovak they worked for Sergei Mikhailov and that they got paid in two installments, “first and last,” and that after receipt of the second payment “they fly back” to Russia and “that’s it . . . it’s that easy.” *Tr.*, 8/11/09 at 38. Kultin said they were in the U.S. at that moment doing other work, “probably like money laundering and something like that,” but that “they can also do this kind of work. They usually do it in Europe and Russia all the time.” *Id.* at 38-39.

Kultin said the hit men would need to be paid \$10,000 before the hit and \$10,000 after, and that Kultin himself would be getting a portion of this money. *Id.* at 41. Mockovak said that it was a “big problem” for him to come up with this money without leaving a clear paper trail, stating “I can’t just pull ten K out of a checking account and . . .” *Id.* at 42. Kultin

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transcripts will be referred to simply as “*Tr.*” followed by the date of the meeting.

said he understood and suggested that maybe he could take money out of the Lasik business but Mockovak said he could not do that and that he was “gonna have to figure out” how to raise the money. *Id.* at 42-43.

Kultin asked Mockovak if he wanted Klock killed “[b]efore the deposition [of Klock] or after.” *Tr.* 8/11/09 at 43. Mockovak immediately replied “*No, no, no, no.* I want to go ahead and have the deposition happen first . . . to see what’s gonna happen. . . . Because, first of all, *I think there’s some chance after the deposition that this whole thing may disappear.*” *Id.* (emphasis added).

Mockovak said he did not like Klock, but that it was not a personal thing, it was “just a financial thing,” and Kultin agreed, commenting that by means of the civil lawsuit Klock could “get anywhere from maybe over a hundred thousand dollars from [the] company . . . all the way to what seven hundred thousand?” *Id.* at 44. Mockovak then reiterated that he wanted to wait to see how the depositions turned out: “I want the depositions to happen first . . . *because it may just go away at that point.*” *Tr.* 8/11/09 at 44 (emphasis added).

Mockovak explained that CLI’s lawyer thought Klock might do so badly at his deposition that he might decide to just drop his lawsuit. *Id.* at 45. Kultin objected that “this is serious stuff we’re talking about” and said he didn’t want the hit men to become irritated by being asked to wait and

see, and Mockovak immediately responded, “*No, no, no, okay.* Well, listen, you better be very clear then, . . . *let’s not make them think that okay, this is absolutely gonna happen.* . . . But *I want the deposition to happen first*, then I want you and I to have another conversation, *and then we’ll go from there.*” *Id.* at 45-46 (emphasis added).

Kultin responded that the price being charged by the hit men might increase and Mockovak said he understood that. *Id.* at 46-47. Kultin said the hit men were only in the U.S. until November, and he said they could do the hit in either the U.S. or Canada. *Id.* at 49. He assured Mockovak three times that carrying out hits like this was something that “happens all the time,” and told Mockovak, “It’s nothing.” *Id.* at 50.

Kultin said that his friend in Los Angeles was connected to the Sergei Mikhailov crime organization, and that although Kultin personally had never met Mikhailov, he had seen him from a distance with his bodyguards many times. *Id.* at 58-60. Kultin told Mockovak that in Russia “if you get into some serious trouble with anybody, [or if the] police stops you, . . . whatever, if you say name Mikhailov, I mean that’s . . . that’s it. I mean, they’re gonna leave you alone.” *Id.* at 61. But if you say the name Mikhailov and you are not really connected to him – “if you’re just saying it to say it” -- and his organization finds out what you have done, then “you know, forget about it yeah, *Mikhailov will come*

*after your family.*” *Id.* at 61 (emphasis added).

Mockovak then asked why Kultin had “offered” him the idea of killing Klock; but Kultin dodged the question and simply said that Klock’s lawsuit was harming the company, and that the “easiest” and “cheapest” way to deal with Klock was to “make him go away” by killing him:

Mockovak: Yeah. So I have . . . so *I have to ask you, why did you, uh, choose to offer this to me?*

Source: Well, we talked about it.

Mockovak: No, I know that, but, but . . .

Source: You know?

Mockovak: . . . but *why did you . . .*

Source: *Might as well.*

Mockovak: Okay.

Source: Brad [Unintelligible] \_\_\_\_\_.

Mockovak: Okay, you know, you saw . . . but I mean, but I kinda wanted to get . . .

Source: He’s . . . *he’s draining our company, come on, Dude. I mean, it’s affecting everybody you know.*

Mockovak: Yeah, it is. It’s affecting us all.

Source: Fuck, you know, we’re in this . . .

Mockovak: You know we’re in this, you know how much we spent in legal bills on him so far?

Source: I know, it’s fucking ridiculous.

Mockovak: I’ve spent, uh, twenty-five thousand dollars on legal bills already.

Source: See? And that’s just the beginning sometimes.

Mockovak: Yeah.

Source: And he’s not going to go away. *So let’s make him go away.*<sup>7</sup>

Mockovak: Yeah, yeah.

Source: I mean, *easiest way to do it.*

Mockovak: Yeah. No, I agree.

Source: *Cheapest way to do it.*

Mockovak: By far.

Source: *Fuck Brad.*

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<sup>7</sup> Kultin acknowledged that “let’s make him go away meant let’s kill him. RP X, 34.

Mockovak: By far.

*Tr.* 8/11/09 at 62-63 (emphasis added).

After briefly discussing what Klock looked like,<sup>8</sup> Kultin steered the conversation away from a gas station or “street murder” of Brad Klock, and suddenly made the suggestion that if they had King killed as well as Klock, then Mockovak could collect on King’s insurance policy:

Source: [Klock]’s a victim of a crime. A-T-M, whatever he come in, out of the gas station and gets his gas, you know, they take his watch, they take his wallet, you know, they take his car or whatever, drop his body somewhere in the river or whatever. So. It’s easy. It’s Russians, man.

Mockovak: Yeah. Right on.

Source: ***And then, once the practice is free, we can talk about Joe.*** (Chuckles)

Mockovak: (Laughs)

Source: ***You know, about the insurance policy.***

Mockovak: Well that would only be if . . . that has to happen because if the practice splits . . .

*Tr.*, 8/11/09 at 69-70 (emphasis added).<sup>9</sup>

Returning to the subject of Klock, Mockovak told Kultin that “to be honest, ***to me that whole conversation is a last resort,***” but Kultin warned him not to anger the hit men stating, “I just don’t want to drive the people, you know . . .” *Id.* at 83. Mockovak explicitly told Kultin twice, “***Don’t***

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<sup>8</sup> Kultin asked if he had a picture of Klock and Mockovak said he had a copy of Klock’s passport. *Id.* at 68. Mockovak said Klock was “a porky guy” and Kultin responded that it would not matter how hefty Klock was, even if he was “huge” a shot from a nine millimeter pistol would take care of him. *Id.* at 68-69.

*say anything to anyone.* You just need to say that, you know, um, again, this was a . . . *I want to have the deposition done . . .*” *Id.* But Kultin was impatient and he pressed Mockovak to agree to hire the hit men:

Source: Like, next time . . . *next time I want to talk to them you know, I want to be ready to . . .*  
Mockovak: To . . . to . . .  
Source: . . . *pay them the money and execute . . .*  
Mockovak: Yeah, yeah, yeah, yeah, yeah. Okay.  
Source: *Because if I do it again and they’re like, “Fuck, this guy’s not serious.”*  
Mockovak: Yeah. Right, right, right.

*Tr.*, 8/11/09 at 83 (emphasis added). Kultin told Mockovak the price of the hit “probably [was] not gonna really change” and Mockovak again stated that the depositions in Klock’s case would take place in September and after that “we’ll see” if there isn’t “a chance for the thing to fall through.” *Id.* at 84.

After listening to the tape of this August 11<sup>th</sup> conversation between Kultin and Mockovak, Agent Carr thought that maybe Mockovak was just “venting or he’s blowing off some smoke.” RP VII, 71.

**j. Agent Carr’s Payment to Daniel Kultin on September 16th.**

On September 16th, Kultin met with Agent Carr and Detective Carver and Carr gave Kultin a payment of \$1,200. RP VI, 99; RP VII, 38. Carr said this payment was for the two August meetings with Mockovak that

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<sup>9</sup> At this point, Kultin commented that he did not think that King and Mockovak would be able to negotiate a resolution of their business differences. *Id.* at 70.

Kultin had gone to. RP VI, 99. Carr said it was understood that Kultin would receive future payments. RP VI, 100.<sup>10</sup>

**k. October 20<sup>th</sup>: The Second Tape Recorded Meeting.**

Kultin met with Mockovak again on October 20<sup>th</sup>. RP VIII, 34. This meeting, like the previous meeting of August 11<sup>th</sup>, was secretly tape recorded. RP VIII, 40. Early in their conversation Kultin brought up the subject of the depositions that had been taken in the Klock lawsuit and asked Mockovak: “How did it go?” *Tr.* 10/22/09 at 6. Mockovak replied, “Uh, our depositions [King’s and Mockovak’s] were outstanding.” *Id.*<sup>11</sup> In an effort to see whether Mockovak wanted to go forward with Klock’s murder, Kultin asked Mockovak, “So what’s the outcome, you know, still . . . ?” *Id.* at 7. Mockovak explained that Klock was not scheduled to be deposed until mid January of 2010; then he changed the subject and inquired “um, how’s your knee?” *Id.* at 7-8.

Mockovak and Kultin were joined by Christian Monea, and Kultin then questioned Monea about the status of Klock’s deposition. *Id.* at 21.<sup>12</sup> Kultin commented that the process “can drag for a long time, can’t it?”

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<sup>10</sup> In fact, after Mockovak was arrested on November 12<sup>th</sup>, and after Kultin sent Agent Carr a text message on November 24<sup>th</sup> asking Carr to look into the matter of Kultin getting his “final payment,” Kultin was paid again in December. RP VII, 60-61; Exhibit No. 61. Kultin was paid another \$5,000. RP VII, 86-87.

<sup>11</sup> They were both deposed on September 15, 2009 by Klock’s attorney. RP V, 181.

<sup>12</sup> Monea confirmed that Klock wasn’t available to be deposed until January. *Id.*

Monea replied that the case was not set to go to trial until June of 2010. *Id.* at 22. Monea explained that Clearly Lasik's attorneys believed they had never been properly served and that they were contemplating waiting until the statute of limitations expired in January of 2010 and then moving for dismissal of Klock's lawsuit. *Id.* at 22-23. Monea explained that if that strategy worked, then the Klock lawsuit would simply "go away" and "that's what we're hoping for." *Id.* at 23.

When Monea left, Kultin and Mockovak were alone together again, and Mockovak told Kultin he wanted to "update" him on the "nonsense" that was transpiring between King and himself. *Id.* at 32. Mockovak said King had threatened to shut down the Edmonton surgery center if he did not get his way with increased compensation. *Id.* at 33. Kultin responded, "But the question is, why is he [King] doing this?" and "What is he trying to accomplish?" *Id.* at 33-34. Mockovak showed him King's most recent letter in which King proposed to stop operating in Canada and to split equally the surgery fees produced at the Renton center. *Id.* at 38. Kultin said King should make up his mind whether he's Canadian or American. *Id.* at 39.<sup>13</sup> Kultin then brought up the subject of the insurance policies

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<sup>13</sup> Mockovak also said that King was complaining about the company employing Mockovak's father; Kultin sympathized with him and noted that the company had paid a million dollars to employ King's brother Michael over the past few years. *Id.* at 39-40. Mockovak said that his father actually did some work for the company, unlike Michael King. *Id.* at 40.

that each doctor held on the other doctor's life:

CHS: (Sighs) Does that, uh, if you guys split the practice, does that eliminate the whole, um, insurance? Business insurance thing? One . . . if one doctor . . .  
Mockovak: It would obviously change that.

*Tr.* 10/20/09 at 41.

When Mockovak again complained about King's threat to shut the Edmonton office, Kultin said: "I really feel for you. I really do. This is like, I wouldn't want to be in your shoes, you know, having a partner like that. It's fucked up." *Id.* at 42. When Mockovak complained about the way King wanted to split up the five surgery centers between the two of them, Kultin agreed with Mockovak that King was not making him a fair proposal. *Id.* at 43-46. Kultin said again that he "wouldn't want to be in your shoes," and told Mockovak, "you know, *he's been screwing you over for a long time like that.*" *Id.* at 47.

After more discussion in which Mockovak voiced his fear that perhaps King was spying on him, *id.* at 50, suddenly Kultin began aggressively feeding Mockovak's fears, playing Iago to Mockovak's Othello, by planting the thought that perhaps King was planning to kill Mockovak:

CHS: I mean, you're . . . *you are acting like a true business owner with the business in mind*, with the employee's [sic] interest in mind, with the whole profit for the company in mind.  
Mockovak: Yes.  
CHS: I mean, you're doing everything like any normal businessman would do anywhere in the world.

*What he's doing sounds like* a completely lackey, uh, his own personal interest, perhaps *some sort of a sneaky way to get something done*. I don't even know what he's trying to accomplish. *Um, is . . . is he trying to completely kick you out?*

Mockovak: I think so . . .

CHS: *Is he going to have you killed? You know? That would be ideal for him, because he gets the five million dollars, doesn't he? Um, so, that would be ideal for him.*

Mockovak: Mmhmm.

*Tr.* 10/20/09 at 52 (emphasis added).

Kultin then returned to the subject of Brad Klock (“Yeah, the thing about Brad, uh . . .”), and tried to stimulate that dormant assassination plan by telling Mockovak that he was “actually going to L.A. again next month (laughs).” *Id.* at 61. But Mockovak responded, “I really don’t care.” *Id.* Mockovak said there was “nothing urgent about Brad” Klock, but said that “this thing with Joe [King] is just like, Jesus.” *Id.* at 62.

Mockovak told Kultin that King was leaving on a vacation trip to Australia in November. *Id.* Kultin responded that it would “probably be cheaper” to have a hit carried out there because Australia was “a wild country.” *Id.* Kultin encouraged him to find out King’s exact travel dates and told him that there were “a lot of Russians there too,” because “the guys in L-A, they have worldwide connections.” *Id.* at 64. Kultin then asked Mockovak, “Did you hear the, uh, uh, Russia’s number one thief got murdered.” *Id.* at 65. Mockovak said he had not, and that he wanted to

hear about it but that he had to go and see some patients. *Id.*

Before parting, Kultin asked Mockovak if he wanted to meet again and they arranged to meet there, two nights later. *Id.* at 85-86, 106. Kultin told him that he would call his friend in L.A. and would ask him, “‘How you doin’ in Sydney,’ or whatever” (i.e., if a hit could be done in Australia). *Id.* at 107. Mockovak told Kultin, “I can’t figure out what else to do, my friend,” and Kultin replied “I feel you Mikey.” *Id.* Mockovak asked, “What do you do when you’re in a position like this?” and Kultin replied, “There’s not a . . . there’s no other fucking way.” *Id.* at 108.

As a result of this meeting, Kultin informed Carr that Mockovak’s target had switched from Klock to King. RP VII, 66.

**I. October 22nd: The Third Tape Recorded Meeting.**

On October 22nd, Mockovak and Kultin met again. RP VIII, 61. Mockovak told Kultin that King had made a proposal for splitting up the surgery centers which Mockovak found unacceptable, but that he was going to make King a counter proposal that he thought might work. *Tr.* 10/22/09 at 44. Kultin told Mockovak he wouldn’t trust King and that he could not imagine being a partner with someone like King. *Id.* at 45.

Kultin said that if Mockovak were to run the Lasik company by himself, he would be way more successful. *Id.* at 64, 68. He then told Mockovak a long story about a “Russian mafia” crime lord named

Vichaslov Vinkoff who “became basically the king of the crime world.” *Id.* at 70, 73, 76. He said Vinkoff tried to help a lot of elderly Russian people who got ripped off in a scam by two Jewish guys. *Id.* at 78. Kultin said it was “unbelievable how fair this guy” Vinkoff was. *Id.* at 80. “[H]e goes his way in life and he just you know very fair, very sincere. Truthful this guy even though he’s a criminal probably killed a few people here and there uh, he’s a very . . . I mean sometimes you just don’t see people like that . . . “ *Id.* at 81. Kultin said that President Putin of Russia attended Vinkoff’s funeral and that Vinkoff was extremely “precise” when it came to “[d]oing the right things versus the bad thing.” *Id.* at 81-83.

Mockovak began to talk about President Obama and said that a lot of people did not like him because he was black and smart and “all those things [that racist people think] that black people shouldn’t be.” *Id.* at 100. Kultin agreed and then said, “I think Joe [King] hates him [Obama].” *Id.* Mockovak’s only response was to ask, “Really?” *Id.* at 101.

Kultin invited Mockovak to come on a trip with him to Russia and said that Mockovak would love St. Petersburg. *Id.* at 107-110. He then asked Mockovak to “hook him up” with a woman named Tiffany and Mockovak “guaranteed” that Tiffany would find like Kultin. *Id.* at 112, 114-15, 123.

After discussing women for several minutes, Mockovak said that everything was going to “come to a head in the next few days with Joe.”

*Id.* at 119. Mockovak said that King had agreed that Mockovak would do 80% of the surgeries at the Renton office, and he had asked King if he was just saying that, and whether he would simply change his mind again. *Id.* at 139. King had assured him that “it would all be in writing.” *Id.*

Kultin’s immediate response to this information was to tell Mockovak that it would be easy to kill King while he was in Australia:

Source: Well I’ll tell you what. I spoke with my friend.  
Mockovak: Yep.  
Source: ***Australia is easy.***  
Mockovak: Oh, really?  
Source: ***Australia is actually very easy.***  
Mockovak: Good, because you know what . . .  
Source: ***There’s a lot of Russians in Australia.***  
Mockovak: . . . it’s, it’s far away.

*Tr.* 10/22/09 at 140 (emphasis added).<sup>14</sup>

Kultin said that the hit men wanted as much information as possible about King’s airplane flights. *Id.* He asked who King was going to be traveling with; whether King was going to be in Sydney; whether he was going to travel inside the country; whether he was a water sports fan; and he said to Mockovak: “Hotel would be really nice to know.” *Id.* at 141-42. Mockovak said he would try and find out what hotel he was going to stay at. *Id.* at 142. Kultin said they would need a photo of King and

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<sup>14</sup> Kultin told Mockovak that the Russians that live in Australia have a “mutual agreement” with the police there, that “the Russians are allowed to do [anything],” and that the “cops just don’t get it” so “it just kind of stays in Australia.” *Id.* at 155-56. He told Mockovak again that Australia was “very easy” and that it was “easier than anywhere else.” *Id.* at 157.

Mockovak said okay. *Id.* Kultin asked if they were “just getting rid of Joe” or whether the hit men were also going to kill King’s wife. *Id.* at 143. Mockovak replied, “nooo, no, no, no, no.” *Id.*

**m. Application For State Court Permission To Tape Record.**

Kultin and Mockovak did not meet again until November 6<sup>th</sup>. In the meantime, on November 4<sup>th</sup>, for the first time law enforcement agents applied to a State court<sup>15</sup> for a judicial order granting them authority to record conversations taking place between Kultin and Mockovak. RP VII, 68-69. As Carr later acknowledged at trial, in that application, law enforcement discussed the defense of entrapment and told the State court that they needed more evidence to figure out whether Kultin was encouraging Mockovak to commit crimes:

Q. . . . And even as far as November 4<sup>th</sup>, the request was made by the investigators to record the conversations between Kultin and Mockovak *to determine Mockovak’s true intentions* with respect to the above crimes, and if appropriate, to develop evidence of such crimes, correct?

A. Yes.

Q. And so as of even November 4<sup>th</sup> *you were still asking questions about Dr. Mockovak’s true intentions*, correct?

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<sup>15</sup> Under federal law, federal agents do not need judicial approval to tape record a conversation if one of the parties to the conversation (in this case Kultin) consents to the recording. Under Washington State law (RCW 9.73.030 et seq.) one party consent generally does not suffice (none of the statutory exceptions to the consent of all parties apply in this case) and state agents need judicial approval to tape record. Despite the fact that Detective Carver was a state agent working with FBI Agent Carr, no application to any state court for permission to record was made for any of the prior conversations.

A. *Correct, yes.*

\* \* \*

Q. In that application you also discuss the defense of entrapment. *A recording* of the conversations between Mockovak and Kultin *will provide evidence* of exactly what is said by whom, thus providing investigators with evidence *that will be critical to sorting out who planned or is planning the crimes and whether that person is being encouraged in any way to commit crimes that he would not otherwise commit, correct?*

A. *Yes.*

RP VII, 69-70 (emphasis added).

**n. November 6th: The Fourth Tape Recorded Meeting.**

On November 6<sup>th</sup>, Kultin met Mockovak again. RP IX, 17. Prior to going to this meeting, Agent Carr instructed Kultin, “We need the money and it’s up to you.” *Tr.* 11/6/09 at 2. At the meeting, Mockovak told Kultin he had no idea what flight King was taking to Australia and Kultin asked if he knew where he was going to stay when he got there. *Id.* at 8. Mockovak did not know so Kultin asked him, “What do you suggest?” *Id.* Again Mockovak said he did not know. *Id.* at 9.

Kultin asked Mockovak if he wanted the hit men to send any specific message to King when they killed him and Mockovak said he did not care. *Id.* at 52, 58. Kultin said the hit men were asking how Mockovak wanted the job done: “street robbery, [or] drown in the ocean . . .” *Id.* Mockovak said he thought the idea of a drowning was “not bad.” *Id.* Eventually Mockovak said “I just, in fact I almost don’t want to know,” and Kultin

replied, "Okay." *Id.* at 53. Mockovak said, "It creeps me out even to think about these kinds of things, frankly." *Id.* at 53-54.

When Mockovak commented that King's wife would be getting a large piece of the insurance money paid out when King was killed, Kultin asked Mockovak if Mrs. King was business savvy. *Id.* at 56. Mockovak said, "No, but her dad is." *Id.* Kultin then asked if the father was also going to Australia and suggested that he could have him killed too:

Source: She's not going with him to Australia is he [sic]?  
Mockovak: Father?  
Source: ***Cuz if you got another 25 (laughing)*** . . .  
Mockovak: No.  
Source: ***I can do the father.***  
Mockovak: No, I don't want to do the father. That, that I can't do.

*Tr.* 11/6/09 at 56 (emphasis added).

When Kultin asked Mockovak "have you really thought this through," Mockovak replied, "I'm a little uneasy." *Tr.* 11/6/09 at 61. He told Kultin, "you gotta talk to me about it my part." *Id.* Kultin replied, "I'm trying to help you. I'm trying to help you, you know. We're in this together." *Id.* Mockovak said part of him was thinking maybe he should just see if his attorneys could work out a deal with King:

That's just not me. But here's how I feel, to be totally honest. It's like you know, we're working with attorneys and part of me is like, should we try and see if you know, but, part of me think [sic] no, I'll just get fucked.

*Tr.*, 11/6/09 at 61. Mockovak told Kultin that he did "go back and forth"

but that he thought this was the only sure way. *Id.* at 67.

Kultin assured Mockovak that the hit men would never get caught. *Id.* at 77. After they do the hit, Kultin said “they disappear.” *Id.* at 78. “So, it’s easy I mean, trust me,” Kultin told him, “Russia lives like this for hundreds of years.” *Id.* at 78. At this point, Mockovak asked Kultin how he could have risked making this proposal to Mockovak:

So what, what, *I have to ask you what made you so confident in [sic] you could say this to me and I wouldn’t wig out?*

*Tr.* 11/6/09 at 78 (emphasis added). Kultin replied, I think you and I, we’ve, we’ve been talking for a long time, we played chess together. Trust me. . . . When I play chess with somebody I know that, the way this person thinks.” *Id.* Kultin told Mockovak, “it’s your call, Mikie, it’s up to you. Um, he’s flying tomorrow.” *Id.* at 80. Mockovak replied simply, “Yeah.” *Id.*

Mockovak needed to make a \$10,000 down payment first before the hit men would accept the job. *Tr.* 8/11/09 at 41. But on November 6<sup>th</sup> Mockovak told Kultin he was only able to get cash slowly. *Tr.* 11/6/09 at 85. Kultin reminded Mockovak of what he had said back in August: that the next time he contacted the hit men he wanted to be ready “to pay them the money and execute.” *Id.* at 83. When Mockovak said it was hard to come up with enough untraceable cash, Kultin then told him that he was worried and he warned Mockovak what would happen if he failed to make

the first payment and the plan fell through:

Source: Even though he's my friend, he's my best friend, you know. *I'm still fucking nervous*, because you know.

Mockovak: You know who you're dealing with.

Source: It's you know, eventually *if you fuck it up by not giving them the money*, yeah, they'll know, you know, *they're probably not going to kill us, yeah, but they'll fucking, you know*, they're –

Mockovak: They're in it for the money.

Source: Yeah, *they'll make it so we'll pay them, and probably more than that*.

Mockovak: Oh.

Source: You know.

Mockovak: I'm sure, I'm sure. Yeah.

Tr. 11/6/09 at 86.

Kultin suggested that they meet again the next day. *Id.* at 87. Kultin said the hit men would not start working unless and until Mockovak paid Kultin the first \$10,000. *Id.* Mockovak replied that he wanted to go ahead with it because he did not want to make anyone mad at him:

*I just want to go the whole way through* to make sure that there's no, *cuz, I don't want anybody serious people like this upset*.

Tr. 11/6/09 at 89 (emphasis added). Mockovak agreed to bring Kultin ten thousand dollars in cash the following evening at 7 p.m. *Id.* at 97-98.

**o. November 7<sup>th</sup>: The Fifth Tape Recorded Meeting and Payment of \$10,000 To Kultin.**

On November 7, 2009, Dr. King left Vancouver BC and flew to Australia with his family. RP V, 135. That evening, shortly after 5 p.m., Kultin telephoned Mockovak and Mockovak told him that he had had 24

hours to think about what Kultin had said the previous evening, and that “it’s absolutely the right thing to do.” *Tr.* 11/7/09 at 4.

A few hours later Kultin met Mockovak at a soccer complex in Tukwila. RP IX, 37; RP VII, 9. At the parking lot Kultin suggested that they go inside the men’s room. RP IX, 40. Once inside, Mockovak handed Kultin an envelope containing \$10,000 in cash and a photo of the King family. RP IX, 43-44, 47-48. Kultin told Mockovak that it might take a few days for the hit to occur. RP IX, 43. When they parted Kultin told Mockovak that he would see him at the office on Monday. RP IX, 43.

**p. Search of The Mockovak Home and His Arrest.**

Mockovak was arrested on November 12, 2009. CP 12. Later that day law enforcement agents arrested Mockovak and executed a search warrant at his home in Newcastle. RP VI, 16-17. A copy of the life insurance policies covering the lives of King and Mockovak was found in the home. RP VI, 25. Law enforcement seized and searched a total of six computers used by Mockovak, two from Clearly Lasik’s Renton office and four from other locations. RP V, 153-154. A forensic computer specialist found evidence that Mockovak used one of the computers to try and determine what airplane flight King was taking to Australia, but there was nothing on the computers indicating that anyone used them in an attempt to locate a hit man. RP V, 155, 169-170.

#### **D. APPELLATE STANDARDS OF REVIEW**

“Whether an official’s conduct is sufficiently outrageous to bar prosecution is a matter of law that [appellate courts] review de novo.”<sup>16</sup>

“[Appellate courts] review jury instructions de novo to determine whether they accurately state the law without misleading the jury.”<sup>17</sup>

“A claim of ineffective assistance of counsel presents a mixed question of law and fact reviewed de novo.”<sup>18</sup>

Whether the merger doctrine or double jeopardy bars multiple convictions are also questions of law reviewed *de novo*.<sup>19</sup>

The constitutional adequacy of a charging document is reviewed *de novo*.<sup>20</sup>

A challenge to the sufficiency of the evidence is reviewed de novo.<sup>21</sup>

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<sup>16</sup> *State v. O’Neill*, 91 Wn. App. 978, 990-91, 967 P.2d 985 (1998). Appellant recognizes that in *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) Division Two stated that it reviewed a trial court’s dismissal for outrageous governmental conduct under an abuse of discretion standard. However, (1) *Rundquist* preceded *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996), (2) the *Rundquist* Court said that it was treating the motion to dismiss on due process grounds as the equivalent of a motion to dismiss for insufficiency of the evidence, and (3) *Rundquist* conflicts with *O’Neill* which is a post-*Lively* decision. Therefore, appellant believes that *Rundquist* is no longer good law, and in any event it is not good law in Division One.

<sup>17</sup> *State v. van Tuyl*, 132 Wn. App. 750, 757, 133 P.3d 955 (2006). *Accord State v. Chino*, 117 Wn. App. 531, 538, 72 P.2d 256 (2003); *State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006); *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002).

<sup>18</sup> *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). *Accord In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001); *State v. Martinez*, 161 Wn. App. 436, 441, 253 P.3d 445 (2011); *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

<sup>19</sup> *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010); *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

<sup>20</sup> *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007); *State v. Allen*, 161 Wn. App. 727, 751, 255 P.3d 784 (2011).

<sup>21</sup> *State v. Schelin*, 104 Wn. App. 48, 51, 14 P.3d 893 (2000), *aff’d*, 147 Wn.2d 562, 55 P.3d 632 (2002).

## **E. INTRODUCTION TO THE ARGUMENT**

### **1. THE DIFFERENCE BETWEEN A LEGAL CLAIM OF OUTRAGEOUS GOVERNMENTAL CONDUCT AND THE FACTUAL DEFENSE OF ENTRAPMENT.**

In *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996), the Court extensively analyzed the differences between the legal claim of outrageous governmental conduct, which a court decides, and the affirmative defense of entrapment, which a jury decides.

Appellant submits that the proceedings below failed to conform to *Lively's* requirements, both because the government's conduct was so outrageous that it violated due process (*see* part F.1 below) and because the jury instructions and the prosecutor's closing argument incorrectly told the jury that defendant had to prove a third element to establish the defense of entrapment, even though Washington law is entirely clear that no such third element is part of that defense (*see* parts F.2 and F.3 below).

The central confusion in the trial court arose because a Washington pattern jury instruction incorrectly injects the issue of the reasonableness of the government's conduct — which is an *objective inquiry* to be decided *by the court* as part of a due process analysis of outrageous governmental conduct — into the jury's assessment of the defense of entrapment. The jury is supposed to use a purely *subjective standard* when resolving the only two factual questions that constitute the defense

of entrapment: (i) whether the idea for the crime originated in the mind of a law enforcement agent; and (ii) whether the defendant was induced into committing a crime he had not intended to commit. *See* part F.2 below.

Because *Lively* controls the resolution of core issues affecting defendant's conviction, appellant begins with a description of its facts and procedural posture.

In *Lively* the defendant contended that she was entrapped into procuring cocaine by police informant Kamlesh Desai. She maintained that she had been struggling with drug and alcohol problems since she was 14 years old. *Id.* at 6. After unsuccessfully attempting to stop using alcohol on her own, she voluntarily entered an alcohol detoxification program at a local hospital and began attending AA/NA meetings. *Id.* While under contract with the Walla Walla City/County Drug Unit, Desai started attending these meetings in order to identify addicts who were selling drugs. *Id.* Desai met Lively at an AA/NA meeting and two weeks later he began dating her. *Id.* at 7. Lively was distraught and had previously attempted suicide, but because she found Desai very supportive and responsive to her emotional needs, she entered into a relationship with him. *Id.* Their relationship became intimate and she moved in with him. *Id.* At one point he proposed marriage to her. *Id.* About 4-6 weeks after they met, Desai told her that his friend "Rick" wanted to buy cocaine and

he asked if she knew anyone who could sell it to him. *Id.* According to Lively, Desai asked her every day for two weeks before she finally agreed to buy cocaine for Rick, and then she did it only because she was so emotionally reliant on Desai. *Id.* Desai disputed much of Lively's testimony and said that she was the first one to mention drugs by volunteering the fact that she had a connection who could supply her with cocaine and marijuana. *Id.* He also denied Lively's contentions that they dated and that they had a sexual relationship. *Id.* at 8.

The trial court instructed the jury that Lively had the burden of proving entrapment by a preponderance of the evidence. *Id.* Prior to closing argument Lively moved for a directed verdict contending that no rational finder of fact could fail to find that she had been entrapped. *Id.* The trial judge denied this motion, the case was argued to the jury, and the jury rejected her entrapment defense and found her guilty. *Id.*

On appeal Lively raised several arguments including the contention that there was insufficient evidence as a matter of law to support the jury's guilty verdict because there was such clear proof of entrapment. After summarizing what it found to be "considerable evidence of entrapment," the Supreme Court concluded that "a rational trier of fact could have found that the Defendant failed to prove entrapment by a preponderance of the evidence," and therefore the trial court did not err "in allowing the jury

to resolve the entrapment issue.” *Id.* at 18.

But at the same time, the Supreme Court vacated Lively’s convictions “because the government conduct violated the principles of due process.” *Id.* at 27. Lively’s due process claim of outrageous governmental conduct was raised for the first time on appeal and yet the Supreme Court considered it because it was constitutional error which “affect[ed] fundamental aspects of due process.” *Id.* at 18-19.

**a. Whether Government’s Conduct Was So Outrageous as to Bar Prosecution is a Question of Law Which Is Decided By Judges, Not By Juries, and Which Focuses on Government’s Conduct Rather Than The Defendant’s Predisposition.**

The *Lively* opinion makes it clear that outrageous governmental conduct is not a defense to be decided by jurors because it is a legal issue: “Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury.” *Lively*, 130 Wn.2d at 19.

The Court stressed the difference between the entrapment defense and a claim of outrageous conduct: “In evaluating whether the State’s conduct violated due process, *we focus on the State’s behavior and not the defendant’s predisposition.*” *Lively*, 130 Wn.2d at 22 (emphasis added).

Similarly, pre-*Lively* cases hold that the focus of a court’s inquiry when resolving a claim of outrageous governmental conduct is on the objective reasonableness of the conduct of the police where the competing public policies of crime detection and fair treatment of suspects are

balanced against each other. *State v. Emerson*, 10 Wn. App. 235, 240-41, 517 P.2d 245 (1974).<sup>22</sup>

**b. An Entrapment Defense Is Predicated On Proof That The Defendant's Subjective State of Mind Was Such That He Was Not Predisposed to Commit the Crime Charged.**

*Lively* distinguishes between the objective focus of a claim of outrageous governmental conduct on the *actions* of law enforcement and the subjective focus of an entrapment defense on the defendant's *mind*:

Under *the subjective approach of entrapment*, the focal issue is the predisposition of the defendant to commit the offense. *Conversely, outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."* [Citation]. For the police to violate due process, the conduct must shock the universal sense of fairness. [Citation].

*Lively*, 130 Wn.2d at 19 (emphasis added).

In contrast to the legal nature of an outrageous governmental conduct claim, "[T]he defense of entrapment involves the *factual* determination that (1) government officials induced the defendant to commit the crime, and (2) that the defendant lacked the predisposition to commit the crime. Because these are *factual* determinations, they fall within the province of

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<sup>22</sup> "Concepts of public policy require that crime be detected and its perpetrators punished. Public policy also requires that a defendant be fairly treated. Practical considerations require that, in the performance by police of crime detection duties, at least some deceitful practices and 'a limited participation' in unlawful practices be tolerated and recognized as lawful. It is also part of public policy that competing public policies involved be reconciled to the end that these policies may be used without unnecessarily

the jury.” *State v. Pleasant*, 38 Wn. App. 78, 80, 784 P.2d 671 (1984).  
*Accord State v. Swain*, 10 Wn. App. 885, 890, 520 P.2d 950 (1974).<sup>23</sup>

c. **As *Lively* Illustrates, The Legal Due Process Claim and The Factual Defense Are Independent And Both Issues Can Be Raised in the Same Case.**

The two tests operate independently. The government’s conduct could be reasonable and yet the defendant could have been entrapped. Or, as in *Lively*, the defendant was not entrapped, but nevertheless the government’s conduct was outrageous. Stressing the independence of the two contentions, the *Lively* Court noted that whether or not a defendant was able to prove entrapment was simply not relevant to a due process claim of outrageous conduct:

The government conduct may be so extensive that *even a predisposed defendant may not be prosecuted* based on “the ground of deprivation of due process.”

*Lively*, 130 Wn.2d at 22 (citation omitted) (emphasis added).<sup>24</sup>

Thus, while the amount of persuasion used by police to overcome the

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impairing the vigor of each. Such a reconciliation may be at least impliedly involved in arriving at due process principles.”

<sup>23</sup> “[T]he defense of entrapment is basically an inquiry into the intention of the defendant, and that intention along with questions of inducement, ready complaisance and other evidence of predisposition, may raise *an issue of fact*.” (Emphasis added).

<sup>24</sup> The analytical distinctions between the entrapment defense and a due process claim of outrageous governmental conduct were also recognized in *State v. Emerson*, 10 Wn. App. 235, 238, 517 P.2d 245 (1974) where this Court stated that when deciding whether the evidence furnishes a defense to the charge based on “public policy considerations,” it was “helpful to consider the *related, though distinct, defenses of entrapment and due process* even though those defenses are not claimed by defendant.” (Emphasis added).

defendant's reluctance to commit the crime in question is *not* relevant to the jury's assessment of an entrapment defense, it *is* relevant to the decision of both the trial court judge, and the *de novo* determination of appellate judges, as to whether a due process violation based on governmental misconduct has been established. *Lively* also makes it quite clear where police use only a normal amount of persuasion and deceit – in the nature of pretending to be a co-participant in the criminal activity – that will not suffice to establish a due process violation. *Id.* at 20.

**d. The “Totality of the Circumstances” Test for Claims of Outrageous Governmental Conduct Does Include An Assessment of The Amount of Persuasion Used by Government to Overcome the Defendant’s Reluctance.**

Courts reviewing claims of outrageous governmental conduct must evaluate the conduct based on the “totality of the circumstances” and “[e]ach case must be resolved on its own unique set of facts . . .” *Lively*.

at 21. In *Lively*'s case the Court identified five relevant inquiries:

- (1) Whether the police instigated a crime or merely infiltrated ongoing criminal activity;
- (2) Whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation;
- (3) Whether the government controls the criminal activity or simply allows for the criminal activity to occur;
- (4) Whether the police motive was to prevent crime or protect the public; and

- (5) Whether the governmental conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.

*Lively*, 130 Wn.2d at 22.

## **2. SUMMARY OF APPELLANT'S CLAIMS REGARDING OUTRAGEOUS GOVERNMENTAL CONDUCT AND ENTRAPMENT.**

Bearing in mind these general principles governing entrapment and outrageous governmental conduct, the appellant submits that in this case:

- (1) Daniel Kultin, the government's agent, engaged in outrageous conduct which violated due process and justifies dismissal of the charges;

- (2) The jury was given a misleading jury instruction on entrapment, which was highly susceptible to a misinterpretation under which the jury would have felt precluded from finding that the defendant had been entrapped;

- (3) In closing argument the prosecutor told the jury that under the court's jury instruction on entrapment the defendant was required to prove *three* elements, when in fact the law required that he prove only *two*, and the prosecutor misled the jury to believe that the defendant had to prove that law enforcement used more than a reasonable amount of persuasion in order to establish entrapment; and

- (4) Defense counsel failed to object to the prosecutor's misstatement of the law regarding the "elements" of the entrapment defense, thereby compounding the problem by providing ineffective assistance of counsel.

Presumably this Court will want to address the issue of outrageous governmental conduct first for reasons of judicial economy. If this Court finds that there has been a due process violation, then prosecution of all the charges against Mockovak would be barred, and there would be no reason for the Court to address any of the eleven other appellate claims which, if found meritorious, might necessitate a retrial or a resentencing. For that reason, this brief addresses the due process issue first.

**F. ARGUMENT**

**1. KULTIN, A GOVERNMENT EMPLOYED AGENT, ENGAGED IN OUTRAGEOUS CONDUCT BY ENCOURAGING MOCKOVAK TO HIRE HIT MEN TO KILL KLOCK. WHEN HE EXPRESSED RELUCTANCE TO PAY TO HAVE KLOCK KILLED, KULTIN CONSTANTLY PRESSURED HIM TO EMPLOY THEM TO KILL DR. KING.**

**a. Kultin Did Not Infiltrate an Existing Criminal Organization, He Invented a Fictional One.**

In *Lively* the informant “did not infiltrate an ongoing criminal activity, but established a relationship with the Defendant for the purpose of instigating a crime.” 130 Wn.2d at 23. The same is true in this case. Kultin could not possibly infiltrate an existing criminal organization because there was no organization to infiltrate. Instead, Kultin and the FBI invented an entirely fictional criminal organization of Russian assassins for hire and then Kultin persuaded Mockovak that he should

employ this nonexistent organization.<sup>25</sup>

**b. While Being Taped Kultin Admitted That He Was The One Who First Suggested Hiring People to Kill Klock.**

Only one tape recorded conversation contains any discussion about who first brought up the idea of hiring hit men. That recording shows that Kultin *admitted* that *he* was the one who first suggested this as a solution to Mockovak's business problems. Mockovak said to Kultin, "I have to ask you, why did you, uh, choose to offer this to me?" First Kultin tried to dodge the question by saying, "Well, we talked about it." *Tr.* 8/11/09 at 62. But when Mockovak pressed for an answer, Kultin did *not* deny that he was the instigator of the idea. Instead, he said simply, "Might as well." *Id.* at 62.<sup>26</sup> In the plainest of language, Kultin pushed Mockovak towards accepting the idea of having Klock killed: "And, he's not going to go away. So let's make him go away." *Id.* He told Mockovak that killing Klock was the "easiest way to do it" and the "cheapest way to do it." *Id.*

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<sup>25</sup> Compare *State v. Jessup*, 31 Wn. App. 304, 312-13, 641 P.2d 1185 (1982) (rejecting claim of outrageous governmental conduct and accepting the State's argument that the undercover informant's "courageous *penetration of a sophisticated organization led to the State's destruction of that organization*, and that when scrutinized in light of the factual characteristics of the enterprise she infiltrated, her conduct and police acquiescence does not shock an objective sense of justice") (emphasis added); *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1167, 36 L.Ed.2d 366 (1973) ("infiltration of drug rings . . . is a recognized and permissible means of apprehension").

<sup>26</sup> When Mockovak pressed *again* for a more meaningful answer ("but why did you?"), Kultin explained that he suggested killing Klock because he thought it would solve the business problem that Kultin's lawsuit had created for the company. "[H]e's draining our company, come on, Dude. I mean, it's affecting everybody you know." *Id.* at 62. Kultin said that the \$25,000 that Clearly Lasik had already spent on legal bills to defend against Klock's suit was "just the beginning" of what the suit was going to cost. *Id.* at 63.

Ultimately Mockovak was *not* willing to go ahead with Kultin's suggestion to have Klock killed. When Kultin asked when he wanted to have it done, Mockovak immediately replied by stating the word "no" four times, by saying he wanted to see how the September depositions went, and that the whole idea of killing Klock was a "last resort." *Id.* at 43.

**c. Kultin Was The First To Suggest Killing King and Said That King Might Already Be Thinking of Killing Mockovak.**

The FBI's own tapes plainly show that it was Kultin who first suggested the idea of killing King. Kultin said to Mockovak that King's murder could come after Klock's murder had been carried out: "And then, once the practice is free, we can talk about Joe. (Chuckles)." *Id.* at 69. When Mockovak said *nothing* in response, Kultin suggested the idea again and reminded Mockovak, "You know, about the insurance policy." *Id.* Once again, Mockovak was cool to the idea, saying "that would only be if . . . that has to happen." *Id.* at 70.

Two months later, in October, Kultin tried to reanimate his suggestion that Klock be murdered, by asking how the September depositions went, and Mockovak said they went very well. *Tr.* 10/22/09 at 6. Mockovak told him that he wanted to wait until Klock himself was deposed in January and explained that things were going so well that Klock's lawsuit might end up getting dismissed; accordingly Mockovak was not interested in discussing the possibility of having Klock killed. *Id.* at 7-8, 23.

Mockovak's unwillingness to discuss killing Klock simply led Kultin to shift the discussion to another potential target. He knew that Mockovak was not getting along with King, so he turned Mockovak's attention to him. After twice stating that he would not want to be in Mockovak's shoes as King's partner, Kultin stated that King had been "screwing" Mockovak over "for a long time." *Id.* at 42, 47. And then, out of the wild blue, Kultin suggested that maybe King was "going to have you [Mockovak] killed" because "[t]hat would be ideal for him [King] because he gets the five million dollars" from the key man policy on Mockovak's life if Mockovak dies. *Id.* at 52. When Mockovak remarked that King was going to take a vacation trip to Australia, it was Kultin who suggested the option of killing King by commenting that it would "[p]robably be cheaper in Australia." *Id.* at 62.

In sum, the tapes show that Kultin was the instigator in both instances. When he failed to obtain Mockovak's approval for a hit against Klock, Kultin then became the instigator of the plot to kill King.

**d. Mockovak's Reluctance was Overcome By Persistent Solicitation, False Professions of Friendship and Sympathy, and By Constant Reminders of the Insurance Money That Would Flow from The Murder.**

Here, as in *Lively*, the defendant's reluctance "was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation." *Lively*, 130 Wn.2d at 22. Kultin consistently told Mockovak that he

sympathized with him because he had to run a business with a greedy snake who thought only of his personal interest instead of the good of the company. *Tr.* 10/20/09 at 52. He told Mockovak that King was a racist who hated President Obama. *Tr.* 10/22/09 at 100. He suggested that King was the one who had deliberately scratched Mockovak's car. *Tr.* 8/11/09 at 28. He reminded Mockovak that King had "been screwing you over for a long time." *Tr.* 10/20/09 at 47.

When Mockovak hesitated, Kultin told him that murders for business reasons "happen all the time." *Tr.* 8/11/09 at 50. He told Mockovak about a Russian crime figure who killed people and who was an "unbelievably fair guy" who always knew precisely how to do "the right things." *Tr.* 10/22/09 at 80, 83. When Mockovak said that King had agreed that Mockovak would do 80% percent of the surgeries at the Renton surgery center, instead of only 50% as King had previously stated, Kultin's immediate response was to say to Mockovak, "Well, I'll tell you what. I spoke to my friend . . . Australia would be easy." *Tr.* 11/22/09 at 140.

At every opportunity, Kultin reminded Mockovak that if King were killed, a \$5 million insurance policy would be paid off and Mockovak would have lots of money and the Lasik business would flourish. *Tr.* 8/11/09 at 69; *Tr.* 10/20/09 at 41. Kultin said, "I know that eventually you'll take care of me in some way" and Mockovak swiftly agreed he

would. *Tr.* 10/22/09 at 148. When Mockovak said he wanted him to learn everything he could about internet marketing, Kultin replied that once King was gone, “Shiree [sic] [Funkhouser] and I can run this business” and Mockovak agreed. *Id.* at 148-49. Once the company’s problems were solved, Kultin promised to take Mockovak to St. Petersburg where they could continue to fix each other up with beautiful young women. *Id.* at 107-110. When Mockovak said he was “a little uneasy” about the whole thing, Kultin coaxed him along, stating, “ I’m trying to help you, you know. We’re in this together.” *Tr.* 11/6/09 at 60-61.

Here, as in *Lively*, the evidence supports “the conclusion that the Defendant’s reluctance to commit a crime was purposefully overcome by the State.” *Lively*, 130 Wn.2d at 25.

**e. The FBI was in Complete Control of the Criminal Activity.**

There is no question in this case about who was in control of the criminal activity. In *Lively* there were people in the Walla Walla community who *really were* dealing drugs. Although the informant did not control those drug dealers, he controlled defendant Lively through his emotional manipulation of her. Since the informant controlled Lively and manipulated her into delivering payment to some unknown drug dealer in exchange for cocaine which she gave to the informant, the Court held that the State was in control of the criminal activity:

The conduct of the informant here is so closely related to the actions of the Defendant we conclude that ***the informant controlled the criminal activity from start to finish.*** The informant, an alcoholic in extreme distress, developed a relationship with the defendant. As a result, she became emotionally reliant on him. It was the informant's "close friend," Rick, at the informant's apartment to whom the Defendant agreed to deliver cocaine because of her emotional dependence. The informant's car was used by the Defendant to obtain cocaine at times arranged by the informant, who communicated with the drug detectives on a daily basis. ***The government conduct was directly and continuously involved in the commission of the offense.***

*Lively*, 130 Wn.2d at 26 (emphasis added).

Kultin's control of Mockovak was even greater than Desai's control of Lively. Since the crimes committed were inchoate crimes that did not require completion of the contemplated murder, it was possible for the FBI's agent to control the criminal activity "from start to finish." Like Desai, Kultin claimed to have a friend who was part of the criminal activity. Desai's friend was "Rick" who in actuality was an undercover detective posing as a drug customer. Kultin's "best friend" from childhood was entirely fictional and it was not necessary to find anyone to play the friend's part. In *Lively* the government's agent Desai determined where and when to meet in order for Rick to provide Lively with the money to buy the drugs. In this case Kultin determined where he would meet Mockovak in order to obtain the first payment for the hit men. He determined how much Mockovak would be required to pay for the hit. As in *Lively*, the informant communicated with the FBI before and after

each meeting with Mockovak. Moreover, law enforcement instructed Kultin on what to say. On May 8<sup>th</sup> Carr instructed Kultin “never ever” to bring up the Russian Mafia with Mockovak, but to wait for Mockovak to bring up the topic. RP VI, 73. But on June 11<sup>th</sup>, when Carr learned that Mockovak had not raised the topic of the Russian Mafia on his own, Carr changed his instructions and directed Kultin to raise the topic himself by telling Mockovak he was going to visit a friend in Los Angeles whom he thought had a connection to a Russian criminal organization. RP VI, 73. On August 5<sup>th</sup> Carr gave Kultin his “backstory” about a connection to a Russian crime lord. RP VI, 92-93. Finally, in *Lively real drugs were actually delivered*. In this case, there was never any possibility that a *real* murder would be committed.

**f. Kultin’s Motive Was to Make Money. Carr’s Motive Was to Improve His Own Performance Evaluations By Recruiting His First CHS.**

*Lively* teaches that the propriety of law enforcement’s objectives are also to be considered. In this case the question is whether the government was really motivated by a desire to protect the lives of Klock and King, or whether the real motive was to persuade Mockovak to commit a crime that would justify not only his arrest, but the recruitment of Kultin as a CHS, and the payment made to Kultin for his services to the FBI.

As of June 16, 2009, Agent Carr did not think there was any real

likelihood that Mockovak would actually approve a plan to kill anyone. On this date, Carr said it was looking like “Mockovak was just blowing smoke.” RP VII, 55. But another motive served to keep Carr in touch with Kultin. Employing Kultin served Carr’s own *personal* interest in earning a better performance evaluation from his superiors, for as Carr frankly conceded, he was “dinged” for the fact that he had never recruited anyone to be a CHS for the FBI. RP VI, 85-86.<sup>27</sup> Moreover, Carr’s decision to employ Kultin to advance his own career seems to have worked, because in early 2010, after Mockovak had been arrested and charged, Carr was promoted and transferred to the east coast. RP X, 134.

Kultin’s motives must be considered as well, because as of August 4<sup>th</sup> he was officially a CHS working for government. Kultin’s own motive was to earn money. Carr confirmed this when he checked “monetary compensation” as Kultin’s motive on the form he used to “open up” Kultin as an official CHS. RP VII, 58.<sup>28</sup>

After he was “signed up” as a CHS in August, in September Kultin

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<sup>27</sup> “At this point in time I didn’t have a source, and it’s on our performance evaluations, you know, if you don’t have a source on that area, then you kind of get dinged, so I thought this was a great opportunity to proceed with this case, but at the same time to fill that need to have a CHS.”

<sup>28</sup> Coincidentally, at exactly the same time that Carr was becoming convinced that Mockovak was not seriously contemplating killing anyone, in June of 2009 Kultin’s motive to make money was strengthened by the fact that his employment status was changed from a full time to a part time employee, and his salary was reduced by one-third from \$72,000 to \$48,000. RP V, 39. Thus Kultin developed a stronger financial motive to demonstrate to the FBI that his services were of real value to the agency.

received a payment of \$1200 from Carr. RP VI, 99-100. It was “understood” that Kultin would receive an additional future payment. RP VI, 100. When Kultin failed to receive any additional payment after Mockovak’s arrest, Kultin called Carr to ask him when he was going to get it and Carr got him an additional payment of \$5,000 in December. RP VII, 60-61, 86-87; Exhibit No. 61.

In *Lively* the Court found that law enforcement’s real objective was to *create* crime: “[T]he government conduct demonstrates a greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior.” 130 Wn.2d at 26. As several of the Mockovak jurors noted in interviews conducted before sentencing, Mockovak was no real danger to anyone.<sup>29</sup> It was only when egged on by the FBI’s *agent provocateur* that Mockovak was persuaded to take his own clumsy steps into criminal activity.<sup>30</sup>

**g. By Implying That Their Own Lives Would Be Endangered If Mockovak Did Not Go Ahead With the Plan to Pay Russian Hit Men to Kill King, The FBI Informant Engaged in Criminal Activity Which is Repugnant to a Sense of Justice.**

The *Lively* Court also found that informant Desai’s conduct was

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<sup>29</sup> “Well, my gut tells me that I don’t feel he’s a danger to society.” [Juror No. 2]. “I don’t think he is a threat to society at all.” [Juror No. 6]. “I certainly don’t feel he poses any danger to society.” [Juror No. 8]; CP 790-91.

<sup>30</sup> “I strongly felt that Kultin played such a critical role in coercing Mockovak to do something that he otherwise wouldn’t done [sic]. It was Kultin pushing him to do it.” [Juror No. 6]. “Daniel, he is the one that is doing the pushing, and the FBI instructed him to push.” [Juror No. 12]. CP 789.

“repugnant to a sense of justice.” 130 Wn.2d at 26. The Court was outraged by the fact that law enforcement chose to take advantage of a person with a drug and alcohol problem who had sought treatment and was struggling to overcome her addiction problems. This contradicted the strong public policy of promoting the rehabilitation of drug addicts through treatment: “People’s efforts to seek help through such organizations should be commended — not result in victimization by the police and their agents.” *Id.* at 27.<sup>31</sup>

Similarly, Kultin’s conduct in constantly pushing Mockovak to hire an assassin is obviously against the clear public policy that prohibits murder. In addition, Kultin employed a strategy of fear to overcome Mockovak’s reluctance. Before Mockovak had ever said one word about hiring someone to kill King, Kultin suggested that *King* might be planning *to kill Mockovak* because that “would be ideal” strategy for King. *Tr.* 10/20/09 at 52. When that didn’t work, Kultin found a new way to indirectly threaten Mockovak with physical harm. He suggested that Mockovak should be wary of not going ahead with the plan for fear of making the hit men angry. Kultin argued that if Mockovak did not go ahead it might

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<sup>31</sup> Kultin also played upon Mockovak’s vulnerable emotional state. First, Mockovak had recently been involved in an especially contentious and stressful divorce. RP III, 47; CP 687. Second, Mockovak had been raped for years as a child by his uncle, an experience which left “profound, lasting” psychological scars. CP 675-678, 679.

“drive” the hit men to do something. *Tr.*, 8/11/09 at 83.<sup>32</sup> Kultin told Mockovak that if a person did something to cross the Mikhailov crime organization, they “will come after your family.” *Tr.* 8/11/09 at 61. Kultin said he didn’t want to irritate these people by getting them going and then letting them see that Mockovak was “not serious.” *Id.* at 83.

The day before Mockovak finally tendered the initial down payment to Kultin, Kultin entreated him to hurry up and make that payment by telling him what he feared would happen if he did not: “I’m still fucking nervous, because you know . . . eventually, if you fuck it up by not giving them the money,” then while “they’re probably not going to kill us, yeah, but they’ll fucking, you know . . . they’ll make it so we pay them, and probably more than that.” *Tr.* 11/6/09 at 86.<sup>33</sup> The tape recording of their conversation shows how clearly Mockovak got the message. As he said to Kultin, “I just want to go the whole way through to make sure that there’s no, cuz, I don’t want anybody serious people like this upset.” *Tr.* 11/6/09 at 89 (emphasis added).

Inducing a person to approve a murder for hire by causing them to

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<sup>32</sup> Because Kultin spoke here, as he often did, in fragments of sentences, he did not spell out *what* the hit men might be “driven” to. It appears that Kultin may have been saying simply that if Mockovak did not give the go ahead for the hit he would “drive” the hit men “up the wall” or “drive them crazy.”

<sup>33</sup> If Kultin was “fucking nervous” about upsetting the Russian hit men by not going ahead with the plan, then what was the implication for Mockovak? After all, Kultin was connected to the hit men by his “best friend” from childhood. But Mockovak had no such personal connection.

fear for their own life if they do not give approval is “contrary to public policy and to basic principles of human decency.” *Lively*, 130 Wn.2d at 27. The appropriate reaction to Kultin’s conduct was summed up by Juror No. 4 in her post-verdict statement to the defense investigator:

When we came to realize what was legal in terms of otherwise illegal activities, and what a CHS was legally allowed to do, any of us, if not most or all of us, were really like, “Oh my God, are you serious, you can really do that?”

CP 789. In sum, here, as in *Lively*, the totality of the circumstances weigh heavily in favor of finding a due process violation.

**h. All The Evidence Regarding the Outrageous Conduct of the Government Agents Came From The Agents Themselves and Was Undisputed. Therefore, There is No Need to Remand for the Entry of Findings of Fact Regarding their Conduct.**

As noted in *Lively*, only after several factual findings had been made regarding the circumstances under which the defendant committed his crime, could the Court could decide the legal due process issue:

A violation of due process must be determined as a matter of law and it is the trial court which makes the findings of fact related to that decision.

*Lively*, 130 Wn.2d at 24. Thus, a potential problem exists in this case because the trial court made no factual findings and never articulated any analysis of the *Lively* due process factors. RP XVIII, 42.

The same problem existed in *Lively*. There the trial court had not made any factual findings explicitly addressing the five due process

factors. However, the *Lively* trial court *had* made findings of fact in support of an exceptional sentence below the standard range, and the Supreme Court held that those findings were adequate to permit it to make a legal ruling on the due process issue. *Lively*, 130 Wn.2d at 24.

In this case, since the trial judge entered a standard range sentence there are no exceptional sentence findings of fact. At first blush, *Lively* might be read as suggesting that a remand to the trial court is needed. Citing to *United States v. Bogart*, 783 F.2d 1428 (9<sup>th</sup> Cir. 1986), *vacated on other grounds with respect to one defendant sub nom. United States v. Wingender*, 790 F.2d 802 (9<sup>th</sup> Cir. 1986), the *Lively* Court said:

[The appellate court] observed that there were several factual determinations that were key to a finding of outrageous conduct. These determinations could be made only by the district court. Since that court made no findings regarding the factual nature of the government's conduct, the appellate court remanded for findings of fact.

*Lively*, 130 Wn.2d at 24-25.

Admittedly, the appellate courts are “not a fact-finding branch of the judicial system of this state.” *Berger Engineering Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959). “Trial courts, not appellate courts, make factual determinations.” *State v. Walters*, 162 Wn. App. 74, 81, 255 P.3d 835 (2011).<sup>34</sup> But in this case, *all* of the evidence regarding the

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<sup>34</sup> *Accord Quinn v. Cherry Lane Auto Plaza*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (“Appellate courts do not . . . find facts . . .”). “A tribunal with only appellate

conduct of Kultin and the FBI agents came from their own testimony, and from the FBI's own tape recordings. The defense never challenged either the accuracy of the tapes or the accuracy of agents' testimony regarding their relationship with the informant. Since the evidence was undisputed, and since it is the government's own evidence which so clearly shows that all of the *Lively* factors weigh in favor of dismissal, a remand for the entry of findings of fact is not necessary.

Mockovak urges this Court to take this approach and to hold that the undisputed evidence so clearly demonstrates outrageous governmental conduct that a rational trial judge could reach only one conclusion – that a due process violation occurred. This legal conclusion is supported by the undisputed evidence that government agents:

- (1) instigated the crimes;
- (2) overcame the defendant's reluctance to commit the crime through persistent solicitation, expressions of sympathy, and veiled threats of assault;
- (3) controlled the criminal activity from start to finish;
- (4) were motivated by a desire to make money and to advance their personal careers, rather than to protect the public; and

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jurisdiction is not permitted or required to make its own findings. . . ." *Storedahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 8, 103 P.3d 802 (2004); *State ex rel. Dickson Co. v. Pierce County*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). "[B]ecause we, an appellate court, are not fact finders," if there are missing factual determinations the only way to make them is to remand to the Superior Court where they can be made. *Clallam County v. Dry Creek Coalition*, 161 Wn. App. 366, 386, 255 P.3d 709 (2011).

- (5) the conduct of Kultin, the government's informant, in suggesting that he could kill people for the defendant if he wanted that done, is repugnant to our system of criminal justice.

In addition, there are particularly egregious circumstances unique to this case. Here the government agent implied that if Mockovak did not hire someone to kill King, King might kill Mockovak. Moreover, Kultin seized every opportunity to paint King as a despicable character who was a racist, an unscrupulous business partner, and possibly the person who deliberately vandalized Mockovak's car.

- i. **In the Alternative, If This Court is Not Prepared to Rule That A Due Process Violation Occurred, A Remand is Required So That The Necessary Fact Findings May Be Made.**

If, however, this Court is uncomfortable taking this approach, either because it feels the record is incomplete, or because in its view the proof of the outrageous nature of the government's conduct is not overwhelming, then the only other option is to remand so that a trial court judge can make the necessary missing factual findings.

**2. THE JURY WAS INCORRECTLY INSTRUCTED THAT THE DEFENSE HAD TO PROVE A *THIRD* ELEMENT – GOVERNMENTAL USE OF AN UNREASONABLE AMOUNT OF PERSUASION -- TO ESTABLISH ENTRAPMENT. BUT THERE IS NO SUCH THIRD ELEMENT.**

- a. **The Entrapment Defense Has Two Elements.**

In 1975 the Legislature codified the affirmative defense of entrapment in RCW 9A.16.070. That statute states:

### **Entrapment.**

- (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 showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

Prior to the enactment of RCW 9A.16.070 the defense was recognized by case law. “[T]he statutory definition of entrapment contained in RCW 9A.16.170 is but a legislative reiteration of the ‘subjective test’ for that defense, as it applied in both the federal courts, and in our State Supreme Court.” *State v. Ziegler*, 19 Wn. App. 119, 121, 575 P.2d 723 (1978) (citations omitted). “Thus, both by statute and court decision the defense requires proof of *two* distinct elements.” *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 180 (1984) (emphasis added).

Entrapment occurs only when the criminal design originated in the mind of the police officer or informant, and the accused is lured or induced into committing a crime he had no intention of committing.

*Id.* at 42. *Accord State v. Smith*, 93 Wn.2d 329, 350, 610 P.2d 869 (1980).

**b. Instruction No. 29 Told The Jury That The Use of a Reasonable Amount of Persuasion to Overcome Reluctance Does Not Constitute Entrapment.**

The first paragraph of Instruction No. 29 repeated essentially verbatim

the statutory language of subsection (1) of RCW 9A.16.070. Similarly, the first sentence of the second paragraph of the instruction stated nearly verbatim the statutory language of subsection (2) of the statute. But the second sentence of the second paragraph is not derived from any part of RCW 9A.16.070. The first two paragraphs of the instruction read:

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 the crime. *The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.*

CP 595 (emphasis added). The last sentence is derived from the opinion of the Court in *State v. Waggoner*, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971), and although it is contained in the WPIC 18.05, the standard WPIC instruction on entrapment, it should not be in the entrapment instruction because it is not relevant to that defense.

**c. Whether Law Enforcement Used *More Than a Reasonable Amount of Persuasion to Get the Defendant to Commit a Crime is Irrelevant to the Defense of Entrapment. The Jury Instruction (on the Affirmative Defense of Entrapment) Should Not Have Made Any Mention of this Issue.***

The *amount or magnitude* of police persuasion used to overcome a defendant's reluctance to commit a crime is not relevant to the entrapment defense. The amount of persuasion *is relevant to the due process claim of*

outrageous governmental conduct and *is* covered by the second *Lively* factor.<sup>35</sup> But if a defendant asserting entrapment proves (1) that the idea for the crime originated in the mind of a law enforcement agent, and (2) that he was induced into committing a crime that he had not intended to commit, then it does not matter whether it took a tiny bit, or a massive amount of persuasion, to induce him to commit the crime.

As *State v. Keller*, 30 Wn. App. 644, 637 P.2d 985 (1981) shows, it is easy to confuse the elements of entrapment with the elements of the due process test for outrageous governmental conduct. In *Keller* the defendant said that two men (undercover agents as it turned out) introduced to him by a friend (an informant) “began imploring him to sell them drugs immediately upon entering his home”; and that when he told them that all he had was a small amount for his own personal use and set the drugs down before them, one of the men said he was not going to drive home empty handed, threw money down on the table, reached out and picked up the drugs and left. *Id.* at 646. When asked why he sold them the marijuana Keller said he “was put in the position of not being a rude person”; that the men wouldn’t leave his house and just kept asking for marijuana; and that they made him feel “like [he] was obligated to sell

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<sup>35</sup> The second factor is whether the defendant’s reluctance to commit a crime “was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation.” *Lively*, 130 Wn.2d at 22.

them some marijuana just because they had driven so far.” *Id.* This was a remarkably *low* level of persuasion. Nevertheless, the Court of Appeals held that it was enough that the jury could have found the two elements of entrapment and therefore it reversed Keller’s conviction because the trial court had refused to give any instruction on entrapment. *Id.* at 648.

On appeal the State argued “the evidence was insufficient to submit the defendant’s proposed instructions because . . . defendant did not show that the conduct of the officer or informant was unfair or outrageous but only showed they provided an opportunity for defendant to enter into the transaction . . .” *Id.* at 647. Division Three rejected this argument, holding that whether the police used no more than a normal amount of persuasion was simply *irrelevant* to the entrapment defense:

First, ***it is true as the State argues that use by police officials of a normal amount of persuasion to facilitate the commission of a crime does not constitute entrapment.*** *State v. Waggoner*, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971). ***However***, it is not necessary to prove outrageous conduct when asserting the statutory defense. ***That evidence is relevant only if it is contended the conduct violated due process.*** [Citations omitted]. Here, defendant’s argument is based upon the statutory defense, not due process principles.

*Keller*, 30 Wn. App. at 647 (emphasis added). Because the evidence was sufficient to create an issue of fact on the two elements of the entrapment

defense,<sup>36</sup> the Court held that entrapment instructions should have been given regardless of whether or not the evidence showed that police failed to use more than “a normal amount of persuasion.”<sup>37</sup>

**d. The Irrelevant Sentence In WPIC 18.05 Regarding “More than a Reasonable Amount of Persuasion” Is Traceable to Waggoner Where the Court Upheld the Decision Not to Give Any Instruction on Entrapment Because The Evidence Did Not Justify One.**

The sentence in WPIC 18.05 which appellant Mockovak now challenges comes straight out of the opinion in *Waggoner*, 80 Wn.2d 7, 490 P.2d 1308 (1971). But *Waggoner* held that the trial court properly refused to give the jury any instruction at all on entrapment:

*Appellant next contends that the trial court erred in refusing to give any of the requested entrapment instructions to the jury. We do not agree. Entrapment occurs only where the criminal design originates in the mind of the police officer or informer and not with the accused, and the accused is lured or induced into committing a crime he had no intention of committing. [Citations]. . . . In the case now before us, the evidence favoring appellant’s contention of entrapment indicates only that appellant, for unexplained reasons, was initially reluctant to enter into the [drug] transaction. Even when viewed in the light most favorable to the appellant, it does not support the conclusion that the intention to sell originated in the mind of the informant.*

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<sup>36</sup> “[T]he trier of fact could choose to believe defendant’s testimony that he was not a drug dealer but sold the marijuana only after the countless requests and the crime originated in the minds of the law enforcement officials.” 30 Wn. App. at 648.

<sup>37</sup> Similarly, in *State v. Smith*, 93 Wn.2d 329, 350, 610 P.2d 869 (1980), the Court noted that the trial court correctly rejected a jury instruction on entrapment proposed by the defendant which erroneously incorporated the public policy issue of whether it was constitutionally acceptable for undercover police to engage in illegal conduct in order to apprehend criminals: “It has never been supposed that the jury must be instructed to weigh public policy or good faith [of the police] in reaching its decision on whether the defense of entrapment has been made out.”

*Waggoner*, 80 Wn.2d at 10 (emphasis added).

*Waggoner* upheld the refusal to instruct on entrapment because there was no evidence of either of the two elements of entrapment:

***The trial court refused to give an instruction on entrapment, and properly so. The defendant did not testify. There is no evidence as to his state of mind: no evidence to indicate that he was lured or induced into making this sale \* \* \**** The person to whom the sale was made, though a decoy and an informer, merely afforded the defendant the opportunity to make the sale. ***This does not warrant an instruction on entrapment.***

*Waggoner*, 80 Wn.2d at 11 (emphasis added). Since *no* entrapment instruction was given, and since the Court approved of that failure to instruct, there was no occasion for the Court to discuss what language ought to be used in an entrapment instruction.

However, the opinion *did* contain the following sentence regarding what was *not* sufficient to establish entrapment instruction:

***[T]he testimony indicates that Mrs. Crombie [the informant] employed no more persuasion than would be necessary to effect an ordinary sale. The record itself reveals that the activities of individuals such as Mrs. Crombie have made discretion and suspicion an operating principle for drug dealers in all of their sales. A police informant's use of a normal amount of persuasion to overcome this expected resistance does not constitute entrapment and will not justify an entrapment instruction.***

*Waggoner*, 80 Wn.2d at 10-11 (emphasis added).

This is the sentence which eventually found its way into WPIC 18.05. The WPIC states: “The use of a reasonable amount of persuasion to

overcome reluctance does not constitute entrapment.”

A statement that X is *not* sufficient to establish something is *not* the equivalent of a statement that to establish that something a party must prove *more* than X, or that he must prove the opposite of X. But when a negative statement is made, it is not uncommon for a listener (or reader) to draw this type of illogical conclusion from it.<sup>38</sup>

Unfortunately, the challenged sentence in WPIC 18.05 lends itself quite easily to precisely this kind of logical fallacy. By linking the phrase “use of a reasonable amount of persuasion” to the phrase “do not constitute,” the challenged WPIC sentence has a dangerous tendency to cause people to reason – illogically -- in this manner:

Negative Premise	Entrapment <i>is not</i> established by showing that a <i>reasonable amount</i> of persuasion was used to overcome reluctance.
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False Conclusion	<i>Therefore</i> to establish entrapment <i>one must show</i> that <i>more than a reasonable amount</i> of persuasion was used to overcome reluctance.
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**e. Due Process Is Violated When There is a Reasonable Likelihood That the Jury Read An Instruction Incorrectly So as to Preclude Consideration of a Proper Defense.**

“To satisfy the constitutional demands of a fair trial, the jury

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<sup>38</sup> This particular type of error is well known to logicians as the error of drawing an affirmative conclusion from a negative premise. See [http://en.wikipedia.org/wiki/Affirmative\\_conclusion\\_from\\_a\\_negative\\_premise](http://en.wikipedia.org/wiki/Affirmative_conclusion_from_a_negative_premise). The only valid conclusion that can be drawn from a *negative* premise is a *negative* conclusion. For example: Negative premise: No ugly people get into Harvard. False Affirmative Conclusion: Therefore, all the people who get into Harvard are beautiful.

instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” *State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2010).<sup>39</sup> Similarly, in *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) the Court held that when it is claimed that an “instruction is ambiguous and therefore subject to an erroneous interpretation, [w]e think the proper inquiry is whether there is a reasonable likelihood” that the jury misapplied the challenged instruction in a way that prevented consideration of relevant evidence.

The *Boyde* standard was applied to the language of WPIC 18.05 in *State v. O’Neill*, 91 Wn. App. 978, 967 P.2d 985 (1998). Admittedly, there are large differences between the facts of this case and those in *O’Neill*. In *O’Neill* the defendant was arrested by Officer Stone for DUI and was taken to the police station. Stone and O’Neill gave conflicting testimony about who then initiated the conversation about payment of a bribe. Stone said O’Neill asked if he could make the DUI go away by making a payment to Stone. O’Neill said Stone initiated the conversation by writing down “\$3,000” on a piece of paper and putting his finger to his

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<sup>39</sup> Similarly, the U.S. Supreme Court has held that when there is a reasonable likelihood that a jury will misinterpret an instruction in such a manner as to shift or alter the burden of proof, or to preclude consideration of a defense argument, there is a violation of due process. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (conviction reversed because a reasonable juror could have misinterpreted the instruction on intent as shifting the burden of proof on that element to the defendant).

lips. It was undisputed that Stone let O'Neill go, and that O'Neill later met Stone and gave him \$3,000. At trial O'Neill said that Stone threatened to take him to jail if he did not pay him the bribe.

"O'Neill's entire defense was that he had been entrapped." *Id.* at 986. The standard WPIC 18.05 instruction on entrapment was given to the jury and O'Neill was found guilty. On appeal O'Neill challenged both of the sentences in the second paragraph of WPIC 18.05. He argued that while these sentences were permissible in an ordinary case involving an undercover police officer who was attempting to apprehend criminals, they should not have been given in his case because the officer was simply a co-participant in the crime and was not an undercover agent.

This Court rejected O'Neill's attack on the sentence which stated that entrapment is not established if law enforcement "did no more than afford the defendant an opportunity to commit a crime." *Id.* at 989. The court held this sentence was not subject to an erroneous interpretation. *Id.*

**f. In *O'Neill* This Court Held That There Is a Reasonable Likelihood That the "Reasonable Use of Persuasion" Sentence Will Mislead Jurors.**

However, this Court also held there *was* a reasonable likelihood that the jury had misinterpreted *the second sentence* regarding the "*use of a reasonable amount of persuasion.*" This Court noted that this sentence was *not* supported by the statute, RCW 9A.16.070, and that the jury likely

misinterpreted it:

O'Neill also attacks the entrapment instruction's language that the "use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment." While this sentence is also included in the WPIC, *it does not derive from the entrapment statute, RCW 9A.16.070. We hold that this language should not have been applied on the facts of this case because it suggests that Stone could have illegally threatened incarceration to extort bribe money by using a "reasonable amount" of persuasion.* Because Stone did not legitimately negotiate the bribe in an attempt to enforce the law, no amount of persuasion would have been reasonable or sanctioned by law.

*O'Neill*, 91 Wn. App. at 989 (emphasis added).

While the facts of *O'Neill* are quite different, its holding is nevertheless applicable to the present case. In this case Kultin suggested to Mockovak that King might kill Mockovak to collect the insurance money, and that the Russian hit men might assault Mockovak if he did not go ahead with the plan by delivering the first payment of \$10,000. Here, as in *O'Neill*, the jury was likely to read the second sentence of the second paragraph of the instruction as stating that the making of these remarks by Kultin to Mockovak constituted only "a reasonable amount of persuasion" which was "not sufficient" to establish the defense. Indeed, as explained below, it is virtually certain that the jury read the instruction in this incorrect manner because that is precisely what the prosecutor argued in closing. See section F.3 below. Thus, here, as in *O'Neill*, this Court must

“reverse and remand for a new trial.” *Id.* at 990.<sup>40</sup>

**g. The Defect In Instruction No. 29 Can Be Raised for the First Time On Appeal Because Defense Counsel’s Proposal of an Instruction Containing the Misleading Language Constituted Ineffective Assistance of Counsel.**

Defense counsel did not make any objection to Instruction No. 29.<sup>41</sup>

Normally, this failure to object would preclude appellate review of the issue. But manifest constitutional error in a jury instruction can be raised for the first time on appeal,<sup>42</sup> and a jury instruction which misstates the law or which improperly allocates the burden of proof is an error of constitutional magnitude.<sup>43</sup> In this case, the claim being raised here *is* of

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<sup>40</sup> This Court held the instructional error was presumed to be prejudicial and that the State could not show that it was harmless: “Because there is some evidence in the record to support a finding that O’Neill was reluctant to agree to a bribe once Stone raised the issue, we cannot conclude that the instructional error had no possible consequences on the jury’s verdict.” *Id.* at 990. This conclusion is even more compelling in the present case; here the record not only contains evidence that Mockovak was at times reluctant to proceed with the murder of King, but also shows that he refused to go ahead with any plan to kill Klock and that the jury *acquitted* Mockovak of that charge. CP 605.

<sup>41</sup> The instruction is identical to WPIC 18.05 except that it substitutes the defendant’s name for the words “the defendant.” CP 595.

<sup>42</sup> *See, e.g., State v. Levy*, 156 Wn.2d 709, 720, 132 P.2d 1076 (2006) (claim that instruction was a comment on the evidence); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000)(instructions misstated accomplice liability principles violating Eighth Amendment); *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996) (instructions improperly shifted burden of proof on element of crime to defendant); *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980) (instructions failed to require jury unanimity thereby invading fundamental right to jury trial); *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011) ( instruction defective on double jeopardy grounds) .

<sup>43</sup> *See, e.g., State v. Deal, supra* (burglary instruction shifted burden of proof on element of intent to commit a crime); *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996)(instruction misstated law of self-defense); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983)(instruction misallocated burden of proof to defendant).

<sup>43</sup> *See, e.g., State v. Deal, supra* (burglary instruction shifted burden of proof on element of intent to commit a crime); *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369

constitutional magnitude. The claim is that the instruction is misleading because it can be read as implying that the defendant has to prove an additional third element to establish entrapment, thereby increasing the defendant's burden of proof. Mockovak further maintains that this was "manifest" constitutional error because it had "practical and identifiable consequences" on the outcome of his trial.

At the same time, Washington appellate courts also follow the rule that invited error normally cannot be raised for the first time on appeal, even if it is of constitutional magnitude. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). "[A] party may not request an instruction and later complain on appeal that the requested instruction was given." *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). In the present case, Mockovak's trial counsel proposed an entrapment jury instruction based on WPIC 18.05. CP 366. That defense proposed instruction was virtually identical to the one which the trial court then gave. CP 595.

But there is also a clear exception to the invited error rule: "If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review." *State v. Kylo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). *Accord State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *State v. Rodriguez*, 121 Wn. App. 180, (1996)(instruction misstated law of self-defense); *State v. McCullum*, 98 Wn.2d 484, 656

183-84, 87 P.3d 1201 (2004).

In *Kyllo*, the trial court gave the jury an instruction on self-defense which defense counsel had proposed. That instruction stated that the defendant was entitled to use force to defend himself only if he believed that he was in danger of great bodily harm. Thus, it “incorrectly stated that *Kyllo* had to apprehend a greater degree of harm than was legally required before nondeadly force could be used in self-defense.” 166 Wn.2d at 863. Despite the fact that *Kyllo*’s trial attorney had proposed this instruction, the Supreme Court identified two reasons why *Kyllo* was allowed to challenge the instruction for the first time on appeal: (1) *Kyllo*’s attorney provided ineffective assistance of counsel and (2) the instruction improperly affected the burden of proof. *Id.* at 862.<sup>44</sup>

First, despite the fact that the instruction trial counsel proposed was identical to a former WPIC instruction, the *Kyllo* Court distinguished the *Studd* case and found the trial attorney’s conduct was deficient. In *Studd* the Court rejected the contention that trial counsel had been ineffective

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P.2d 1064 (1983)(instruction misallocated burden of proof to defendant).

<sup>44</sup> “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. [Citation]. Additionally, because the State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on self-defense that misstates the law is an error of constitutional magnitude, [citations], and this error can be raised for the first time on appeal.”

In *Kyllo* the instruction erroneously lowered the State’s burden of proof on an element of the crime. In the present case the instruction erroneously raised the defendant’s burden of proving an “element” of an affirmative defense.

when he proposed a standard WPIC instruction. There the Court “determined that counsel could not be faulted for requesting a then-unquestioned WPIC on self-defense that erroneously suggested justifiable homicide requires actual imminent harm, and concluded that counsel’s performance was not deficient.” 166 Wn.2d at 866.

But the *Kyllo* Court distinguished *Studd* because at the time of *Kyllo*’s trial there already were reported decisions which indicated that the standard WPIC instruction should not be given:

[T]here is a significant difference between *Studd* and the present case. In *Studd*, at the time of trial the case that made it clear that the instruction at issue was erroneous, *LeFaber*, had not yet been decided. ***In contrast, at the time of *Kyllo*’s trial there were several cases that should have indicated to counsel that the pattern instruction was flawed.***

*Kyllo*, 166 Wn.2d at 866 (emphasis added).

Relying upon the decision in *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996), *Kyllo* argued that the trial court erred in giving WPIC 16.02, the instruction on justifiable homicide, and that the error was of constitutional magnitude. *Kyllo*’s trial lawyer proposed the WPIC instruction which was given, and which *Kyllo* later identified as constitutional error on appeal. The Court held that competent trial counsel should have realized that the instruction was flawed.

The *Kyllo* Court ruled that language in *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997); *State v. Rodriguez*, 121 Wn. App. 180, 87

P.3d 1201 (2004); and *State v. Freeburg*, 105 Wn. App. 492, 503, 20 P.3d 984 (2001) should have alerted competent counsel to the fact that former WPIC 16.02 should not be given because it misstated the law.<sup>45</sup> The Court held that despite the fact that the instruction was recommended and endorsed by the WPIC Committee, it was still unacceptable for defense counsel to fail to recognize the instructional flaw which ordinary legal research would have revealed:

*With proper research, counsel should have determined from RCW 9A.16.020 and these cases that proposing an “act on appearances” instruction using “great bodily harm” was improper despite the term’s appearance in former WPIC 17.04. Failing to research or apply relevant law was deficient performance here because it fell “below an objective standard of reasonableness based on consideration of all the circumstances.”*

*Kyllo*, 166 Wn.2d at 868-869 (emphasis added).

### **The Deficient Conduct Prong**

The deficient conduct prong of *Strickland v. Washington*, 466 U.S.

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<sup>45</sup> These three cases noted that it was incorrect to use an “act on appearances” instruction in conjunction with an instruction referencing “great bodily harm” because it was not necessary that the perceived harm be of that magnitude before it was permissible to use nondeadly force in self-defense. This flaw was embedded in WPIC 17.04, the WPIC instruction that defined the concept of lawful use of force. The *Kyllo* Court held that it was deficient conduct for criminal defense counsel to fail to identify the same problem existed in WPIC 16.02, the pattern instruction on justifiable homicide.

“Although these cases all deal with deadly force, they all indicate that ‘great bodily harm’ should not be used in an ‘act on appearances’ self-defense instruction. *Walden* was decided in 1997, *Freeburg* in March 2001, *Rodriguez* in April 2004, and *Kyllo*’s trial occurred in late 2004. Further, *Walden* and *Rodriguez* would have told counsel that giving the instruction defining ‘substantial bodily harm’ along with the ‘act on appearances’ instruction that used “great bodily harm” was likely to misinform the jury about the law because ‘substantial bodily harm’ is plainly not the correct standard.” *Kyllo*, 166 Wn.2d at 868.

668, 104 S. Ct. 2052 (1984), is clearly met in this case. Here, as in *Kyllo*, there were very clear indications in the existing case law that WPIC 18.05 was flawed. First, ***over thirty years ago*** the *Keller* opinion *rejected* the contention that the amount of persuasion used to overcome the defendant's reticence was an element of the entrapment defense. The *Keller* opinion unequivocally held that the amount of persuasion used by government agents was *irrelevant* to the entrapment defense:

First, ***it is true as the State argues that use by police officials of a normal amount of persuasion to facilitate the commission of a crime does not constitute entrapment.*** *State v. Waggoner*, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971). ***However***, it is not necessary to prove outrageous conduct when asserting the statutory defense. ***That evidence is relevant only if it is contended the conduct violated due process.*** [Citations omitted]. Here, defendant's argument is based upon the statutory defense, not due process principles.

*Keller*, 30 Wn. App. at 647 (emphasis added).

Second, a cursory reading of *Lively* discloses that entrapment is concerned with the subjective state of mind of the defendant, *not* with the conduct of government agents. *Lively*, 130 Wn.2d at 19.

Third, *Keller* demonstrates that even if government agents use very small amounts of persuasion, such as appealing simply to the defendant's obligation to be courteous to his house guests, a defendant is still entitled to an entrapment instruction and may still prevail on that defense.

Fourth, and most significantly, the decision in *State v. O'Neill*, *supra*,

demonstrates that a defendant can succeed – and in that case *did* succeed – in challenging the *very same language* in the *very same jury instruction* on the grounds that it was potentially highly misleading to the jury. More than a decade prior to Mockovak’s trial, in *O’Neill* this Court held that the language in WPIC 18.05 regarding a reasonable amount of persuasion “should not have been applied” because it may have misled the jury into believing that it was precluded from finding that entrapment had been established. *O’Neill*, 91 Wn. App. at 989.

For all of these reasons, Mockovak’s trial counsel was ineffective when he failed to realize that the entrapment instruction he was proposing was misleading because it was highly susceptible to being read in a manner that improperly *increased* the defendant’s burden of proof. As the *Kyllo* Court recognized, it is *always* deficient conduct for a defense attorney to propose an instruction in a criminal case which misstates the burden of proof because there is no conceivable “strategic or tactical reason for [defense] counsel” to make the State’s burden of proof easier or the defendant’s burden of proof harder. *Kyllo*, at 869; *State v. Woods*, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007).

### **The Prejudice Prong**

The prejudice prong of *Strickland* is also clearly met in this case. The misleading instruction increased the defendant’s burden of proof on the

affirmative defense of entrapment by suggesting that he had to prove a third element by showing that the government informant used an *unreasonable* amount of persuasion. Here, as in *Kyllo*, the proposal of a defective jury instruction was extremely prejudicial to the defense.

In *Kyllo* “self-defense was *Kyllo*’s entire defense.” 166 Wn.2d at 869. In this case, entrapment was Mockovak’s entire defense on Counts II, III, IV, and V. In *Kyllo* the record contained “conflicting evidence” on the issue of self defense. *Id.* In the present case, the tape recorded conversations between Mockovak and Kultin contained similar conflicting evidence, a great deal of which supported Mockovak’s contention that there was entrapment. In *Kyllo* the instruction erroneously suggested “that something greater was required” to prove self-defense than the law actually required. *Id.*<sup>46</sup> Here, the instruction was open to the construction that “something greater” than what the law actually required was needed to prove entrapment. Here, as in *Kyllo*, the deficient conduct of trial counsel was prejudicial, and the second prong of the *Strickland* test is met.

Since the record establishes that trial counsel was ineffective in proposing the entrapment instruction which misstated the law, the invited

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<sup>46</sup> “[A]lthough the jury was correctly instructed that a person is entitled to act in self-defense when he reasonably believes he is about to be injured and when the force used is not more than is necessary, [citation], the jury could still be misled into misapplying the law regarding self-defense because counsel’s proposed instruction (instruction 13) and instruction 19 (the ‘substantial bodily harm’ definition) require an apprehension of harm

error doctrine does not apply. Instruction No. 29 violated due process because it is quite likely it was misapplied by the jury in such a way as to increase the proof that the defendant had to present to establish entrapment. Consequently, the defendant's convictions should be reversed and a new trial ordered.

**3. IN HER CLOSING THE PROSECUTOR ERRONEOUSLY ARGUED THAT THE DEFENDANT HAD TO PROVE THAT LAW ENFORCEMENT USED AN UNREASONABLE AMOUNT OF PERSUASION TO OVERCOME MOCKOVAK'S RELUCTANCE.**

The prejudicial effect of the "reasonable amount of persuasion" sentence in Instruction No. 29 was greatly compounded when the prosecutor, in her closing argument, improperly increased the defendant's burden of proof to establish entrapment. Instead of having to prove only *two* "elements" to establish the defense of entrapment, the prosecutor explicitly told the jury that Mockovak had to establish *three* "elements." She incorrectly told the jury that Mockovak had to prove that Kultin used an unreasonable amount of persuasion to overcome his reluctance to proceed with the murder for hire plan.

**a. The Prosecutor Told the Jury That The Entrapment Defense Has Three Elements.**

It is unequivocally settled that "both by statute and court decision the

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greater than is required before Kylo could act on a mistaken belief that he was about to be injured."

defense [of entrapment] requires proof of *two* distinct elements.” *State v. Smith*, 101 Wn.2d at 43 (emphasis added). Those two elements are the origination of the criminal design by law enforcement and inducement of the defendant to commit a crime he was not intending to commit. Nevertheless, in closing the prosecutor argued that Mockovak had to prove *three* elements in order to establish entrapment:

Now, the defendant argues: Yeah, yeah, yeah, but, wait, I was entrapped, so let’s talk for a few minutes about entrapment. ***You have an entrapment instruction in your packet.***

***There are essentially three elements, if you will, to entrapment, and you must believe – the defendant must convince you of each and every one of these elements before you can find entrapment.***

***It’s not just – it’s not enough for you to think: Yeah, I agree with the one, but not the other two. Yeah, I agree with two, but not the third. You must agree with all three before you can find entrapment, and they have to prove to you that it’s more probably true than not. . . .***

RP XII, 93-94 (emphasis added).

The prosecutor discussed the first statutory element of the defense, and argued that Mockovak had failed to prove that the idea for the defendant’s crimes had originated with the informant Daniel Kultin. RP XII, 94.<sup>47</sup> Then she argued that the second element of entrapment had not been proved: “Even if you somehow think that yes, Daniel – it was Daniel’s idea, you don’t have entrapment unless you also believe that the defendant

was lured or induced into soliciting the murders and that he would not otherwise have intended to solicit those murders.” RP XII, 95. And then she argued that in addition the defense had to prove a *third* element - use of an unreasonable amount of persuasion - and she said the defendant had failed to do that because: “[y]ou don’t have entrapment when Daniel [Kultin] used no more than reasonable persuasion.” RP XII, 96-97.

The prosecutor unambiguously and forcefully misled the jury. She explicitly contrasted “reasonable” and “unreasonable” amounts of persuasion. She maintained that nothing the government agent did was “unreasonable,” and thus she contended that the defendant had failed to prove the “third” element of entrapment because he had failed to prove use of an unreasonable amount of persuasion:

*You don’t have entrapment when Daniel used no more than reasonable persuasion. “Reasonable persuasion” is in your jury instruction.* You can use some persuasion, a reasonable amount of persuasion. What’s “reasonable”? Moderate, not excessive.

*Examples of things that are reasonable in undercover investigations:* Use of deception, appeals to friendship, agreement with the defendant, expressions of understanding. *Daniel did all of these things and it was perfectly reasonable.*

*What is “unreasonable” by contrast?* Things that are unconscionable, unjustifiable, excessive, exorbitant or immoderate. *Daniel did none of these things.* Police merely offering the opportunity to commit a crime is not unreasonable. *That’s in your instructions.*

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<sup>47</sup> “An entrapment defense is not established where there’s no evidence that these crimes were Daniel’s idea.”

In this case, even if Daniel had offered to solicit or attempt or conspire in these crimes with the defendant, *it's not unreasonable*, and a reasonable amount of persuasion is okay. *Under the defense of entrapment, it doesn't make the defense.*

How did Daniel offer Mockovak the opportunity? He acted as a willing conspirator. He developed trust with Mockovak. He told Mockovak that the hit man could be hired. He agreed to ask the hit men to commit the murders, and he agreed to act as an intermediary. That's affording the defendant the opportunity. *That's entirely reasonable. What he did was reasonable.*

RP XII, 96-98 (emphasis added).

After mocking the defendant's argument that Kultin did things that were unreasonable – such as “normalizing murder” and making threats - the prosecutor concluded by emphasizing that *all three* of the elements of entrapment – elements she claimed were “in your instructions” - had to be proved by the defendant:

None of these things constitute entrapment. *There are three elements to entrapment. You must believe all of them* are more probably true than not *before you can find entrapment.*

RP XII, 94-98 (emphasis added).

b. **Mockovak's Trial Counsel Did Not Dispute The Assertion That The Defense Had to Prove a Third Element of Entrapment By Showing That Kultin Used an Unreasonable Amount of Persuasion.**

Defense counsel failed to do anything to correct the prosecutor's misinterpretation of the sentence regarding a reasonable amount of persuasion. Instead, he accepted the prosecutor's misstatement of the law.

He contrasted an amount of persuasion that would have been reasonable, with what Kultin actually did. According to defense counsel, what Kultin actually did was “completely unreasonable”:

And so *what is Daniel Kultin doing? Is he saying anything like:* Look, we’re here for you, and if you need to have this done, we’re ready to do it. But look *if you work it out with Joe King, that’s fine too. You let me know what you want to do.*

*Is that “reasonable persuasion? I would say so. If he had said something like that,* is that just leaving the door open for Dr. Mockovak? Sure it is. And then if he wants to walk through it, then that’s fine. *But that’s not what Daniel Kultin’s doing here.*

RP XIII, 10 (emphasis added). Then before launching into a litany of all the things Kultin *did* say,<sup>48</sup> defense counsel explicitly argued, “He’s acting completely unreasonable.” RP XIII, 11 (emphasis added).

In this manner, both the prosecutor and defense counsel compounded the due process problem posed by the jury instruction. When evaluating claims that jury instructions are misleading or inadequate, courts regularly consider “the likely effect on the jurors of the comments of the defense counsel and the prosecutor.” *Penry v. Johnson*, 532 U.S. 782, 800, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001). The *Penry* Court concluded that the closing arguments of both counsel “were insufficient to clarify the

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<sup>48</sup> Defense counsel also specifically argued that creating fear on Mockovak’s part was not reasonable either: “Fear is definitely an element of what happened here, but in the soup, if you will, of entrapment, fear is just one element. The other ingredients are pouring fuel on the fire at every opportunity at Mockovak’s most vulnerable positions in terms of the way he looks at the world.” RP XIII, 12-13.

confusion caused by the instructions themselves.” *Id.*<sup>49</sup>

In the present case there is not merely a “reasonable likelihood” that the jury misinterpreted the jury instruction on entrapment. It is a virtual *certainty* that they did so, because (1) the prosecutor told them how to misinterpret it; (2) defense counsel failed to do anything to correct her misstatement of the law; and (3) defense counsel endorsed the misstatement by accepting the burden of proving the “third element” of entrapment, the use of an unreasonable amount of persuasion.

**4. THE FAILURE OF MOCKOVAK’S TRIAL COUNSEL TO OBJECT TO THE PROSECUTOR’S MISSTATEMENT OF THE LAW OF ENTRAPMENT CONSTITUTED A DENIAL OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION.**

**a. The Failure to Object to a Serious Misrepresentation of the Law Constitutes Ineffective Assistance of Counsel When The Misrepresentation Has a Prejudicial Impact and The Failure to Object is Objectively Deficient.**

Where defense counsel fails to object to prosecutorial misrepresentation of the law in closing argument, Washington appellate courts consider the issue waived on appeal unless the misrepresentation is so flagrant and ill intentioned that it caused prejudice which could not have been cured by an instruction from the trial judge. *State v. Gregory*,

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<sup>49</sup> *Accord Penry v. Lynaugh*, 492 U.S. 302, 326, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (“In light of the prosecutor’s argument, and in the absence of appropriate instructions, a reasonable juror could well have [erroneously] believed” that the law was something other than what it actually was.).

158 Wn.2d 759, 841, 147 P.3d 1201 (2006). In this case, the prosecutor seriously misstated the law by erroneously describing the elements of the entrapment defense. The prejudice which the prosecutor caused *could* have been cured by an instruction from the trial judge. Therefore defense counsel's failure to object deprived Mockovak of his state constitutional right to raise this issue on direct appeal.

But while Mockovak cannot raise a prosecutorial misconduct claim on direct appeal, he *can* raise a claim of ineffective assistance of counsel ("IAC") based upon his trial counsel's failure to object. While appellant has not found any published Washington decision which explicitly recognizes such an IAC claim, decisions from other jurisdictions routinely recognize the viability of such an IAC claim. For example, the Eleventh Circuit has held:

Ineffective assistance of counsel may be established where a defense counsel fails to object to the prosecutor's "very serious instances of prosecutorial misconduct" which include "the initial introduction of [the defendant's] silence," "cross-examination of [the defendant] about his post-arrest silence," and "argument which invited the jury to consider constitutionally protected silence as evidence of [the defendant's] guilt."

*Fugate v. Head*, 261 F.3d 1206, 1223 (11<sup>th</sup> Cir. 2001) (citations omitted).

There are numerous examples of cases where defendants have prevailed on such claims. For example, in *Burns v. Gammon*, 260 F.3d 892, 896-97 (8<sup>th</sup> Cir. 2011) the prosecutor argued that by exercising his

rights to a jury trial and to cross-examine witnesses the defendant had forced the rape victim to have to attend trial. The Court held that defense counsel's failure to object to this improper argument constituted IAC under the *Strickland* test because "there was no reasonable tactical basis" for failing to object to the prosecutor's argument and because it caused prejudice both at trial and later on appeal. *Id.* at 897.

In no less than four cases, the Sixth Circuit vacated the defendants' convictions because their trial counsel failed to object to various instances of prosecutorial misconduct including improper closing argument remarks urging the jury to consider the defendant's post-arrest silence as evidence of his guilt.<sup>50</sup> State courts have done the same.<sup>51</sup>

**b. By Failing to Object to the Prosecutor's Closing Argument Regarding the Need to Prove the Third Element of Entrapment, Mockovak's Trial Counsel Allowed the Prosecutor to Improperly Increase the Defendant's Burden of Proof on The Affirmative Defense of Entrapment.**

The defendant bears the burden of proof to establish entrapment. *Lively*, 130 Wn.2d at 13. There are "two elements" that must be proved to establish this defense. Allowing the prosecutor to persuade the jury that

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<sup>50</sup> *Washington v. Hofbauer*, 228 F.3d 689 (6<sup>th</sup> Cir. 2000); *Combs v. Coyle*, 205 F.3d 269, 286 (6<sup>th</sup> Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000); *Gravley v. Mills*, 87 F.3d 779, 785-86 (6<sup>th</sup> Cir. 1996); and *Rachel v. Bordenkircher*, 590 F.2d 200 (6<sup>th</sup> Cir. 1978).

<sup>51</sup> *Commonwealth v. Egardo*, 426 Mass. 48, 686 N.E.2d 432, 434-36 (1997); *Washington v. State*, 112 Nev. 1054, 921 P.2d 1253, 1256-58 (1996). *See also* *McFadden v. State*, 342 S.C. 637, 539 S.E.2d 391, 393-94 (2000) (counsel ineffective for failure to object to argument that defendant failed to present a defense).

there are *three* elements increases the defendant's burden of proof. Here defense counsel's failure meant that the jury believed the defense had to prove that Kultin used an *unreasonable* amount of persuasion to overcome Mockovak's reluctance to act.

*Increasing* the defendant's burden of proof on his affirmative defense can never be an objectively reasonable tactic. *Cf. State v. Kyllo*, 166 Wn.2d at 869. Moreover, this blunder was obviously very prejudicial. This is a case where the jury *acquitted* the defendant of one of the charges of solicitation of murder. Mockovak had very strong evidentiary support for his claims that the criminal design originated with Kultin (Kultin is the first one to mention the idea as shown in the August 11, 2009 tape recording) and that Kultin induced him to act (on the October 20<sup>th</sup> tape Kultin suggests that King might be trying to have Mockovak killed, and on the November 6<sup>th</sup> tape when Mockovak says he is uneasy about the plan Kultin tells him "I'm trying to help you" and "we're in this together.>"). *Tr.* 8/11/09 at 69-70; *Tr.* 11/6/09 at 60-61, 78. As late as November 4<sup>th</sup> the FBI was still "asking questions about [what] Mockovak's true intentions" were. RP VII, 69-70. Several jurors noted how much evidence of entrapment there was and how "very difficult" the case had been to decide. CP 789. If Mockovak's trial counsel had objected, the trial judge would have told the jury that there were only *two*

elements to the entrapment defense and there is a reasonable probability that the outcome of the trial would have been different.

**5. THE CONVICTIONS FOR SOLICITATION TO COMMIT MURDER AND ATTEMPTED MURDER MERGE BECAUSE SOLICITATION IS AN ATTEMPT TO COMMIT AN ATTEMPT AND THE LEGISLATURE DID NOT INTEND TO PUNISH BOTH CRIMES WHEN THE ACTOR COMMITTED AN ATTEMPT.**

On November 16, 2009, Mockovak was charged with two counts of Solicitation of Murder 1°. Count I alleged that he solicited the murder of King. CP 1. Count II alleged that he solicited the murder of Klock. CP 1-2. With respect to the plan to kill King, the State alleged that the offense was committed between August 3, 2009 and November 12, 2009. CP 1.

More than one year later, in December of 2010, the State amended the information concerning the plot to kill King and split that charge into two. The amended information charged that Mockovak solicited the murder of King during the period from October 14, 2009 through November 6, 2009. CP 269. That amended information took the six days from November 7 through November 12 that previously had been included in the King murder solicitation count and transferred them to a new Count III which charged Attempted Murder 1°. CP 269. That first amended information also added charges of Conspiracy to Commit Theft 1° and Attempted Theft 1° in Counts IV and V. CP 269-70.

On January 26, 2011, after trial had begun but before the State rested, the trial court allowed the State to file a *second* amended information. This information further modified the dates of alleged commission of the Attempted Murder 1° of King charged in Count III. CP 413. The second amended information alleged that the Attempted Murder 1° was committed *solely* on one day, November 7<sup>th</sup>, and the following five days were eliminated from that charge. CP 413. Similarly, the second amended information changed the dates of commission of the Attempted Theft 1° charged in Count V from the six day period of November 7 through 12 to the single day of November 7. CP 414; RP IX, 4-6.

In the information upon which he was tried and convicted, Counts II and III both alleged that Mockovak took a preliminary step towards committing a premeditated murder of King. Pursuant to RCW 9A.28.030, Count II charged Solicitation of Murder 1° – an inchoate preparatory offense – committed between October 14, 2009 and November 6, 2009. CP 269. The preliminary step identified in the information was making an “offer to give money . . . to another to engage in specific conduct which would constitute” Murder 1. CP 269. Pursuant to RCW 9A.28.020, Count III charged Attempted Murder 1° (another inchoate crime) committed between November 7<sup>th</sup> and November 12<sup>th</sup>. CP 269.

Both crimes are inchoate, preparatory offenses, and both were in

preparation for the same murder of the same person. As charged in this case, both were steps taken in a continuing course of conduct towards the same intended murder. Consequently, the one continuing course of conduct which encompasses them both cannot be artificially divided so as to multiply the charges (and thereby increase the offender score and the standard sentencing range). The information did not describe any facts that suggested there was any break between the supposedly separate crimes; the jury instructions failed to differentiate the “substantial step” that formed the basis for the attempt from the conduct that formed the basis for the solicitation; and no special interrogatory or Special Verdict was used to cure the problem of basing two offenses on the same continuing course of conduct.

In the context of this case, the solicitation was part of the “substantial step” in the conduct which constituted the crime of attempted murder. Therefore the solicitation and attempt convictions must merge.

In *State v. Gay*, 4 Wn. App. 834, 486 P.2d 341, *review denied*, 79 Wn.2d 1006 (1971), the defendant, Olga Gay, was convicted of hiring a man to kill her husband. The hired man was an undercover police officer. The defendant assisted him by furnishing photos of her husband and telling him where her husband could be found. Gay challenged her attempt conviction on the ground that the act of hiring someone to murder her

husband is the crime of solicitation, a crime preparatory to attempt, but not the greater offense of attempted murder. The Court of Appeals rejected this argument and ruled that while *attempting* to hire a hit man might properly be characterized as mere solicitation, once money was actually transferred to the hit man there was a completed contract which constituted a full-blown attempt.

In *Gay* the Court held that the crime of solicitation was committed when the defendant made the request that the undercover officer kill her husband. Solicitation lacked what the Court called the “overt step” (which is now called the “substantial step”) required for an attempt. But once the defendant paid the hit man and created a “contract” there was a further act of “hiring” which changed the crime from mere solicitation into an attempt. Distinguishing the two crimes, the Court held that solicitation is missing one element that attempt contains: the “overt step”:

***We agree that solicitation alone would not constitute the crime of attempt. Solicitation is a step in the direction of the target crime but it did not constitute the overt act directed toward its commission that is a necessary element of the crime of attempt. Solicitation involves no more than asking or enticing someone to commit a crime. . . . An information which charges the defendant with hiring someone to commit a crime alleges the commission of the contract. Such a hiring is an overt act toward the commission of the target crime. It goes beyond the sphere of mere solicitation and it may constitute the crime of attempt . . .***

*Gay*, 4 Wn. App. at 839-40 (emphasis added) (citations omitted).

Thus *Gay* holds that solicitation is a step towards an attempt, or “an

attempt to attempt.” Because solicitation is a crime composed of a subset of the elements of attempt, solicitation is a lesser included offense of attempt even though the penalties are the same. *State v. Nguyen*, 165 Wn.2d 428, 435-36, 197 P.3d 673 (2008).

This is the way Washington courts have always treated solicitation. In *State v. Jensen*, 164 Wn.2d 943, 950, 195 P.3d 512 (2008), the Court explained that solicitation is a step that can “ripen[] into . . . attempt” if another step towards the target crime is taken:

The crimes of conspiracy and attempt have been part of Washington’s criminal code since 1909. [Citation]. In contrast, solicitation was not recognized as a statutory crime until 1975. [Citation]. ***Before 1975, solicitation was punishable only when it ripened into a conspiracy or an attempt.*** See *State v. Gay*, 4 Wn. App. 834, 436 P.2d 341 (1971) (affirming conviction for attempted murder where defendant “consummated a contract” with a purported hit man to kill her husband). This is consistent with the national trend. Under the common law, solicitation was not deemed serious enough to criminalize. [Citation].

(Emphasis added).<sup>52</sup>

The enactment of a statute criminalizing solicitation gave Washington the ability to prosecute three different types of inchoate crimes:

[T]he crime of *solicitation . . . is the most inchoate of the three anticipatory offenses*. In the crime of solicitation, criminal liability may attach to words alone. Solicitation involves no more than asking someone to commit a crime in exchange for something of value. ***Unlike conspiracy or attempt, it requires no overt act***

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<sup>52</sup> In 1975 the Legislature made solicitation a crime consistent with the approach of the Model Penal Code. *Id.* at 951. “Both crimes involve an effort to engage another person in joint criminal activity, with the specific intent to commit a crime . . .” *Id.*

*other than the offer itself.*

*Jensen*, 164 Wn.2d at 952 (emphasis added).

As the *Jensen* opinion notes, if the actor proceeds along the continuum of inchoate crimes by taking an additional step beyond the making of a verbal request, the actor then becomes liable for a more advanced inchoate crime that is further down the line, but he cannot be held liable for both:

By offering something of value to another person to commit a crime, a solicitor supplies a motive that otherwise would not exist, thereby increasing the risk the greater harm will occur. The harm of solicitation is fully realized when the solicitor offers something of value to another person with the intent to promote or facilitate a target crime or crimes. ***If the greater harm of an attempted or completed crime occurs, the solicitor will be criminally liable for that greater harm under the principles of accomplice liability*** and will be punished accordingly.

*Jensen*, 164 Wn.2d at 953 (emphasis added).

When the actor goes “past” an attempt and “finishes” the intended crime, the attempt merges into the completed crime and he cannot be punished for both.<sup>53</sup> Similarly, when an actor goes past mere solicitation and takes a substantial step towards completion of the crime, he cannot be punished for both solicitation and attempt. *See Black’s Law Dictionary* (8<sup>th</sup> ed. 2004)(explaining in “merger” definition that “a defendant cannot be convicted of both attempt (or solicitation) and the completed crime”).

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<sup>53</sup> *See State v. Arnett*, 38 Wn. App. 527, 529, 686 P.2d 500 (1984) (“merger problem occurs when the prosecution . . . joins charges of attempts to commit a given crime as

Solicitation to commit murder is properly characterized as “an attempt to attempt” to commit murder. When the actor’s conduct goes beyond mere solicitation and reaches the point of constituting an attempt, the crime of solicitation merges into the crime of attempt. Since the jury in this case found an attempt was committed, the solicitation offense (Count II) should be held to have merged into it (Count III). Thus, the case must be remanded for resentencing so that Count II can be stricken from the judgment and a new sentence imposed on the remaining counts.<sup>54</sup>

**6. CONVICTIONS FOR BOTH SOLICITATION AND ATTEMPTED MURDER ALSO VIOLATE THE DOUBLE JEOPARDY PROHIBITION AGAINST IMPOSITION OF MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.**

The same result is compelled by the Double Jeopardy Clause.

To determine whether two convictions violate double jeopardy courts apply the *Blockburger* “same evidence” test to determine whether the crimes are identical in both fact and law. There is no violation if each crime requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 305 (1932).

A person is guilty of solicitation “when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or

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well as the completed crime.”); *State v. Mannering*, 150 Wn.2d 277, 284, 75 P.3d 961 (2003) (“[A]n attempt to commit a crime is included in the crime itself.”).

other things of value to another to engage in specific conduct which would constitute said crime . . .” RCW 9A.28.030(1). The elements of the offense are intent to commit the target crime – in this case Murder 1 – and the offer of value to entice another to commit that crime. The crime of attempt is committed when, “with intent to commit a specific crime, [a person] does any act which is a substantial step toward commission of that crime.” RCW 9A.28.020. Its elements are intent to commit the target crime – here Murder 1 – and a substantial step towards committing it. *State v. Patel*, 170 Wn.2d 476, 480, 242 P.3d 856 (2010). Both crimes have the intent element of intent to commit Murder 1. Attempt differs from solicitation because of the additional element of commission of a substantial step. Where, as here, that substantial step is the making and the acceptance of an offer to commit a target crime, the attempt includes all the elements of solicitation. Therefore, the two offenses are the same in law and fact under *Blockburger* and punishment for both is constitutionally prohibited.

**a. Courts Must Treat the “Substantial Step” Element as a Placeholder and Fill It In with the Specific Facts of this Case.**

When applying *Blockburger* to an attempt crime, a court cannot consider the “substantial step” at an abstract level. *In re Restraint of*

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<sup>54</sup> See, e.g., *State v. Parmelee*, 108 Wn. App. 702, 711, 32 P.3d 1029 (2001) (two convictions for violating protection order merge into stalking conviction, case remanded

*Orange*, 152 Wn.2d 795, 818-21, 100 P.3d 291 (2004). Instead, the “substantial step” element is considered a “placeholder.” The phrase “substantial step” cannot “remain a generic term for purposes of the ‘same elements’ test.” *Id.* at 818. It is a term which has “no meaning with respect to any particular crime, and [which] acquir[es] meaning only from the facts of each case.” *Id.*

In this case, Solicitation of Murder 1<sup>o</sup> must be considered a lesser-included offense of Attempted Murder 1<sup>o</sup>, because all the elements of solicitation are also elements of the greater offense of attempt. *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). The solicitation charge required the State to prove (1) an offer to pay another to engage in conduct which constitutes Murder 1<sup>o</sup>, and (2) an intent to accomplish the commission of Murder 1<sup>o</sup>. The attempt charge required the State to prove (1) a substantial step towards commission of Murder 1<sup>o</sup> and (2) an intent to accomplish Murder 1<sup>o</sup>. In lieu of the generic phrase “substantial step” this Court must ask, “Under the circumstances of this case, what was the substantial step which was taken?”

The amended information did not say. It alleged simply that Mockovak “committed an act which was a substantial step towards”

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for resentencing).

Murder 1. CP 269.

The jury instructions did not say either. No. 14, the “to convict” instruction for solicitation, did describe the act of “offer[ing] to give money” that was the basis of the solicitation offense. CP 580. But Instruction No. 15, the instruction which defined attempt, was phrased only in the abstract:

A person commits the crime of Attempted Murder 1 in the First Degree when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime.

CP 581. The definition of a substantial step in Instruction No. 16 was just as general. CP 582.<sup>55</sup> Instruction No. 17, the “to convict” instruction which listed all the elements of Attempted Murder 1<sup>o</sup>, also failed to give any specific content to the term “substantial step.” CP 583. And no special verdict or interrogatory was given to the jury to provide any further guidance or clarification of the term.

But at trial, the evidence presented and the argument made by the State showed that the substantial step alleged was the making of a contract by means of an offer and acceptance of that offer to pay another person to commit a murder. Thus, solicitation (Count II) was based upon the same offer which was subsumed within the substantial step predicate for the attempt (Count III).

**b. Since the Jury Instructions Left the Jury Free to Use Mockovak's Act of Solicitation As the Substantial Step Required for An Attempt, The Entry of Convictions for Both Solicitation of Murder 1 and Attempted Murder 1 Violates Double Jeopardy.**

As a consequence of the jury instructions' failure to specify exactly what the "substantial step" was, the jury was not limited as to the acts upon which it could rely to convict for Attempted Murder 1. In fact, the jury did not specify what act it used to satisfy the "substantial step" element of the attempt. But the only act the State relied upon in argument was the November 7<sup>th</sup> act of consummating the offer to pay for a hit by making partial payment for that hit. Thus, the offer to pay – which was the crime of solicitation – was also subsumed within the substantial step predicate of the attempt.

In *Orange* the Court held that the evidence introduced at trial, when combined with the charging instrument and the jury instructions, created a danger that the very same facts were used as the basis for conviction for both of the crimes charged in that case:

[W]e reverse the Court of Appeals and hold that Orange's convictions for first degree attempted murder and first degree assault violated his constitutional protection against double jeopardy. . . . Under the *Blockburger* test, the crimes of first degree attempted murder (by taking the "substantial step" of shooting at Walker) and first degree assault (committed with a firearm) were the same in fact and in law. The two crimes were based on the

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<sup>55</sup> "A substantial step toward the commission of a crime is conduct that strongly indicates a criminal purpose and that is more than mere preparation."

same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange for the first degree assault.

*Orange*, 152 Wn.2d at 820.

The same is true in this case. The acts forming the basis for the crime leading up to Attempted Murder 1 were necessarily encompassed within the Attempted Murder 1 itself. In *Orange* the Court vacated the duplicative conviction because “the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange for first degree assault.” *Id.* at 820. Similarly, under the jury instructions given in this case, the same act of engaging Kultin to hire the hit men was sufficient to convict Mockovak of both Solicitation of Murder 1° and Attempted Murder 1°. Here, as in *Orange*, the conviction on the lesser-included offense must be vacated. That is the appropriate remedy for duplicative convictions that are barred by double jeopardy. *State v. Varnell*, 162 Wn.2d 165, 172, 170 P.3d 24 (2007); *State v. Knight*, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008).

**c. Additionally, Solicitation and Attempt Are Both Continuing Offenses. Splitting Them Up By Date Impermissibly Multiplied the Number of Convictions in Violation of The Double Jeopardy Prohibition Against Multiple Punishments for the Same Offense.**

The fact that the charging document separated the solicitation and attempt charges into two different time periods does not change the fact

that entry of judgment for these two offenses violates double jeopardy. In this case, in a fairly transparent effort to increase the defendant's punishment, the prosecution changed its position and altered the dates of the charged offenses in an effort to convert one continuing offense into two separate criminal offenses.

With respect to the plan to kill King, initially, in November of 2009, the prosecution charged Mockovak with *only* one offense – Solicitation of Murder 1 – and alleged that it was committed between August 3, 2009 and November 12, 2009. CP 1. Thus the State charged *one continuous offense* and the time period included November 7<sup>th</sup>, the day when Mockovak gave Kultin a payment of \$10,000 to forward to the hit men. But more than one year later, as the trial date approached, the State amended the information and *split that one charge into two*. In December of 2010, the State lopped a bit more than two months off the front end of the solicitation count, and six days off the tail end. Under the amended information Mockovak was charged with Solicitation of Murder 1<sup>o</sup> committed from October 14, 2009 through November 6, 2009. CP 269. The six days from November 7 through November 12 which were cut out of the solicitation count were *transferred* to a *new* count charging Attempted Murder 1<sup>o</sup>. CP 269. Significantly, the State never provided any explanation for why it decided to split the one crime into two crimes in this manner.

Moreover, the State's decision to split one offense into two conflicted with the express statement which the prosecutor made on November 17, 2009 in support of its request for bail to be set at \$3 million. CP 16. There the prosecutor ended her description of the crime of soliciting the murder of King with this statement: "This crime has been ongoing since approximately August 4, 2009." CP 15. But roughly a year later, on December 7, 2010, the amended information expressed the prosecutor's *new* position that the crime of Solicitation of Murder 1<sup>o</sup> ended on November 6<sup>th</sup> and the crime of Attempted Murder 1<sup>o</sup> began the following day and ran for the next six days. CP 269. The only explanation for the prosecution's decision to transfer the day when the money changed hands (November 7<sup>th</sup>) into a new count is that convictions for two crimes instead of one would generate a higher offender score and a higher standard range.

It is settled that solicitation is a continuing offense, which is *not* limited to a single conversation or act. In *Jensen* the Court explicitly rejected the State's theory that there should be one unit of solicitation "per conversation" in which a criminal act is solicited. *Id.* at 956. Instead the Court held that solicitation, like conspiracy, is an "inherently continuous offense." *Id.* at 957. Similarly, in *State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007), the Court ruled that the unit of prosecution for solicitation is the underlying request to commit the unlawful act, and that

there is only one offense no matter how many times that request is made.

Attempted Murder 1<sup>o</sup> is also a continuing offense. Multiple conversations about or multiple steps taken towards completing the crime do not constitute separate attempts. For example, witness tampering is defined as a particular type of attempt offense. A person commits that crime if he “*attempts* to induce a witness” to testify falsely or to absent himself from a hearing.” RCW 9A.72.120. If a person has several telephone conversations with a witness and tries to induce him to testify falsely in all of these conversations, that course of conduct constitutes only *one* offense of witness tampering. Thus, in *State v. Thomas*, 158 Wn. App. 797, 800-801, 243 P.3d 941(2010) the Court vacated seven of Thomas’ eight convictions for witness tampering because even though there were eight phone calls there was only one course of conduct aimed at inducing the witness either not to appear or to lie. *Accord State v. Hall*, 168 Wn.2d 726, 734-35, 230 P.3d 1048 (2010).

The prosecutorial gimmick of splitting up one continuing offense into several smaller time periods so as to multiply the charges is not a new one. Over 100 years ago the Supreme Court condemned this practice in *In re Snow*, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) where the prosecution tried to make one offense of cohabitation with more than one woman into three separate offenses by charging one count for each of the

three years that the defendant cohabited with several women. *Accord Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955) (invalidating prosecutorial attempt to divide one continuous offense of transporting women across state lines for immoral purposes into multiple offenses); *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 816 (2009) (invalidating attempt to divide continuous offense of possession of child porn into multiple crimes based on number of photos possessed). Here, as in *Snow*, *Bell*, and *Sutherby*, the appropriate remedy is to vacate the duplicative conviction and to remand for resentencing.

**7. CONVICTIONS FOR BOTH CONSPIRACY (COUNT IV) AND ATTEMPT (COUNT V) TO COMMIT FIRST DEGREE THEFT VIOLATE THE DOUBLE JEOPARDY PROHIBITION AGAINST MULTIPLE PUNISHMENT FOR THE SAME OFFENSE.**

**a. Both Offenses Charge a “Substantial Step” Towards The Same First Degree Theft of the Same Property From the Same Victim.**

Appellant Mockovak was charged, convicted and sentenced for both Conspiracy to Commit Theft 1° (Count IV) and Attempted Theft 1° (Count V). Both charges were based on a plot to obtain the same insurance proceeds on the life of the same person (King).

As noted in argument sections 5 and 6, conspiracy and attempt are both continuing crimes. Entry of convictions for both of these charges creates the same problems that were created by the entry of convictions for

both solicitation of murder and attempted murder. Under the *Blockburger* test the theft conspiracy and the theft attempt are the same offenses in both law and fact. Because the conspiracy charge contains all the elements of the attempt charge, the attempt is the lesser included offense. Punishment for both thus offends double jeopardy. In addition, because they are continuing crimes which occurred during the same time period the two offenses merge.

In Washington, by statute both conspiracy and attempt require that the actor take a substantial step towards commission of the target crime. RCW 9A.28.020(1) (attempt) and RCW 9A.28.040(1) (conspiracy). Conspiracy also requires an agreement between two or more persons to commit the target crime. RCW 9A.28.040(1).

In this case, the information upon which Mockovak was tried alleged that he made an agreement with another to commit Theft 1<sup>o</sup> and that he took a substantial step<sup>56</sup> towards committing that offense. CP 269. The conspiracy was alleged to have occurred between August 5, 2009 and November 6, 2009. CP 269. The attempt was alleged to have occurred on or about November 7, 2009. CP 270.

While the amended information did not describe what the substantial

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<sup>56</sup> In the conspiracy count the amended information used the phrase “perform an overt act” instead of using the word substantial step. Why the information departed from the

step was for either offense, all of the evidence, argument and the jury instructions made it clear that both offenses were predicated on a plan to collect \$4 million worth of insurance proceeds on the life of Joseph King following his murder. No other theft was ever mentioned.

Similarly, the jury instructions did not differentiate between the property that was the subject of the conspiracy and the attempt. Instruction No. 18 defined conspiracy to commit theft only in general terms . CP 584.<sup>57</sup> Instruction No. 19 defined the term “substantial step” in equally general terms. CP 585.<sup>58</sup> And Instruction No. 27, the “to-convict” instruction for the conspiracy charge similarly said simply that one of the elements of the offense was that “one of the persons involved in the agreement took a substantial step in pursuance of the agreement.” CP 593. The instructions on Attempted Theft 1<sup>o</sup> were also generically phrased. Instruction No. 28, the “to-convict” instruction on the attempt charge, said that the State had to prove that Mockovak “did an act that was a substantial step towards the commission of Theft in the First Degree.” CP

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words of the conspiracy statute – “takes a substantial step in performance of such agreement” is unclear.

<sup>57</sup> “A person commits the crime of Conspiracy to Commit Theft in the First Degree, when, with intent that conduct constituting the crime of Theft in the First Degree be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of that agreement.” (Second paragraph omitted).

<sup>58</sup> “A substantial step in pursuance of the agreement is conduct which strongly indicates a criminal purpose.”

594. The only difference between the two charges, which was explained in the jury instructions, was that the conspiracy charge also required proof of an agreement with another person to commit the targeted theft.

**b. The Two Offenses Are Identical in Both Fact and Law.**

There are three elements of conspiracy: intent to commit a target crime, an agreement to commit it, and taking a substantial step towards it. *State v. Bobic*, 140 Wn.2d 250, 262, 996 P.2d 610 (2000); *State v. Stark*, 158 Wn. App. 952, 962, 244 P.3d 433 (2010). There are two elements of attempt: an intent to commit the target crime and the taking of a substantial step towards it. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); *State v. Chom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). Thus, all of the elements of attempt are subsumed within the elements of conspiracy. Conspiracy adds the element of “agreement.” Under *Blockburger*, the two crimes are “identical in law” because attempt does not have an element which conspiracy does not have. In this case the two offenses are also identical in fact because both were based on the same attempt to obtain the same property.

As noted in argument section 6, splitting up the continuous course of conduct of trying to obtain the insurance proceeds into different time periods does not change the analysis. The fact that Mockovak tendered a payment to Kultin on November 7 does not mean that the conspiracy

ended on the previous day and that the attempt began on November 7<sup>th</sup>.  
*See, e.g., Snow, supra; In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889) (double jeopardy barred government from convicting defendant of bigamy, a continuing offense, and also committing adultery with the same wife on the next day following the time period charged for the bigamy offense).

Since the two offenses are identical in both fact and law, there is a double jeopardy violation and the remedy is to vacate the attempt conviction. *Varnell*, 162 Wn.2d at 172.

**8. THE CONSPIRACY AND ATTEMPTED THEFT 1 CONVICTIONS MERGE BECAUSE THE LEGISLATURE INTENDED THAT DEFENDANTS BE CONVICTED ONLY OF THE GREATER INCHOATE OFFENSE.**

The entry of convictions for two inchoate theft crimes is also improper under the merger doctrine because it is contrary to legislative intent to convict a defendant of both a greater and a lesser-included offense. RCW 10.61.010 provides:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.

(Emphasis added). Use of the word “or” demonstrates that the Legislature did *not* authorize conviction of a defendant for the crime charged (here conspiracy to commit theft) *and* for an attempt to commit the same crime.

While appellant could find no Washington case addressing this issue, courts in other states have held that convictions for conspiracy and attempt based on the same target crime merge. *Green v. State*, 856 N.E.2d 703, 704 ((Ind. 2006) (defendant plead to attempted robbery and conspiracy to commit robbery, trial court held convictions merged and state supreme court affirmed); *Dean v. State*, 273 Ga. 806, 806 n.1, 546 S.E.2d 499 (2001) (convictions for conspiracy to commit armed robbery and attempt to commit armed robbery merged); *Commonwealth v. Brown*, 336 Pa. Super. 628, 486 A.2d 441 (1984) (attempted burglary and conspiracy to commit burglary merged); *Walker v. State*, 213 Ga. 407, 411-12, 444 S.E.2d 824 (Ga. App. 1994).<sup>59</sup>

Again, the proper remedy is to vacate the duplicative conviction for Attempted Theft 1<sup>o</sup> and to remand for resentencing.

**9. BECAUSE THE INFORMATION OMITTED THE ESSENTIAL ELEMENT OF A SUBSTANTIAL STEP FROM THE CHARGE OF CONSPIRACY TO COMMIT FIRST DEGREE THEFT, THAT CHARGE MUST BE DISMISSED.**

“[T]he ‘essential elements’ rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged.” *State v. Leach*, 113 Wn.2d 679,

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<sup>59</sup> In other jurisdictions where “substantial step” is not an element of the crime of conspiracy, the crimes of conspiracy and attempt do not merge since they are not the same in law and fact, and each crime contains an element that the other does not. *See, e.g., State v. Villalobos*, 120 N.M. 694, 905 P.2d 732 (N.M. App. 1995).

689, 782 P.2d 552 (1989), quoted in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). “[T]he defendant must be apprised of the elements of the crime charged and the conduct which is alleged to have constituted that crime.” *Id.* at 98. “A challenge to the constitutional sufficiency of a charging document may be raised initially on appeal.” *Id.* at 102.

When the challenge is made for the first time on appeal, the appellate court makes a two prong inquiry. First, the court asks whether the missing element appears in any form, or by fair construction can be found somewhere in the information. *Id.* at 108. If the answer to this question is no, then prejudice is presumed and the proper remedy is dismissal of the charge. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). If the answer to the first inquiry is yes, then the court proceeds to the second inquiry and asks whether the defendant can show he was actually prejudiced by the inartful language of the information. *Kjorsvik*, 117 Wn.2d at 106. In the present case, in Count IV the amended information charged the crime of Conspiracy to Commit Theft 1°. CP 269. The taking of a substantial step towards commission of the target crime is an element of the crime of conspiracy. RCW 9A.28.040(1). But the information in this case made no mention of this element. The words “substantial step” never appear in the information. Count IV alleges:

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse MICHAEL EMERIC MOCKOVAK of the crime of

**Conspiracy to Commit Theft in the First Degree**, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant MICHAEL EMERIC MOCKOVAK in King County, Washington, during a period of time intervening between August 5, 2009, through November 6, 2009, did feloniously agree with one or more persons to engage in and cause the performance of such conduct and one of the parties so agreeing did perform an overt act pursuant to the agreement;

Contrary to RCW 9A.28.040, 9A.56.030(1)(a) and 9A.56.020(1)(a) and (b), and against the peace and dignity of the State of Washington.

CP 269. Since the information *completely omitted* the substantial step element, prejudice is simply presumed and the conviction for conspiracy to commit first degree theft must automatically be reversed and dismissed. *McCarty*, 140 Wn.2d at 428.

The State may argue that the substantial step element is not completely omitted from the information because Count IV does allege that one of the parties to the agreement “did perform an overt act pursuant to that agreement.” CP 269. But on its face it is evident that performance of some “overt” act is not the equivalent of performance of an act which is a “substantial” step towards commission of the target crime. For example, if two persons agree to rob a bank at 10 a.m., and pursuant to that agreement both of them travel to a location within a few blocks of that bank, they commit an “overt” act – an act that can be witnessed – which might be said to be pursuant to their agreement. But a substantial step is

different from an overt act. A substantial step need *not* be an act taken pursuant to the criminal agreement. And yet a substantial step *must* be an act “which strongly indicates a criminal purpose and which is more than mere preparation.” WPIC 100.05; *State v. Gatalski*, 40 Wn. App. 601, 699 P.2d 804 (1985).

In *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978), the Court explicitly noted that when the Legislature adopted a new criminal code in 1975, it stopped using the phrase “overt act” and employed the new phrase “substantial step.” The Court held that this change in language had to be viewed as intentional and thus the two phrases had different meanings. Under the pre-1975 criminal statute defining an attempt, “[a]n overt act was understood to mean a direct, ineffectual act done toward commission of a crime, where the design of a person to commit a crime is clearly shown and, slight acts done in furtherance of this design will constitute an attempt.” *State v. Nicholson*, 77 Wn.2d 415, 420, 463 P.2d 633 (1969). But in *Workman* the Supreme Court held that it must “assume that the legislature’s adoption of different language in the newer statute was intentional. ***The standard of substantial step will not be identical to an overt act.***” 90 Wn.2d at 452. A “slight act” no longer suffices, nor does an act of “mere preparation.”

Even assuming *arguendo* that use of the phrase “overt act” were sufficient to “apprise[] [Mockovak] of the elements of the crime charged,” it utterly failed to also apprise him “of the conduct which is alleged to have constituted that crime.” *Kjorsvik*, 117 Wn.2d at 98. **Nothing** in the information told Mockovak **what act** constituted the substantial step allegedly taken towards conspiracy to commit theft.

Assuming this Court believes that the substantial step was articulated in some implied form in the information, the second question is whether Mockovak was prejudiced by the vague way in which it was alleged. Clearly he was prejudiced, because he had no way of knowing what act allegedly provided strong corroboration of his intent to commit Theft 1°.

Jury instructions come too late in the game to fulfill an information’s constitutional function of informing the defendant of the particulars of the charge so that he can prepare and mount a defense at trial. *State v. McCarty*, 140 Wn.2d at 425. For that reason the Supreme Court has flatly *rejected* the contention that clarity in the jury instructions can cure the error in a constitutionally defective charging document. “[A]n information which is constitutionally defective because it fails to state every statutory element of a crime *cannot* be cured by a jury instruction which itemizes those elements.” *State v. Holt*, 104 Wn.2d 315, 322, 704

P.2d 1189 (1985).<sup>60</sup> But even if *Holt* had never been decided, the jury instructions in this case could never cure the constitutional error, since nothing in the theft offense instructions Nos. 27 and 28 said anything about what the substantial step was that supposedly provided strong corroboration of the defendant's criminal design to steal from the insurance company. CP 593-94. Moreover, nothing in the prosecutor's closing argument ever addressed this point. The bald fact is that the prosecution *never identified* the substantial step taken towards first degree theft and there is absolutely no way anyone can say what the jurors thought it was. This failure to identify the conduct which constituted a substantial step not only prejudiced Mockovak's ability to prepare to defend this charge, it also continues to prejudice him on appeal since he is unable to make a meaningful challenge to the sufficiency of the evidence to prove the element of a substantial step.

For these reasons, pursuant to *Kjorsvik*, this Court should vacate Mockovak's conviction for Conspiracy to Commit Theft 1<sup>o</sup> and remand with directions that Count IV be dismissed.

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<sup>60</sup> *Accord State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995) (“[P]roper jury instructions cannot cure a defective information.” Jury instructions and charging documents serve different functions.”).

**10. BECAUSE THE INFORMATION FAILED TO IDENTIFY THE CO-CONSPIRATOR WHO MADE AN AGREEMENT WITH THE DEFENDANT TO COMMIT FIRST DEGREE THEFT, THAT CHARGE MUST BE DISMISSED.**

Count IV of the amended information alleged that Mockovak “did feloniously agree with one or more persons” to commit Theft 1, but it did not identify that person or persons. CP 269.<sup>61</sup> And yet it is settled that “[a] charge which does not connect a defendant with a specific co-conspirator is not maintainable under our conspiracy statutes.” *State v. Miller*, 131 Wn.2d 78, 87, 929 P.2d 372 (1997). A defendant cannot be convicted of conspiring with an unnamed co-conspirator. *State v. Stark*, 158 Wn. App. 952, 962, 244 P.3d 433 (2010) (reversing conviction for conspiracy to commit Murder 1<sup>o</sup>). *Cf. State v. Brown*, 45 Wn. App. 571, 726 P.2d 60 (1986) (reversing conviction for conspiracy to commit theft 1 where neither information nor jury instructions specified the identity of the co-conspirators).

With respect to this defect in the charging document, there is absolutely *nothing* in the amended information regarding the identity of Mockovak’s co-conspirator. There are no words from which it could be implied or inferred that Kultin was the co-conspirator. Thus, despite the

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<sup>61</sup> Neither did Instruction No. 27, the to-convict jury instruction for the offense of Conspiracy to Commit Theft 1. CP 593. As noted above, however, even if the jury instruction has identified the co-conspirator, that would not cure the defect in the charging document. *Holt*, 104 Wn.2d at 322.

rule for liberal judicial construction of a charging document challenged for the first time on appeal, the charge in Count IV is constitutionally inadequate, and under *Kjorsvik* Count IV must be reversed and dismissed.

**11. THE 1997 AMENDMENT TO THE CONSPIRACY STATUTE, WHICH PURPORTS TO ELIMINATE THE “DEFENSE” THAT THERE WAS NO “TRUE” AGREEMENT BECAUSE THE DEFENDANT’S CO-CONSPIRATOR WAS A GOVERNMENT AGENT, VIOLATES DUE PROCESS.**

The essence of the crime of conspiracy is the existence of an agreement between two or more persons to commit a crime. *State v. Dent*, 123 Wn.2d 467, 476, 869 P.2d 392 (1994); *State v. Miller*, 131 Wn.2d 78, 87, 929 P.2d 372 (1999); RCW 9A.28.040(1). As stated in *State v. Pacheco*, 125 Wn.2d 150, 155, 882 P.2d 183 (1994), a conspiratorial agreement necessarily requires more than one person to agree because it is impossible to “agree” with oneself.

In *Pacheco* the Court held that when the only agreement is between the defendant and an undercover police officer, there is no “true” agreement because the police officer has no real intent to commit the crime. *Id.* at 156. Thus *Pacheco* reversed and dismissed the appellant’s convictions for conspiracy to commit murder and to deliver drugs. In the present case, the only other person with whom Mockovak could conceivably have conspired was the FBI informant Daniel Kultin. Under *Pacheco*, this would be insufficient to support the conviction.

However, appellant acknowledges that the Legislature amended the conspiracy statute in 1997 by adding subsection (2)(f). This appeal raises an issue of first impression regarding the proper construction of that amendment. The subsection added to the statute in 1997 provides:

*It shall not be a defense* to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired: . . . [i]s a law enforcement officer or other government agent who did not intend that a crime be committed.

RCW 9A.28.040(2)(f) (emphasis added).

This amendment expressly asserts that a fact – the absence of any government agent intent to carry out the crime – is “*not a defense.*” But it does not eliminate *the element* of the crime that an agreement between two or more persons be proved. Defendants bear the burden of proof to establish a “defense.” But the prosecution bears the burden of proof on the elements of the crime. Consequently, two questions now arise: (1) Is it unconstitutional for a statute to criminally punish a “unilateral” agreement to commit a crime as a conspiracy? (2) And if it is not unconstitutional, under what circumstances can a defendant (after the 1997 amendment) be convicted of a conspiracy where the only person he is supposed to have conspired with is a government agent?

Taking the constitutional question first, Mockovak draws this Court’s attention to the following language of the *Pacheco* opinion:

[T]he unilateral approach fails to carry out the primary purpose of

the statute. ***The primary reason for making conspiracy a separate offense from the substantive crime is the increased danger to society posed by group criminal activity.*** [Citation omitted]. However, the increased danger is nonexistent when a person “conspires” with a government agent who pretends an agreement. ***In the feigned conspiracy there is no increased chance that the criminal enterprise will succeed, no continuing criminal enterprise, no educating in criminal practices, and no greater difficulty of detection.***

***Indeed, it is questionable whether the unilateral conspiracy punishes criminal activity or merely criminal intentions.*** [Citation], The “agreement” in a unilateral conspiracy is a legal fiction, a technical way of transforming nonconspiratorial conduct into a prohibited conspiracy. [Citation]. ***When one party merely pretends to agree, the other party, whatever he or she may believe about the pretender, is in fact not conspiring with anyone.*** Although the deluded party has the requisite criminal intent, there has been no criminal act. [Citation].

*Pacheco*, 125 Wn.2d at 157 (emphasis added).

In *Pacheco* these observations led the Court to construe RCW 9A.28.040(1) as retaining the common law requirement that there be a “true” agreement with a real “meeting of the minds.” But now that the Legislature has amended the statute and eliminated the “defense” that the government agent was just feigning agreement, the question arises whether the legislative decision to impose additional punishment (beyond that imposed for an attempt) is constitutional. Mockovak submits that it is not, either because such a statute serves no legitimate government purpose, or because it is cruel and/or unusual punishment to impose additional criminal punishment for having bad thoughts or intentions.

Moreover, as the Supreme Court commented in *Pacheco*, if unilateral conspiracies – conspiracies between the defendant and himself – can be punished, then the Legislature has authorized law enforcement officials to manufacture crime. By injecting a “second person” into the equation in order to create a fictional “agreement,” law enforcement can simply keep itself busy by creating conspiracies which do not really exist, and thus which do not really pose any danger to society:

*Another concern with the unilateral approach is its potential for abuse. In a unilateral conspiracy the State not only plays an active role in creating the offense, but also becomes the chief witness in proving the crime at trial. [Citation]. We agree with the Ninth Circuit this has the potential to put the State in the improper position of manufacturing crime. At the same time, such reaching is unnecessary because the punishable conduct in a unilateral conspiracy will almost always satisfy the elements of either solicitation or attempt. The State will still be able to thwart the activity and punish the defendant who attempts agreement with an undercover police officer.*

*Pacheco*, 125 Wn.2d at 157-58 (emphasis added).

These observations and predictions fit the present case like a glove. Here the State manufactured a “crime” of conspiracy which never existed because there never was any real agreement. Here, as Justice Johnson observed, punishment for the crime of a unilateral conspiracy is wholly unnecessary because the defendant can be punished for attempted theft, and in fact he was convicted of that charge and is being punished for it.

For these reasons, Mockovak respectfully submits that the imposition

of additional criminal punishment for a “unilateral conspiracy” which the State manufactured, serves no rational purpose, imposes unnecessary punishment on top of his punishment for the crime of attempt, and therefore violates the due process clause and the cruel and/or unusual punishment clauses of the state and federal constitutions.

**12. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR CONSPIRACY TO COMMIT THEFT 1 BECAUSE THERE WAS NO EVIDENCE OF ANY AGREEMENT BY KULTIN THAT HE WOULD HELP OBTAIN THE INSURANCE PROCEEDS BY DECEPTION.**

While Mockovak submits that his conviction for a unilateral conspiracy to commit theft is unconstitutional, this Court can avoid the need to decide that issue by simply finding that the evidence was insufficient to prove even a feigned or fake “agreement.” It is significant while the Legislature has relieved the prosecution of having to prove that the *true* intent of the government agent was to carry out the agreement to commit a crime, it did *not* relieve the State of the burden of proving that *some kind of an agreement* was made between the defendant and some other person. The upshot is that while a “fake” agreement will arguably suffice under the statute to establish criminal liability for conspiracy, there *still* must be proof beyond a reasonable doubt that such a “fake”

agreement was actually made.

There is *no evidence* in this case to prove that Kultin made an agreement with Mockovak to defraud the insurance company by collecting the insurance proceeds on King's life after he was killed. Moreover, it is difficult to conceive what Kultin could conceivably have agreed to do. The crime of Theft 1° by deception was premised on the theory that Mockovak was going to deceive the insurance company by making a claim on the policy without disclosing the material fact that he was King's slayer. There was never any evidence that Kultin agreed to deceive the insurance company, or that he agreed to communicate in any way with the insurer, or that he agreed to help submit the claim.

Since there is no such evidence, even applying the rule that all reasonable inferences must be drawn in favor of the State, the conviction for Conspiracy to Commit Theft 1° must be reversed and dismissed.

#### **F. CONCLUSION**

For the reasons stated above in sections 1 of the Argument section, appellant asks this Court to find that due to outrageous governmental conduct in the law enforcement investigation of this case, prosecution of the defendant is barred by due process.

For the reasons stated in sections 2, 3, & 4, appellant asks this Court to reverse his convictions and to remand the case for a new trial, so that a

jury may determine the entrapment defense without being misled by either an improper jury instruction or improper closing argument on the proof required to establish the defense of entrapment.

For the reasons stated in sections 5 & 6, appellant asks this Court to vacate his conviction for Solicitation of Murder 1° (Count II) and to remand for resentencing.

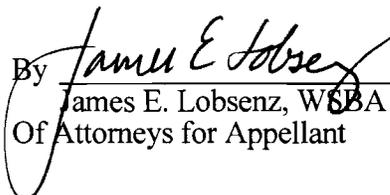
For the reasons stated in section 7 & 8, appellant asks this Court to vacate his conviction for Attempted Theft 1° (Count V) and to remand for resentencing.

For the reasons stated in sections 9 & 10, appellant asks this Court to vacate his conviction for Conspiracy to Commit Theft 1° (Count IV) and to remand for dismissal of that count and for resentencing.

For the reasons stated in section 11 & 12, appellant asks this Court to vacate his conviction for Conspiracy to Commit Theft 1° (Count IV) and to remand for dismissal of that count *with prejudice*, and for resentencing on any remaining counts.

DATED this 28 th day of November, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSB No. 8787  
Of Attorneys for Appellant

# APPENDIX A

INSTRUCTION NO. 29

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.

# APPENDIX B

## APPENDIX B

<b>Vol. No.</b>	<b>Hearing</b>
RP I-A	Pretrial hearing of November 18, 2009 (arraignment);
RP II-A	Pretrial hearing of December 19, 2009;
RP III-A	Pretrial hearing of February 18, 2010;
RP IV-A	Pretrial hearing of February 24, 2010;
RP V-A	Pretrial hearing of May 27, 2010;
RP VI-A	Pretrial hearing of July 14, 2010;
RP VII-A	Pretrial hearing of October 22, 2010;
RP VIII-A	Pretrial hearing of December 6, 2010;
RP IX-A	Pretrial hearing of December 13, 2010;
RP X-A	Pretrial hearing of December 16, 2010;
RP XI-A	Pretrial hearing of January 3, 2011;
RP I	Trial proceedings of January 12, 2011 (jury selection);
RP II	Trial proceedings of January 13, 2011 (jury selection);
RP III	Trial proceedings of January 18, 2011 (opening statements);
RP IV	Trial proceedings of January 18, 2011;
RP V	Trial proceedings of January 19, 2011;
RP VI	Trial proceedings of January 20, 2011;
RP VII	Trial proceedings of January 24, 2011;
RP VIII	Trial proceedings of January 25, 2011;
RP IX	Trial proceedings of January 26, 2011;
RP X	Trial proceedings of January 27, 2011;
RP XI	Trial proceedings of January 28, 2011;
RP XII	Trial proceedings of January 31, 2011 (closing arguments);
RP XIII	Trial proceedings of February 1, 2011 (closing arguments);
RP XIV	Trial proceedings of February 2, 2011;
RP XV	Trial proceedings of February 3, 2011 (verdicts returned);
RP XVI	Post trial hearing of February 23, 2011 (on release pending sentencing);
RP XVII	Post trial hearing of March 16, 2011 (on shackling of defendant);
RP XVIII	Sentencing hearing of March 17, 2011.

# APPENDIX C

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 08/05/2009

To: Seattle

Attn: CHSC

From: Seattle

C - 1

Contact: SA Lawrence D Carr, (206) 262-2063

Approved By: Maeng J Sung *Maeng J Sung*

Drafted By: Carr Lawrence Bldc

Case ID #: 137-SE-95730 <sup>5</sup> (Pending)

Title: SE-00022169

Synopsis: Admonishments provided to the Confidential Human Source (CHS).

Details: The following are instructions to be given to a CHS at opening and for other specified operational reasons.

Admonishments

Section 4.1 of the Confidential Human Source Policy Manual (CHSPM) states that at opening (before first operational tasking) and thereafter at least annually or more often if circumstances warrant, at least one FBI Agent and a witness who is either another FBI Agent or another government official must provide the CHS with all applicable instructions. (These guidelines shall be administered at opening, prior to the first operational use and no later than 90 days after the date of opening.)

The CHS was opened on 08/04/2009 and the instructions were provided to the CHS on 08/05/2009. The captioned CHS was provided with the instructions set forth below:

I. Opening

1. The CHS's assistance and the information provided to the FBI are entirely voluntary.
2. The CHS must provide truthful information to the FBI.
3. The CHS must abide by the instructions of the FBI and must not take or seek to take any independent actions on behalf of the US Government.

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4. The US Government will strive to protect the CHS's identity but cannot guarantee it will not be divulged.

## II. Additional Admonishments

If applicable to the particular circumstances of the CHS, or as they become applicable, the following admonishments need to be completed. They need not be given if they have no relevance to the CHS's situation. (For example, the immunity instruction need not be given unless there is an issue of apparent criminal liability or penalties relating to the CHS. The Attorney General's Guidelines emphasize, however, that whether or not these instructions are given, the FBI has no authority to confer immunity and that agents must avoid giving any person the erroneous impression that they have any such authority.) Indicate whether the following instructions were given:

1. The FBI on its own cannot promise or agree to any immunity from prosecution or other consideration by an FPO, a state or local prosecutor, or a Court in exchange for the CHS's cooperation because the decision to confer any such benefit lies within the exclusive discretion of the prosecutor or a Court. However, the FBI will consider (but not necessarily act upon) advising the appropriate prosecutor of the nature and extent of the CHS's assistance to the FBI. (This instruction should be given if there is any apparent issue of criminal liability or penalty).  Yes/No
2. The CHS is not authorized to engage in any criminal activity and has no immunity from prosecution for any unauthorized criminal activity. (This instruction is not necessary for CHSs who have such authorization. This instruction should be repeated if the CHS is suspected of committing unauthorized illegal activity).  Yes/No
3. The CHS is not an employee of the US Government and may not represent himself/herself. (This instruction should be given to all CHSs except under those circumstances where the CHS previously has been or continues to be otherwise employed by the US Government).  Yes/No
4. The CHS may not enter into any contract or incur any obligation on behalf of the US Government, except as specifically instructed and approved by the FBI. (This instruction should be given to all CHSs except to those CHSs who are otherwise authorized to enter into a contract or incur an obligation on the behalf of the US).  Yes/No

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5. No promises or commitments can be made, except by the Department of Homeland Security (DHS), regarding the alien status of any person or the right of any person to enter or remain in the US. (This instruction should be provided if there is any apparent issue of immigration status that relates to the CHS.) Yes/No
6. The FBI cannot guarantee any rewards, payments, or other compensation to the CHS. Yes/No
7. Each time a CHS subject to the AGGs CHS receives any rewards, payments, or other compensation from the FBI, the CHS shall be advised at the time of payment that he/she is liable for any taxes that may be owed on that compensation. Yes/No
8. Whenever it becomes apparent that the CHS may have to testify in a court or other proceeding, the CHS must be advised of that possibility (see Confidential Human Source Policy Manual [CHSPM], Section 9.1). Yes/No

**III. Additional Instructions Based on Employment or Position**

9. If a CHS is in a position to obtain information from a subject who is facing pending criminal charges for whom his/her 6th Amendment right to counsel has attached, the CHS must be advised not to solicit such information from the subject regarding the pending charges (see CHSPM, Section 9.4). Yes/No
10. For CHSs in a position to obtain information from a subject who is represented by counsel or planning a legal defense, the CHS must be advised not to interfere with an attorney/client relationship (see CHSPM, Section 9.4). Yes/No
11. If the CHS is an employee of a financial institution, the CHS must be advised that he/she remains subject to the provisions of the Right to Financial Privacy Act and that the FBI will not knowingly accept information which violates the provisions of the Act. (CHSPM, Section 4.2.2) Yes/No
12. If the CHS is an employee of an educational institution, the CHS must be advised that he/she remains subject to the provisions of the Family Educational Rights and Privacy Act of 1974 (20 USC Sec. 1232 g) known as the Buckley amendment (see CHSPM, Section 4.2.3). Yes/No

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13. If the CHS is a Union official of any rank charged with the duties and obligations under the Employee Retirement and Income Security Act (ERISA) of 1974 (Title 29 USC) (i.e., having responsibilities related to retirement, benefits, or other income benefits of union members [see Title 29 USC]) he/she must be advised that he/she remains subject to reporting provisions of the Employee Retirement and Income Security Act (ERISA). The CHS must not operate in a manner which adversely affects the operation of union affiliated pension, welfare, and benefit plans (see CHSPM, Section 5.2.3). Yes/No Yes

The content and meaning of the mandatory instructions and relevant additional instructions were conveyed to the CHS by the FBI Agent named below and were witnessed by the government official named below. The CHS acknowledged his/her receipt and understanding of these instructions.

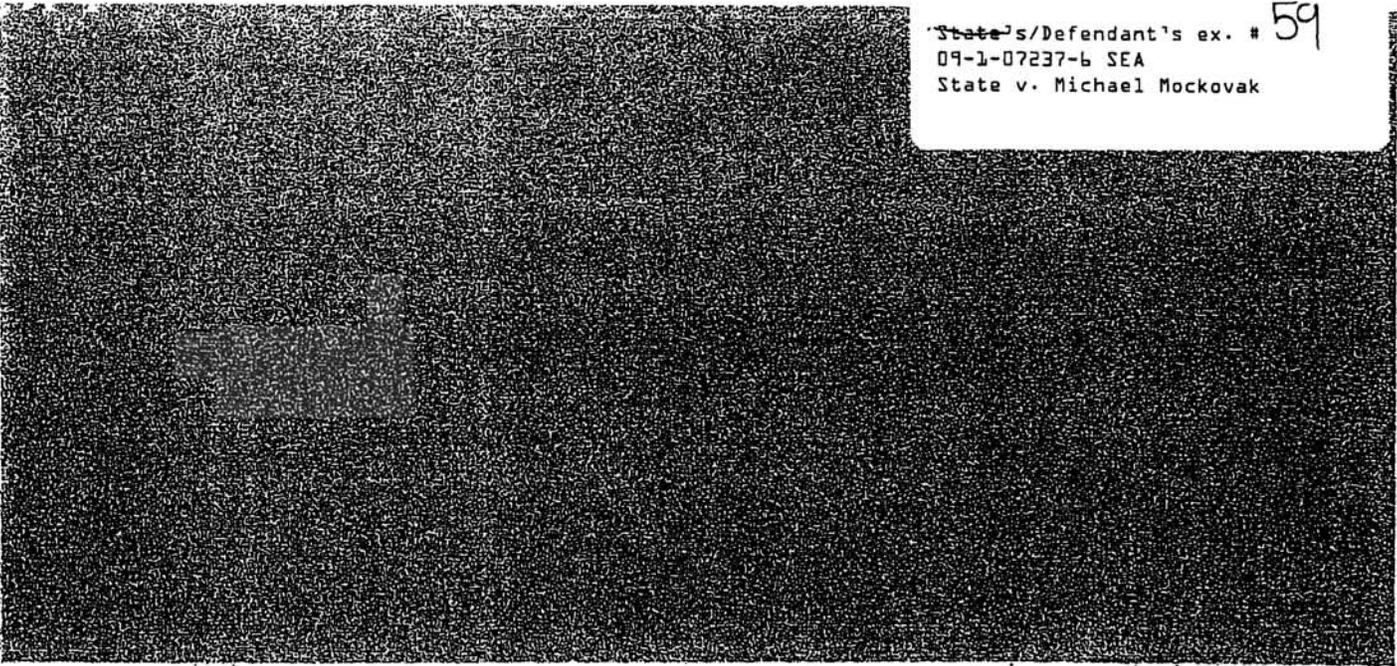
[Signature] 08/05/09 [Signature] 08/05/09  
FBI SA Date Witnessing Official Date  
Signature Signature

LAWRENCE W. CARP  
FBI SA  
Print Name

LEN CARVER  
Witnessing Official  
Print Name

TFO SEATTLE POLICE  
Witnessing Official's  
Title and Agency

# APPENDIX D



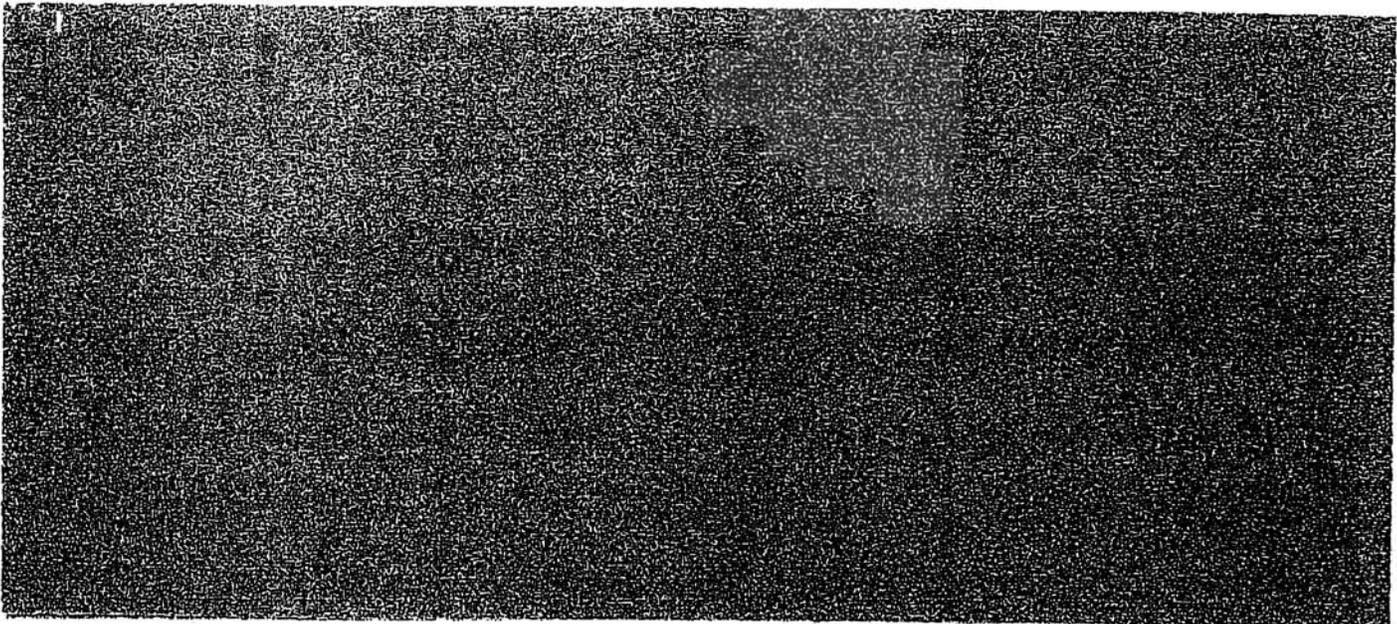
**OIA Admonishments**

- (1) The CHS is only authorized to engage in the illegal activity as set forth in the written or oral authorization and not in any other illegal activity. (The CFP's written authorization should be read to the CHS, unless it is not feasible).
- (2) The CHS's authorization is limited to the time period specified in the written authorization.
- (3) If the CHS is asked by any person to participate in any unauthorized illegal activity or if he/she learns of plans to engage in such activity, he/she must immediately report the matter to his/her Case or Co-Case Agent.
- (4) Participation in any prohibited conduct or unauthorized illegal activity could subject the CHS to criminal prosecution.
- (5) Under no circumstances may the CHS:
  - a. Participate in an act of violence (except in self defense);
  - b. Participate in an act designed to obtain information for the Federal Bureau of Investigation (FBI) that would be unlawful if conducted by a law enforcement agent (e.g.; breaking and entering, illegal wiretapping, illegal opening or tampering with the mail, or trespass amounting to an illegal search);
  - c. Participate in an act that constitutes obstruction of justice (e.g: perjury, witness tampering, witness intimidation, entrapment, or fabrication, alteration, or destruction of evidence, unless such illegal activity has been authorized); or
  - d. Initiate or instigate a plan or strategy to commit a federal, state, or local offense, unless such activity has been authorized.

**Acknowledgement Of OIA Admonishments**

I hereby acknowledge that I have been advised of the above-listed guidelines and instructions and I fully understand all of the provisions, including the restrictions on the authorized conduct and the time period allowed for this specific conduct.

CHS Signature or Initials: *[Signature]*  
Date: 08/02/09 <sup>DK</sup> signed on 2/24/10  
Agent Signature: X *[Signature]*  
Date: 2/24/10  
Agent Printed Name: C.W. Woodbury  
Witness Signature: X *[Signature]*  
Date: 2/24/10  
Witness Printed Name: Len Carver - SPD



**OIA Admonishments**

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  - d. Initiate or instigate a plan or strategy to commit a federal, state, or local offense, unless such activity has been authorized.

**Acknowledgement Of OIA Admonishments**

I hereby acknowledge that I have been advised of the above-listed guidelines and instructions and I fully understand all of the provisions, including the restrictions on the authorized conduct and the time period allowed for this specific conduct.

CHS Signature or Initials: *[Signature]*  
 Date: *DF 11/2/09* signed *2/24/10*

Agent Signature: X *[Signature]*  
 Date: *2/24/10*

Agent Printed Name: *C.W. Woodbury*

Witness Signature: X *[Signature]*  
 Date: *2/24/10*

Witness Printed Name: *Len Casner - SPD*