

No. 69390-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of,
MICHAEL E. MOCKOVAK,
Petitioner.

FILED
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Court of Appeals
Division I
State of Washington

ON APPEAL FROM COUNTY SUPERIOR COURT
Honorable Palmer Robinson

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

James E. Lobsenz WSBA No. 8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Petitioner

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I. INTRODUCTION

Mockovak's trial attorneys failed to support his entrapment defense with evidence that Mockovak, as a result of having been sexually abused for ten years when he was a child,¹ developed the well-known adverse effects of the battered child syndrome: learned helplessness and suggestibility. His attorneys failed to present readily available expert testimony that these long-term psychological injuries made Mockovak exceptionally vulnerable to entrapment by the government's informant.

Initially, in response to Mockovak's IAC claim the State offered a litany of theories – but never any factual support of any kind – in an attempt to justify the trial attorneys' failure to present this evidence. Mockovak has provided specific facts to negate the State's empty speculation. The State's most recent brief offers new speculation. Now the State supposes that the trial attorneys made a conscious decision not to present evidence of learned helplessness because they thought that such evidence would hurt the defense of entrapment. But the State offers no evidence to support that rank speculation. Mockovak submits facts, not unsupported theories, to negate the State's latest speculation.

The State also asks this Court to embrace a new legal standard for PRPs, requiring a Petitioner to obtain an admission by trial counsel that

¹ The abuse started when he was eight years old and perhaps even earlier. CP 676.

his or her own conduct was deficient and allowing the State to draw a missing witness inference against any Petitioner who fails to submit such an admission. But there is no legal basis for the State's attempt to impose new burdens on Petitioners. Despite the State's urging, it is simply not the law that a Petitioner who is a victim of ineffective assistance must then rely upon the same counsel to fess up.²

Mockovak's PRP is based upon facts, not speculation. His PRP is based on case law that has existed for decades. After two full rounds of briefing the State has yet to come forward with any facts to support its litany of speculative theories.

II. ARGUMENT

A. The State offers no factual support for its theories.

Initially the State argued “[t]here is no evidence that trial counsel were told about this abuse before trial”³ and “[o]viously if Mockovak chose not to share this information before trial, defense counsel could not prepare a defense on this basis.”⁴ The State argued that it “defie[d] logic

² In fact, in one conspicuous case from the late 1990's, former trial counsel retained his own lawyer to argue vociferously that he had not been ineffective. Former trial counsel went so far as to “intervene” in the criminal case. The attorney was so angry that he “threatened to reveal hurtful things about [the defendant] and his family.” *State v. Cloud*, 95 Wn. App. 606, 613, 76 P.2d 649 (1999). Eventually, over former counsel's bitter protest, the trial court found that he had been ineffective. See *Fifth Decl. Lobsenz*, ¶ 31.

³ *State's Response to Personal Restraint Petition* (“SRP,” filed 11/17/14), at 77.

⁴ *Id.* at 78.

to assert that Mockovak shared this information with trial counsel.”⁵

The State failed to present any evidence for its speculation. Nonetheless, Mockovak showed that his attorneys were told about his childhood sexual abuse more than a year before trial. They were *specifically* told by a forensic psychologist that victims of such long-term abuse develop the attitude that resistance to the demands of their abuser is futile⁶ and “this becomes a part of their general response to people who seek to manipulate them,” thereby making them more vulnerable to entrapment.⁷ Faced with those facts, the State’s most recent opposition abandons its earlier contention.

But the State cannot abandon so quickly the assumption at the heart of its prior argument. The State thought it “defie[d] logic” to believe that trial counsel would fail to present evidence of childhood sexual abuse if they knew about it. As Mockovak has shown through declarations by three witnesses, trial counsel *did* know about the abuse. The part that “defies logic” is how the State can now reverse course completely and argue that defense counsel rendered effective assistance when they presented the defense of entrapment, but failed to present evidence of the

⁵ *Id.* at 78.

⁶ There were times when Mockovak “unsuccessfully tried physical resistance” but his uncle was able to overpower him and forcibly sexually assaulted him. CP 676.

⁷ Decl. Gonsiorek, ¶¶ 5, 6, & 9; and *Petitioner’s Reply Brief* (filed 2/6/15), at 4-7; *Brief of Petitioner* (filed 6/22/15), at 8-9.

long-term effects of childhood sexual abuse.

The State's initial opposition brief also speculated that there was no evidence that any expert believed that Mockovak suffered from learned helplessness. Thus, the State urged, even if the trial attorneys did know about the childhood sexual abuse, there was no reason to believe that any favorable psychological evidence existed.⁸

The State failed to present any factual support for its speculation. Nonetheless, PRP counsel retained Dr. Novick-Brown to examine Mockovak.⁹ Based upon psychological testing and her interviews of Mockovak, she diagnosed him as suffering from Post-Traumatic Stress Disorder ("PTSD") caused by ten years of childhood sexual abuse.¹⁰ She specifically concluded that "**testing revealed** an external locus of control, deficient ego mastery, defective inhibition, **suggestibility, and learned helplessness.**"¹¹ Faced with Dr. Novick-Brown's examination, testing, and conclusions, the State's most recent brief abandons its contention that trial counsel could not have found an expert to make the unsurprising diagnosis that Mockovak does in fact suffer from the well-established

⁸ *Id.* at 73 ("Mockovak cannot establish deficient performance because Mockovak has not established . . . that an expert would have testified that he suffered from learned helplessness . . .").

⁹ *Decl. Novick-Brown*, ¶3.

¹⁰ *Id.*, ¶¶3-7.

¹¹ *Id.*, ¶8 (emphasis added).

consequences of years of childhood sexual abuse. But the State cannot escape the obvious import of its prior argument that the logical explanation for failing to present such evidence must have been there was no such evidence. Since it has been shown that there *was* such evidence, the State must live with the import of its prior (now discredited) argument, that if such evidence existed competent attorneys would have presented it.

The State's most recent opposition brief asserts that trial counsel likely decided not to present evidence of learned helplessness because such evidence would have been detrimental to the entrapment defense. *State's Supplemental Response* ("SSR"), at 2. The State speculates that if Mockovak's attorneys had presented evidence of learned helplessness and suggestibility, the entrapment defense would have lost all credibility. According to the State, "The notion that he was helpless to resist his subordinate, an information technology employee, when he routinely battled his business partner, his chief operating officer, and other high level peers, is highly improbable." *Id.* At the threshold, the State is offering argument, nothing more. The State has *no factual support* to rebut the expert opinion of Dr. Novick-Brown, based upon her psychological testing of Mockovak and consistent with extensive literature in the field of childhood sexual abuse, that Mockovak suffers from PTSD, learned helplessness, and suggestibility. The State also misperceives what

such psychological deficits entail. The State supposes – with no factual support – that persons suffering from these mental health illnesses are cowering and passive. But the case law is replete with fact patterns where the evidence of PTSD and learned helplessness is relevant and admissible to explain why the defendant committed violent crimes.¹² And that is also exactly what Dr. Novick-Brown has already stated: “PTSD is associated with aggressive behavior, heightened sensitivity to potential threats, and over reaction, which may lead to reckless or self-destructive behavior.”¹³

B. All the evidence shows that the trial attorneys consistently ignored the advice to get an expert on childhood sexual abuse to evaluate Mockovak.

At the very outset, within a month of Mockovak’s arrest, Dr. John Gonsiorek, an experienced forensic psychologist, told trial counsel that

- (1) “during childhood [Mockovak] was sexually abused for years”;
- (2) he had a “history of being easily manipulated and exploited”;
- (3) “that people who are repeatedly sexually abused as a child tend to develop the attitude that resistance to . . . the abuser is futile, and this becomes part of their general response to people who seek to manipulate them”;
- (4) that although “professional ethics prevented [Gonsiorek] from serving in an expert witness capacity . . . *other experts with such expertise [in childhood sexual abuse] might be helpful in his defense*”; and
- (5) that “*Mike’s history as a victim of childhood sexual abuse*

¹² See *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984); *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984); *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993).

¹³ *Decl. Novick-Brown*, ¶12, citing DSM-5 at pp. 275-76. *Id.*, ¶15 (PTSD studies have found “disrupted communication in fear-network connectivity leads to exaggerated and generalized fear responses. Dr. Mockovak’s reactions to Kultin over the six months in question are consistent with this research.”).

made him more vulnerable to pressure exerted by others to get him to do something he did not want to do, and thus *made him more vulnerable to entrapment*.

Decl. Gonsiorek, ¶¶5-9 (emphasis added).

Although the State speculates in its most recent brief that trial counsel considered and rejected presenting evidence of learned helplessness, the State offers no facts to support its latest speculative theory. The flaws in the State's speculative hypothesis are transparent.

First, it is completely at odds with all the arguments that the State initially made. In their initial briefing it was conceded that –

- if they had only known of the childhood sexual abuse, or
- if they had only been able to find an expert who would confirm that Mockovak had these psychological injuries, or
- if only Washington case law allowed such evidence to be presented,

– *well then of course they would have presented this evidence* because it obviously provides powerful support for the entrapment defense that, as the trial judge noted, everyone knew from the very start of the case was going to be the defense offered at trial.¹⁴

¹⁴ One month before trial, and more than a year after the charges had been filed, one of the trial prosecutors stated that it had only recently learned “that the defense was going to be entrapment.” *Trans.* 12/6/10, at 71. The trial judge rejected this statement as preposterous stating, “Now, Ms. Barbosa, I mean a person with very little experience in criminal law need only read the cert [the certificate of probable cause filed along with the initial Information] and [they would] be hard pressed to say that it [was] a surprise” to the prosecution to learn that the defense at trial was going to be entrapment. *Id.*

See Trans. 12/6/10 at 71.

But *now*, in a classic flip-flop, the State takes the exact opposite position. Now the State says that the trial attorneys made a reasonable strategic choice not to present this evidence. The State simply *asserts* – without any evidentiary basis and without citing to any page, passage, or paragraph – that the trial attorneys consciously considered the wisdom of presenting evidence of learned helplessness.

The facts do not support the State’s new theory. A review of all the files of trial counsel shows that despite being so advised, trial counsel never heeded this advice, never obtained an expert in childhood sexual abuse, and never considered presenting expert testimony about the long-term effects of such abuse on Mockovak’s ability to resist the inducements of the informant. *Fifth Decl. Lobsenz*, ¶¶ 17, 18, 28, 29.

The absence of any legal research on the pertinent subjects is striking. Even a cursory Westlaw search for Washington State cases containing key phrases turns up 10 criminal cases which mention “learned helplessness,” 33 cases that contain the phrase “battered child,” and 54 cases that mention “battered women.” *Id.*, ¶¶ 22-24. But a search of the trial attorneys’ electronic folder for legal research reveals that *none* of these cases were found. *Id.* In fact, the subfolder labeled “mental health” that was created within the folder “legal research” *does not have any cases in it at all.* *Id.*, ¶21.

The attorneys' stunning failure to do any legal research about psychological harm to abused women and children is all the more alarming since one of the attorneys did do legal research about the law of entrapment in Washington. There are 23 cases in the subfolder labeled "Entrapment," (although there is no copy of the Washington statute on entrapment). Thus, despite being specifically told by Gonsiorek that childhood sexual abuse makes people "more vulnerable to entrapment," no legal research was done in this area. Similarly, the trial attorneys' itemized billing records do not contain *any* references to the subjects of battered women, battered children, or learned helplessness. *Id.*, ¶28.

The "legal research" file does contain a subfolder on "pharmaceuticals," which contains medical journal articles on steroid induced psychosis, and on the adverse effects of certain medications that Mockovak had been taking. *Id.*, ¶¶ 19, 27. Thus there is evidence to show that trial counsel did consider presenting a "traditional" diminished capacity defense based upon the contention that Mockovak's prescription medications reduced his capacity to form the intent to kill. This evidence is consistent with all the other evidence that shows that trial counsel erroneously believed that if they presented a mental health defense, then

they would not be allowed to present an entrapment defense.¹⁵

If the trial attorneys really had considered presenting expert testimony from a psychologist to support the entrapment defense, there would be *some mention of this somewhere* in their files. It is inconceivable that this could have been considered without leaving some trace of evidence showing such consideration. But “there is no objective evidence contained in the trial attorneys’ files to support the notion that they ever considered expert testimony on the subject of the adverse long-term psychological effects of childhood sexual abuse, such as learned helplessness, suggestibility, and Post Traumatic Stress Disorder.” *Id.*, ¶30.

Even when the trial was over, in preparation for sentencing, attorney Marmer urged trial counsel to hire an expert on childhood sexual abuse to evaluate Mockovak, and to explain the causal connection between such abuse and an increased vulnerability to entrapment, but trial counsel *still* did not follow such advice. *Third Decl. Marmer*, ¶¶ 11,¹⁶ 13,¹⁷ 14. They *still did not* get any expert on childhood sexual abuse to

¹⁵ See *Decl. Marmer* ¶14; *Third Decl. Marmer* ¶9; *Third Decl. Mockovak* ¶¶10, 11, 13; and trial counsel’s patently erroneous statement made on the record in open court, that “[i]n the State of Washington, Dr. Mockovak has to admit to the offense before he can even plead the defense of entrapment.” *Trans.* 12/6/10 at 15.

¹⁶ “In that same meeting after the trial, I was the one who raised with attorneys Tvedt and Robinson that it would be desirable to retain experts to analyze the long-term effects of sexual abuse.”

¹⁷ “I made the point that they should find a local expert on childhood sexual abuse who could examine Mockovak. That local expert then could explain how Mockovak’s
(Footnote continued next page)

examine Mockovak and while they did get an expert to summarize the general research findings about how sexually abused children are psychologically damaged, that expert's report said *nothing* about Mockovak specifically,¹⁸ and at sentencing one of the prosecutors pointed out that "there is absolutely no evidence in this case that that experience led to this crime." *Id.*, ¶¶ 17-18. Similarly, the attorneys' sentencing memorandum offered no explanation of any causal connection between the childhood sexual abuse and the crimes. *Id.*, ¶¶ 19-20.

In sum, from the very beginning to the very end, the trial attorneys ignored the advice they were given and failed to present the type of psychological evidence that case law both in this State, and in other jurisdictions, has recognized as highly relevant and admissible.

C. The State's speculation that Attorney Tvedt discussed presenting learned helplessness evidence with attorney Marmer is completely wrong.

In a complete about-face from its initial position, at the last hour the State now argues that the trial attorneys *did* consider presenting a learned helplessness defense, and that in his "second declaration Mr. Marmer makes clear that he and Ms. Tvedt were discussing a learned

past might make him more susceptible to suggestions, including suggestions that played upon his fear that others were taking advantage of him and manipulating him. I told them that they needed to have someone with expertise and experience in the treatment of survivors of childhood sexual abuse to explain the type of psychological damage that led Mockovak to commit the crimes he had been convicted of."

¹⁸ *Third Decl. Marmer*, ¶17.

helplessness defense perhaps as late as September, 2010.” *SSR*, at 21. As attorney Marmer states, the State’s characterization of the facts in his second declaration is completely erroneous:

The prosecutor’s brief seeks to create the incorrect impression that Ms. Tvedt and I discussed learned helplessness. To be clear, Ms. Tvedt and I *never* discussed learned helplessness. Nor did I ever discuss learned helplessness with Jeff Robinson or Joe Campagna. Throughout the entire time leading up to the trial, and throughout the trial itself, the subject of learned helplessness was *never* mentioned by *any* of the defense attorneys.

I did not even know the phrase “learned helplessness” until long after the trial was completed

Id., ¶¶4-5 (emphasis in original).

Marmer explains that he and Tvedt *did* discuss the possible adverse effects that Mockovak’s anti-depression and respiratory medications had on Mockovak, and that Tvedt did explore the possibility that “the steroid Mockovak had been taking caused him to become psychotic and engage in “steroid rage.” *Id.*, ¶7. But “[p]rior to Mockovak’s trial, Mockovak’s attorneys *never* indicated that they had considered whether the long-term effects of childhood sexual abuse made Mockovak more susceptible or vulnerable to entrapment.” *Id.*, ¶8. “Tvedt never suggested that they could present evidence concerning childhood sexual abuse as part of the entrapment defense.” *Id.*, ¶9. Instead, Tvedt told Marmer that “they had to choose between a defense of diminished capacity and a defense of entrapment,” and “that they had to be careful not to present evidence

concerning Mockovak's mental state that might prevent them from obtaining a jury instruction on entrapment." *Id.* The State cannot put a gloss on these facts to explain away trial counsel's failure to consider presenting evidence of childhood sexual abuse in support of the entrapment defense. Trial counsel erroneously believed that any attempt to present evidence of Mockovak's mental health would prevent them from presenting the entrapment defense.¹⁹ This massive blunder led directly to the failure to present evidence that would have supported the entrapment defense.

D. An admission of ineffectiveness from trial counsel is not a requirement for establishing an IAC claim.

The State argues that since Mockovak has not offered a declaration from one of the trial attorneys that contains an admission to ineffective assistance, that this Court must reject his IAC claim.²⁰ But there is no

¹⁹ This *was* the law in Washington until 1992. *See State v. Matson*, 22 Wn. App. 114, 587 P.2d 540 (1978) that entrapment could only be argued if the defendant admitted that the crime took place. But in 1992 this Court *repudiated Matson* in *State v. Galisia*, 63 Wn. App. 833, 836-37, 822 P.2d 303 (1992) ("We do not require a defendant to admit either the crime itself or all the elements . . . before being entitled to an entrapment instruction." *See also Mathews v. United States*, 485 U.S. 58, 62 (1988).

²⁰ In an attempt to have this Court apply the "missing witness" doctrine, the State cites to *State v. Abdulle*, 174 Wn.2d 411, 417, 275 P.3d 1113 (2012). There the "missing" witness was a police officer whom the State failed to call at a suppression hearing. The Court *rejected* the defendant's contention that a police officer was "within the control" of the State and rejected the argument that the failure to call the officer should have led the judge to draw an adverse inference against the State. Just as a police officer is not a witness within the State's control, a defendant's former trial attorney is not a witness within his control. Thus no adverse inference can be drawn from a PRP petitioner's failure to obtain an admission of ineffective assistance from former counsel.

such requirement, and for good reason.

While some trial defense attorneys may be willing to “fall on their sword” for a former client by confessing that they were ineffective, others may be extremely hostile to the mere suggestion that they were ineffective. *See State v. Cloud, supra*. Indeed, there is no shortage of cases where trial attorneys who denied that they were ineffective, were held to be ineffective anyway, either because their “strategies” were objectively unreasonable or because they simply failed to do what any reasonable criminal defense attorney would have done.

E. There is nothing “novel” about offering psychological evidence to show that the defendant’s thinking and behavior were damaged by having been the victim of long term abuse.

In the State’s initial opposition brief, the State argued that even if trial counsel knew all about the childhood sexual abuse, and even if there was evidence that it had caused profound psychological damage rendering Mockovak more susceptible to entrapment, Mockovak allegedly had failed to show “that the abuse would have been admissible”²¹ That argument was perplexing because Mockovak’s opening brief presented the case law showing that such evidence was relevant and admissible –

²¹ *SRP*, at 73.

indeed, it is generally reversible error to exclude such evidence.²²

The State's most recent opposition puts a slightly different spin on its earlier argument, contending that the application of learned helplessness to the defense of entrapment "is not in the mainstream; it would be novel." *SSR* at 19. Therefore, according to the State, trial counsel should not be faulted for failing to consider it. *Id.*²³

The State's current argument fares no better than the prior version. If, by using the word "novel" the State means that the average criminal defense lawyer would never think of presenting psychological evidence to support the obviously applicable defense of entrapment, that contention is simply ridiculous. There is no shortage of case law to show that anyone who understands the law of entrapment would instantly understand that psychological deficits that make people exceptionally vulnerable to

²² *State v. Allery*, 101 Wn.2d 591, 596-97, 682 P.2d 312 (1984) and *State v. Kelly*, 102 Wn.2d 188, 190, 685 P.2d 564 (1984), were both decided 26 years before Mockovak's trial. In both cases murder convictions were reversed. In *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993), the Court recognized the relevance and admissibility of evidence about the psychological deficits caused by child abuse. *Janes* held that the battered child syndrome was the functional equivalent of the battered women syndrome, and acknowledged the admissibility of learned helplessness evidence to explain the conduct of an abused child. *Janes* was decided 17 years before Mockovak's trial.

²³ The State argues that if trial counsel had presented evidence of learned helplessness they would have been doing so "outside of the traditional diminished capacity context." *SSR*, at 17. But this is simply quibbling over the use of a label ("diminished capacity"). It simply doesn't matter whether such a strategy is labeled a "traditional diminished capacity context," an "untraditional diminished capacity defense," or something else. Indeed, it need not have had any separate "defense" label at all. Testimony from experts such as Dr. Foote and Dr. Novick-Brown would simply have been ER 702 evidence that would have aided the jury in evaluating the entrapment defense. *Decl. Foote*, ¶¶ 4-6.

pressure from others are highly relevant to an entrapment defense and evidence of such defects should be presented. Published decisions show that defense attorneys began offering such evidence over forty years ago.²⁴

First, there was nothing “novel” about the idea that evidence of learned helplessness is highly relevant in cases where the defendant is a battered woman or a battered child. This had been established in the 1980’s and early 1990’s.²⁵ *Allery* held that evidence about the battered woman syndrome could have “a substantial bearing on the woman’s perceptions and behavior at the time of the [offense] and is central to her claim of self-defense.” *Allery*, at 597. “It is appropriate that the jury be given a professional explanation of the battering syndrome and its effects on the woman through the use of expert testimony.” *Id.*

Second, there is nothing “novel” about recognizing that a child who is repeatedly assaulted, just like an adult woman, develops the same syndrome and is psychologically affected by abuse in the same way. This was explicitly recognized in *Janes*.²⁶ Moreover *Janes* noted that “learned helplessness” is a “key characteristic” of “the psychological response to

²⁴ See *United States v. Mosley*, 496 F.2d 1012, 1017 (9th Cir. 1974).

²⁵ *Allery* recognized that the question was whether such evidence constituted “scientific” or “specialized knowledge” that would “assist the trier of fact to understand the evidence or to determine a fact in issue,” 101 Wn.2d at 596, citing ER 702.

²⁶ “[T]he battered woman syndrome and the battered child syndrome constitute a single psychological disorder for purposes of expert testimony. . . . The differences between the two groups are negligible.” *Janes*, 121 Wn.2d at 235.

abuse-induced PTSD,” and that “for children in particular, such a phenomenon is especially severe.” *Janes*, at 233-34.

Third, although the State claims that “traditionally” such evidence has been found relevant only when offered to show that the defendant could not form the mens rea element of the crime charged, that is simply incorrect. Such expert testimony has repeatedly been found admissible under ER 702 to assist the jury in evaluating a defense. *See Kelly, supra*, at 196 (“The expert’s testimony was part of the presentation of petitioner’s self-defense theory.”);²⁷ *Allery, supra*, at 597. In these cases, the evidence was *not* offered to negate the mens rea element of an intent to kill; it was offered instead to show how the defendant perceived the victim as a danger to them and misjudged the need to use force in self-defense.

Fourth, the State argues that while such evidence has been used to support a claim of self-defense, its use to support a claim of entrapment is “novel” and suggests that defense counsel cannot reasonably be expected to have thought of this use of the evidence. But this isn’t true either. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988) shows that the relevance of such evidence to show vulnerability to control by others was first

²⁷ “[T]he expert testimony was offered to aid the trier of fact in understanding the evidence and determining *a fact in issue (i.e. self-defense)*. ER 702.” *Id.* (Emphasis added).

recognized in Washington *by the prosecution*.²⁸ The essence of entrapment is inducement – the manipulation of the defendant into doing something he wasn’t predisposed to do. In *Ciskie*, decided 27 years ago, the Court held it was permissible *for the prosecution* to present such evidence to show why the victim of repeated assaults was exceptionally vulnerable to such manipulation. Citing to a federal case involving women engaged in prostitution who failed to take advantage of opportunities to escape from their abusers, the Court explained the relevance of expert testimony to show how repeated abuse made it possible for others to “maintain control” over them with “only subtle threats.”²⁹

In the same way, an expert witness could easily have described to Mockovak’s jury how the “conditioning process” that Mockovak was “subjected to” by his uncle (who repeatedly raped him), eventually made it possible for people to “maintain control over” Mockovak with “only subtle threats.” And in Mockovak’s case, the threats made by the government informant as to what would happen if Mockovak didn’t go

²⁸ As *State v. Cleveland*, 58 Wn. App. 634, 644, 794 P.2d 546 (1990) demonstrates, it is common for *the prosecution* to present “expert testimony . . . regarding typical behavior of child victims of sexual abuse” as an aid to the jury in evaluating the testimony of witnesses.

²⁹ “Another expert described to the jury the conditioning process that women subjected to forced prostitution go through, and how *eventually only subtle threats are required to maintain control over them*.” *Ciskie*, 110 Wn.2d at 274, quoting *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984) (emphasis added).

ahead and approve the plan to hire Russian hitmen to carry out a hit, were not subtle at all.³⁰ Like the threats his abusing uncle made when he warned Mockovak not to tell anyone he was being raped, informant Kultin warned Mockovak that if a person did something to cross the Russian Mafia, they “will come after your family.” *Tr.* 8/11/09 at 61. He warned Mockovak “if you fuck it up by not giving them the money,” then although “they’re probably not going to kill us, yeah, but they’ll fucking, you know . . . they’ll make it so we’ll pay them, and probably more than that.” *Tr.* 11/6/09 at 86 (see Appendix B).

The *Shuck* case in Tennessee³¹ also shows that it was not “novel” – in 2011 – to present psychological evidence to support an entrapment defense. The *Shuck* trial occurred sometime before 1996. The State would have this Court believe that defendant Shuck’s trial lawyers were exceptionally brilliant and are to be credited with coming up with the “novel” idea of presenting psychological evidence to support an entrapment defense. But as both Tennessee appellate courts recognized, the idea of presenting psychological evidence to support an entrapment

³⁰ Before Mockovak ever said one word about hiring someone to kill Dr. King, the informant suggested that King might be planning to kill Mockovak because that “would be ideal” strategy for King. *Tr.* 10/20/09 at 53 (See Appendix A). And When Mockovak expressed reluctance to hire hitmen to kill Dr. King, the informant told him if he did not go ahead that might “drive” the hit men to do something. *Tr.*, 8/11/09 at 83.

³¹ *State v. Shuck*, 953 S.W.2d 662 (Tenn. 1997).

defense did not originate with Shuck's lawyers. These courts noted that there had already been decisions by several federal courts which explicitly recognized the admissibility, under some circumstances, of expert testimony regarding a defendant's vulnerability to entrapment due to psychological deficits. One court recognized this more than forty years ago.³² By 1991, at least five federal circuit courts had so held.³³

In *Hill* the Third Circuit reversed the defendant's narcotics convictions finding that the exclusion "of expert psychological testimony in an entrapment defense to establish a defendant's unique susceptibility to inducement" was reversible error.

Testimony by an expert concerning a defendant's susceptibility to influence may be relevant to an entrapment defense. [Citation]. An expert's opinion, based on observation, psychological profiles, intelligence tests, and other assorted data, may aid the jury in its determination of the crucial issues of inducement and predisposition. This is the purpose ascribed to expert testimony by

³² *United States v. Mosley*, 496 F.2d at 1017 (9th Cir. 1974) (after reversing conviction on other grounds, the court questioned the trial judge's exclusion of expert testimony about a brain injury stating "we cannot say that a head injury, a changed personality, and a resulting tendency to be easily swayed by others are not relevant factors to be considered on the issue of predisposition.")

³³ See *United States v. Newman*, 847 F.2d 156, 165 (5th Cir. 1988) ("We conclude that when an entrapment defense is raised, expert psychiatric testimony is admissible to demonstrate that a mental disease, defect, or subnormal intelligence makes a defendant peculiarly susceptible to inducement."); *United States v. McLernon*, 746 F.2d 1098, 1115 (6th Cir. 1984) ("[W]e realize that expert testimony concerning a defendant's predisposition may be invaluable in an entrapment case," but no abuse of discretion for excluding it for failure to give timely notice of expert testimony); *United States v. Hill*, 655 F.2d 512, 514 (3rd Cir. 1981); *United States v. Sullivan*, 919 F.2d 1403 (10th Cir. 1990) (expert testimony properly excluded for failure to give timely notice of the expert, conviction reversed on other grounds, and district court advised to consider admitting evidence if proper notice given at the retrial); *Mosley*, 496 F.2d at 1017.

Federal Rules of Evidence 702, and it appears most applicable to the instant case. *A jury may not be able to properly evaluate the effect of appellant's subnormal intelligence and psychological characteristics on the existence of inducement or predisposition without the considered opinion of an expert.*

Hill, 655 F.2d at 516 (emphasis added). The *Hill* Court concluded that if an expert reaches the conclusion, based upon an adequate factual foundation, that the defendant “is more susceptible and easily influenced by the urgings and inducements of other persons, *such testimony must be admitted as relevant to the issues of inducement and predisposition.*” *Id.*

Offering such expert testimony in support of an entrapment defense cannot be viewed as “novel” in 2011 (the time of Mockovak’s trial) when (1) the Third Circuit was reversing convictions for failure to admit such evidence in 1981; and (2) the Ninth Circuit was questioning (but not actually deciding since the convictions were being reversed on other grounds) the trial judge’s exclusion of such evidence in 1974.

F. The failure to present evidence of long-term childhood sexual abuse and learned helplessness was prejudicial.

Finally, the State argues that even if Mockovak’s lawyers had decided to present learned helplessness evidence in support of the entrapment defense such a strategy never would have worked and Mockovak would have been convicted anyway. The State’s position is simply that an entrapment defense *never* would have worked, no matter what evidence was presented to support it. But in making this argument

the State simply ignores the fact that:

- (1) trial counsel *did* present an entrapment defense;
- (2) the defense *was* partially successful in that the jury *acquitted* Mockovak of the count of solicitation of the murder of Bradley Klock (CP 605) (Appendix C);
- (3) it took the informant six months to get Mockovak to agree to give the go ahead to the criminal plan;
- (4) after two months the FBI Agent in charge of the investigation told another Agent that he thought Mockovak was “just blowing smoke” and didn’t intend to do anything (RP VII, 55) (Appendix D);
- (5) when Mockovak failed to initiate criminal activity the FBI Agent instructed the informant to see if he could “spark” Mockovak into action (RP 1/20/11 at 72-73);
- (6) after the trial jurors expressed shock and disgust at the informant’s “critical role in coercing Mockovak to do something he wouldn’t otherwise have done” (CP 790), acknowledged that it proved “very difficult” for them to make their decision, and stated that the case could easily “have swung the other way.” (CP 789).

But the jury that decided this case *did not know* that Mockovak had been sexually abused as a child for ten years. Nor did they know that survivors of childhood sexual abuse develop learned helplessness – they learn as a child that there is nothing that they can do to escape their abuser – and as adults they continue to apply that childhood lesson of futility. As Dr. Foote has stated, male survivors of childhood sexual abuse “show[] higher levels of learned helplessness than would be expected in a normal population” and this makes them “more susceptible to suggestion and influence by others.” *Decl. Foote*, ¶¶ 7-8. This heightened suggestibility “would cause them to actively engage in criminal activity that they might

not otherwise do.” *Id.*, ¶11. Similarly, Dr. Novick-Brown states that compared to the average person, “Mockovak’s general disposition to not engage in criminal behavior is much more easily overcome by a person seeking to persuade him to engage in criminal behavior because his childhood experience showed him that he was powerless to stop his uncle from sexually abusing him.” *Decl. Novick-Brown*, ¶17. If the jurors had heard the testimony of an expert like Dr. Novick-Brown, ***then they would have known*** that Mockovak’s “ability to resist” informant Kultin’s campaign to get him to agree to hire hitmen “was substantially impaired by his long-term sexual abuse. His ability to resist pressure from Kultin to agree to commit this offense was substantially diminished by his learned helplessness. . . .” *Id.*, ¶16.

Without such evidence, the jurors acknowledged that this case could “have swung the other way” and resulted in a ***complete*** acquittal on all counts. The State’s contention that even ***with*** such evidence there ***still*** would not have been a reasonable probability of acquittal on all counts is untenable. No fair-minded person who had reviewed the entire record of this case could ever maintain this position.

III. CONCLUSION

Any criminal defense attorney presenting an entrapment defense – governed in this State by RCW 9A.16.070 – should know that inducement

and the absence of a predisposition to commit a crime are at the very core of the defense. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996).³⁴ Therefore, no reasonable defense attorney could fail to understand that psychological evidence of exceptional vulnerability to inducement and manipulation by a government agent was highly relevant to Mockovak's defense.³⁵ As the Third Circuit said in 1981, "[W]ithout the considered opinion of an expert" to explain the "psychological characteristics" of the defendant, a jury may be unable to evaluate "the existence of inducement or predisposition," and thus may erroneously reject an entrapment defense out of simple ignorance of the defendant's exceptional psychological vulnerability. *Hill*, 655 F.2d at 516. But Petitioner's trial counsel failed to offer such evidence.

The State's most recent speculative theory is that the trial attorneys considered presenting evidence of learned helplessness and rejected that approach because they thought it would detract from the entrapment defense. There is not a shred of evidence to support the State's

³⁴ "[P]redisposition of the defendant is the focal element of the defense. . . . Defendants should ultimately be responsible for demonstrating that they were improperly induced to commit a criminal act which they otherwise would not have committed."

³⁵ In *Lively* the defendant was exceptionally vulnerable to inducement by the informant because she was a former drug addict and "a recovering alcoholic." *Id.* at 6 & 23. In this case, the defendant was exceptionally vulnerable to the informant because he was a "recovering victim" of long-term childhood sexual abuse, but *unlike the jury in Lively, Mockovak's jury never learned about his exceptional vulnerability because no evidence of it was presented.*

speculation. Moreover, Dr. Novick-Brown's expert opinion confirms that the behavior that the State argues is inconsistent with learned helplessness is actually fully consistent with her diagnosis of Mockovak and also with the literature on learned helplessness.

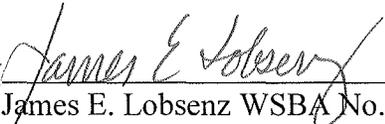
It seems clear that trial counsel's failure was the result of a mistaken belief that Washington law did not permit them to argue that Mockovak's psychological deficits left him with a "diminished capacity" to resist the informant's pressure at the same time they argued for acquittal on the basis of entrapment.³⁶ But the law does *not* preclude an entrapment defense if such psychological evidence is presented. Any so-called "strategy" based upon ignorance of the law is simply deficient conduct.

The failure of Petitioner's trial attorneys to offer learned helplessness evidence that would have supported the entrapment defense was a catastrophic blunder. Entrapment was the defense that the trial judge noted everyone anticipated from the very start and that trial counsel chose to present. There is no conceivable objectively reasonable explanation for their failure to offer such powerful evidence. Therefore, this Court should vacate Petitioner's convictions and order a new trial.

³⁶ That's what attorney Tvedt told *both* Marmer and Mockovak. *Third Decl. Mockovak* ¶10, *Decl. Marmer*, ¶14.

Respectfully submitted this 15th day of December, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz WSBA No. 8787
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

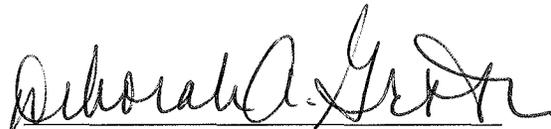
3. On December 15, 2015, I caused to be served *VIA EMAIL and US MAIL* one copy of the following document on:

James M. Whisman
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue, W554
Seattle, WA 98104
Jim.Whisman@kingcounty.gov

Entitled exactly:

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

DATED: December 15, 2015.



DEBORAH A. GROTH
Legal Assistant to James E. Lobsenz

APPENDIX A

166C-SE-95743

Continuation of FD-302 of Tape# 1D2, On 10/20/2009, Page 52

CHS: Okay.

MOCKOVAK: But, it's kinda like at an impasse. Believe me, I've got an attorney. Christian is fully aware of it.

CHS: Mmhmm.

MOCKOVAK: Everyone I talk to believes that, you know, I am...

CHS: Oh yeah, I mean...

MOCKOVAK: That I'm being fair-minded about it.

CHS: I mean, you're...you are acting like a true business owner with the business in mind, with employee's 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 it is he's trying to accomplish. Um, is...is he trying to completely kick you out?

MOCKOVAK: I think so...

03556 MEM

166C-SE-95743

Continuation of FD-302 of Tape# 1D2, On 10/20/2009, Page 53

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? Uh, so,
that would be ideal for him.

MOCKOVAK: Mmhmm.

CHS: So...(stomach growls)

MOCKOVAK: To me, it's just...

CHS: He just hasn't approached me today. (Laughs)

MOCKOVAK: Thank God. Thank God he's not friends with
you.

CHS: Yeah.

MOCKOVAK: But the funny thing is, I don't think he has
any friends. (UI) _____ He's
uncordial.

CHS: I don't know his Canadian ties. What he's got.

MOCKOVAK: Oh yeah, up there, who knows. I'm talking
about...

CHS: Yeah.

MOCKOVAK: But what I'm talking about is, um, you know,
people that he deals with in the practice.

CHS: Mmhmm.

MOCKOVAK: You know, a lot of people in the practice
confide in me and they say the same thing to me

03557 MEM

APPENDIX B

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 your dealing with.

Source - It's you know, eventually if you fuck it up, by not giving them money, yeah, they'll, you know, they're probably not going to kill us.

Mockovak - Yeah.

Source - But they'll fucking you know, they're...

Mockovak - They're in it for the money.

Source - Yeah, they'll, 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.

Source - So,...

Mockovak - Well what do you want to do, do you want to sort of just tell me tomorrow? Sound like you need to, think about this a bit. Or do you want to call somebody, I mean, I don't care what you want to do. But it's obviously gotta be sorted out.

Source - What time you flying from Vancouver tomorrow?

Mockovak - 8:00am

Source - 8:00am, in the morning?

Mockovak - Uh-huh.

Source - From, from, no to...

Mockovak - To Seattle.

APPENDIX C

FILED
KING COUNTY WASHINGTON

FEB 03 2011

SUPERIOR COURT CLERK
BY **Melissa Ehlers**
DEPUTY

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

STATE OF WASHINGTON,)	
)	No. 09-1-07237-6 SEA
Plaintiff,)	
)	
vs.)	VERDICT FORM A
)	
MICHAEL EMERIC MOCKOVAK)	
)	
Defendant.)	

We, the jury, find the defendant MICHAEL EMERIC MOCKOVAK
Not Guilty (write in "not guilty" or "guilty") of the
crime of Solicitation to Commit Murder in the First Degree as
charged in Count I.

2/3/11
Date

Thomas Zylstra
Presiding Juror

APPENDIX D

1 (Defense exhibit 60 marked.)

2 Q. Bates stamp 06626. Starting with the email from
3 Steuer to you, could you just please read that to the jury.

4 A. Agent Steuer emailed me on Tuesday, June 16th, "Hey,
5 Larry, Did you folks ever open a case that I could attribute
6 or upload his FB 302."

7 Q. And FB 302 is a --

8 A. Interview document.

9 Q. An interview document from the Federal Bureau of
10 Investigation.

11 A. Yes.

12 Q. And read your response, please?

13 A. "Not yet. It's starting to sound like the doctor
14 was just blowing smoke. I've been waiting to see what happens
15 after the deposition, but it keeps getting pushed back. I
16 have a meeting set up with Dan to open him as a source to
17 operate on other matters."

18 MS. TVEDT: Your Honor, we'll submit that document.

19 MS. STOREY: No objection.

20 THE COURT: Exhibit 60 is admitted.

21 (Defense 60 admitted.)

22 Q. So this is the email correspondence between yourself
23 and Agent Steuer, correct?

24 A. That's correct.

25 Q. And that's on June 16th, and that's 5 days after

26

1 your meeting with Daniel Kultin, correct?

2 A. Yes.

3 Q. And that's where you said it's starting to sound
4 like the doctor was just blowing smoke.

5 A. That's correct.

6 Q. May, June, July of 2009 you were meeting with Daniel
7 Kultin about every two weeks or in contact anyway, correct?

8 A. Yes.

9 Q. And throughout May, June, and July Daniel Kultin
10 informed you or said that Dr. Mockovak did not broach the
11 subject of a hit during that time period.

12 A. That's correct.

13 Q. Now, in the summer of 2009 the ranks in your
4 criminal squad were depleting, correct?

15 A. Yes.

16 Q. And and you had to open up a confidential human
17 source?

18 A. Yes.

19 Q. Which is like a tick mark on your performance
20 review?

21 A. Yes.

22 Q. And so as much as you thought the case wasn't going
23 anywhere, you looked at Daniel Kultin and said, hey, this case
24 isn't going anywhere, I need a source, so would you be willing
25 to become an FBI source.

1 A. Correct.

2 Q. And this is the first time that you would have been
3 using a long-term confidential source.

4 A. No.

5 Q. You'd been using -- you had one other experience of
6 using a confidential human source?

7 A. Long-term, yes.

8 Q. And this would be your second then --

9 A. Yes.

10 Q. -- long-term source? And as you said before, that
11 under your guidelines if there was anything that was relevant,
12 that would have gone into a report or a handwritten note,
13 correct?

4 A. Yes.

15 Q. On August 3rd you heard from Daniel Kultin, correct?

16 A. I did, yes.

17 Q. And it was at this time that you talked about those
18 phone conversations that Daniel Kultin told you about this
19 cryptic call from Dr. Mockovak.

20 A. Yes.

21 Q. And then on August 4th Daniel Kultin was opened up
22 as a confidential human source.

23 A. Yes.

24 Q. And it's important when you are opening a
25 confidential human source there's some biographical data that

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of,

MICHAEL E.
MOCKOVAK,

Petitioner.

NO. 69390-5-I

FIFTH DECLARATION OF
JAMES E. LOBSENZ

FIFTH DECLARATION OF JAMES E.
LOBSENZ – 1

I, JAMES E. LOBSENZ, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I have personal knowledge of the facts set forth here. This is the fifth declaration I have submitted in this case.

Current Issue.

2. The issue currently before this Court is whether Petitioner's trial attorneys were ineffective for failing to present any expert testimony on the adverse long-term psychological effects of being a victim of childhood sexual abuse, specifically, the development of the psychological characteristics of learned helplessness and suggestibility. The question is since these psychological traits make a person more vulnerable to entrapment, and since trial counsel chose to present an entrapment defense, why didn't they present this psychological evidence to support the entrapment defense.

3. I searched the files of the trial attorneys to see whether there was anything in them that could shed light on this issue, and to see whether there was anything in those files that would show whether the possibility of presenting such evidence was ever even considered.

Materials Obtained and Searched.

4. I examined everything that the trial attorneys had provided to me. As outlined in my first declaration, I asked for their complete file, and I asked for all their email correspondence with Petitioner Mockovak and the three trial attorneys. *See Decl. Lobsenz*, ¶3 (see Appendix A attached to that declaration).

5. In response Andrea Crabtree, the paralegal employed by trial counsel, sent me a computer disk that contained all the email correspondence that their law firm still possessed. *See Decl. Lobsenz*, ¶4 (see Appendix B attached).

6. Ms. Crabtree told me the disk contained “148 emails from Joe Campagna’s computer and 282 from [her own] computer. . . Colette’s computer crashed and had to be replaced so I still need to search her computer. Jeff [Robinson] reports that he doesn’t have any emails left on his machine.” *See Decl. Lobsenz*, ¶4 (and Appendix B attached).

7. I was never given any explanation as to why attorney Robinson “doesn’t have any emails left on his machine” and can only assume that this means that at some point in time these emails were deleted from his computer. *See Decl. Lobsenz*, ¶5.

8. Thus, I was never given copies of Attorney Robinson’s emails from his computer. I was only given copies of Robinson emails which

were found in attorney Joe Campagna's computer, or in Andrea Crabtree's computer. And as noted below, there were some emails addressed to Robinson that I found on Petitioner Mockovak's personal laptop computer.

9. Similarly, I was never given copies of emails that were stored on Colette Tvedt's computer, and only saw those Tvedt emails that were found in Joe Campagna's computer or in Andrea Crabtree's computer.

10. Dr. Mockovak had a laptop computer which he used during the years 2009-2011 (up until the time he was taken into custody on February 3, 2011 when the jury returned its verdicts). This laptop computer was in the possession of Dr. Mockovak's friend, attorney Ronald Marmer. Mr. Marmer sent me copies of all of the emails sent between Dr. Mockovak and any members of the Schroeter Goldmark Bender law firm which were on that laptop. There were some emails to and from attorneys Tvedt and Robinson on that computer.

11. In addition to requesting all their email correspondence, I asked the trial attorneys for all their correspondence with the prosecutors, for all the discovery they were provided by the prosecutors, and for all their notes.

12. In response I received four banker's boxes of materials from the Schroeter Goldmark Bender law firm. These boxes contained

thousands of pages of material, and appeared to contain all non-electronic correspondence, and all discovery materials. However, I did not receive anything that looked like personal attorney notes.

13. In addition I asked to be provided with all of the billing records that the trial attorneys sent for work done on Petitioner Mockovak's case. *See Decl. Lobsenz*, ¶37.

14. I asked to be provided with all of the trial attorneys' legal research files. In response I was provided with a computer disk that purports to have on it the complete legal research files of the trial attorneys. *See Decl. Lobsenz*, ¶14. That disk was labeled "Mockovak: Disk for appellate attorney Lobsenz containing research materials from SGB."

16. So far as I know, I was sent all of the discovery, all of the correspondence, and all of the invoices with the billing time records, and all of the legal research files which the trial attorneys had in their possession. I examined all of this material. I also examined Dr. Mockovak's personal laptop computer that I obtained from Mr. Marmer. I read all of the email correspondence between Mockovak and his trial counsel that I found on that computer.

Results of My Search.

17. In all of the materials that I searched, I found nothing to indicate that prior to or during the trial the trial attorneys ever made any effort to contact and consult with an expert in childhood sexual abuse.¹ And I found nothing to indicate that they ever considered presenting evidence on the long-term adverse psychological effects of childhood sexual abuse, such as learned helplessness, suggestibility, and Post Traumatic Stress Disorder.

18. In the trial attorneys' legal research file I found nothing to indicate that any legal research was done on any of the following subjects:

- a. the battered child syndrome
- b. the battered woman syndrome
- c. learned helplessness
- d. suggestibility
- e. PTSD
- f. psychological deficits that would make a person more vulnerable

to entrapment.

¹ After the trial was over, at the urging of attorney Marmer, they did retain an expert on childhood sexual abuse (John Conte) who supplied them with a report summarizing the academic findings of researchers on the effects of childhood sexual abuse. This report was presented to the sentencing judge. But even then, despite attorney Marmer's exhortation to do so, they *still* did not have Conte, or any other childhood sexual abuse expert, examine Mockovak, and they presented no evidence to explain how Mockovak's childhood sexual abuse was logically connected to the offenses for which he had been convicted, or to the entrapment issues of inducement or predisposition.

19. In the legal research file I did find several separate folders. One of those subfolders is labeled “Mental Health,” one is labeled “Pharmaceuticals,” and one is labeled “Entrapment.”

20. I examined the “Entrapment” subfolder. It contains copies of 23 published appellate decisions. 17 of them are Washington state court opinions; 5 are federal court opinions; and 1 is a Georgia state court opinion.

21. I examined the “Mental Health” subfolder. With one exception, there are no *legal* materials in it. (There is a copy of a brief filed by another attorney in another case. See Paragraph No. 25.) There are no copies of any case opinions in it. I looked in every subfolder to see if any of them contained copies of the Washington state appellate court opinions dealing with learned helplessness, or with the battered women syndrome, or the battered child syndrome. I did not find copies of any such opinions anywhere.

22. I conducted a Westlaw search of all Washington cases that contain the phrase “learned helplessness.” I found ten opinions (in some instances there was both a Court of Appeals and a Supreme Court opinion in the same case). All of them are criminal cases. I did not find copies of, or references to any of these cases in any part of the trial attorneys’ files (or anywhere else in the materials they provided to me).

23. I conducted a Westlaw search of all Washington cases that contain the phrase “battered child.” I found 33 such cases. I did not find copies of, or references to any of these cases in any part of the trial attorneys’ files (or anywhere else in the materials they provided to me).

24. I conducted a Westlaw search of the phrase “battered women.” I found 54 such cases, the majority of which were criminal cases. I did not find copies of any of these cases anywhere in the trial attorneys’ research files (or anywhere else in the materials they provided to me).

25. In the mental health subfolder I did find a copy of Chapter 13 of the handbook on “Child Maltreatment” published by the American Professional Society on the Abuse of Children. This chapter is entitled “Child Sexual Abuse: Definitions, Prevalence, and Consequences.” This chapter contains a subsection entitled “Effects of Child Sexual Abuse” which is one and a half pages long. There is one sentence that states, “research conducted over the past 3 decades indicates that a wide range of psychological, health, and interpersonal problems are more prevalent among those who have been sexually abused in childhood compared to those who have not.” Another sentence states that “More than one third of sexually abused children meet diagnostic criteria for PTSD.” There are no markings and no highlighting to indicate that this chapter was read.

26. The “Mental Health” subfolder also contains the resume (it is called a “profile”) of a clinical psychologist who appears to be an expert in the treatment of alcohol and drug abuse. It also contains a copy of a brief filed in the case of *State v. John Dockum*, King County Cause No. 94-1-00595-6. The brief, written by Seattle attorney Michael Iaria, is entitled *Memorandum in Support of Motion to Compel Mental Examination of Certain Witnesses and to Compel Discovery of Records Pertinent to Such Examinations*. The brief argues that the Superior Court should order two witnesses for the prosecution to submit to psychological examinations.

27. The folder labeled “Pharmaceuticals” does not contain any legal research. It does not contain any decisions from any legal case. It does contain several medical articles regarding the prescription medicine citalopram (also known as Celexa), “steroid-induced psychosis,” psychosis while under the influence of a cortical steroid called ACTH, “rapid-onset” psychosis from the drug prednisone, cortico-steroid induced psychosis, and observed adverse effects from cortico-steroid therapy. Some portions of these articles have been highlighted in yellow indicating that someone read them.

28. I examined the billing records that I obtained from the Schroeter Goldmark Bender law firm. I could not find any reference

anywhere in those records to legal research on the subjects of battered women, battered children, or learned helplessness.

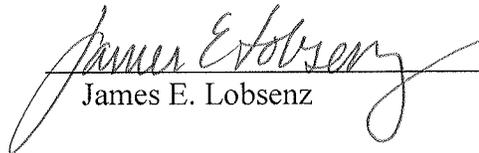
29. In sum, I asked to be provided with all of the trial attorneys' files and records from this case. I examined everything that I was provided, and nowhere did I find any reference to learned helplessness. Nor did I find any reference anywhere to battered women. The only reference I found to battered children (and I view sexually abused children as falling within that category, as does the Washington Supreme Court) was the copy of the chapter from the handbook on Child Maltreatment.

30. Accordingly, there is no objective evidence contained in the trial attorneys' files to support the notion that they ever considered expert testimony on the subject of the adverse long-term psychological effects of childhood sexual abuse, such as learned helplessness, suggestibility, and Post Traumatic Stress Disorder.

31. Not all trial defense attorneys are cooperative when approached by counsel for PRP Petitioners who are seeking declarations about why trial counsel did, or did not, do certain things. Some trial defense attorneys are extremely hostile when it is suggested by PRP counsel that they made mistakes and rendered ineffective assistance of counsel. As *State v. Cloud*, 95 Wn. App. 606 (1999) illustrates, some trial counsel are so outraged by the bringing of an IAC claim against them that

they go to great lengths and expense to oppose any IAC claim brought against them. In *Cloud* a very experienced criminal defense attorney with a very good reputation (and his good reputation was quite well-deserved because he was – generally – an extremely skillful defense attorney) was so angry when an IAC claim was made regarding his conduct that he hired private counsel to represent him, directed private counsel to intervene in the criminal case in Superior Court, and actively opposed his former client and supported the prosecution. Going so far as to hire his own expert witness to testify that he did not provide IAC. Ultimately the Court of Appeals held it was error to have allowed trial counsel to intervene and remanded the case for another evidentiary hearing before a different Superior Court judge. On remand, the Superior Court ruled that the trial attorney had failed to provide effective assistance of counsel and vacated the defendant's murder conviction.

DATED this 15th day of December, 2015.


James E. Lobsenz

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

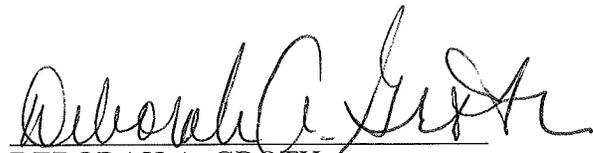
1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On December 15, 2015, I caused to be served *VIA EMAIL and US MAIL* one copy of the following document on:

James M. Whisman
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue, W554
Seattle, WA 98104
Jim.Whisman@kingcounty.gov

Entitled exactly:

FIFTH DECLARATION OF JAMES E. LOBSENZ

DATED: December 15, 2015.



DEBORAH A. GROTH
Legal Assistant to James E. Lobsenz

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of,

MICHAEL EMERIC
MOCKOVAK,

Petitioner.

NO. 69390-5-I

THIRD DECLARATION OF
PETITIONER MICHAEL E.
MOCKOVAK

I, MICHAEL E. MOCKOVAK, do hereby declare under penalty of perjury under the laws of the State of Washington, that the following facts are true and correct:

1. I am the Petitioner in this case. I have personal knowledge of the facts set forth here.

2. I have read the State's Supplemental Response to my PRP. I have read the prosecution's assertion that my attorneys made a strategic choice not to present evidence that I suffered from learned helplessness as a result of the childhood sexual abuse that I suffered. That assertion is totally baseless. No such decision was ever made. If my attorneys had ever even considered the possibility of presenting such evidence, they certainly would have discussed this strategy with me. Since they never did, I am confident that the idea never even occurred to them.

3. Throughout the entire time that I was represented by attorneys Jeff Robinson, Colette Tvedt and Joe Campagna, none of my attorneys ever mentioned the concept of "learned helplessness" to me. I

THIRD DECLARATION OF PETITIONER
MICHAEL E. MOCKOVAK -- 1

had never heard this term, until I was told about it by my post-conviction attorney Jim Lobsenz.

4. Throughout the entire time that I was represented by attorneys Robinson, Tvedt and Campagna, none of my attorneys ever mentioned the possibility of presenting expert witness testimony at my trial regarding the adverse long-term psychological effects that were caused by my having been a victim of years of childhood sexual abuse.

5. Throughout the entire time that I was represented by attorneys Robinson, Tvedt and Campagna, none of my attorneys ever mentioned the possibility that there was any causal connection between my having been a victim of childhood sexual abuse and my vulnerability to inducement or entrapment by Daniel Kultin, the government informant who worked with the Seattle Police Department and the FBI to arrest me.

6. Throughout the entire time that I was represented by attorneys Robinson, Tvedt and Campagna, none of my attorneys ever mentioned the possibility of presenting evidence at my trial that I suffered from the “battered child syndrome.”

7. Throughout the entire time that I was represented by attorneys Robinson, Tvedt and Campagna, none of them ever used the phrase “battered child syndrome” when talking to me.

8. Throughout the entire time that I was represented by attorneys Robinson, Tvedt and Campagna, I was unaware that I suffered from Post-Traumatic Stress Disorder. I did not become aware of that until the fall of 2014 when I was evaluated by Dr. Natalie Novick-Brown and she diagnosed me as suffering from PTSD as a result of the ten years of sexual abuse that I suffered as a child. Dr. Novick-Brown was retained by my post-conviction counsel.

9. My attorneys did discuss with me the fact that I was depressed, and they sought out and obtained information about the medications that I had been taking in the summer and fall of 2009. They did explore the possibility of presenting evidence that I was suffering from a medication induced "steroid psychosis."

10. My attorney Colette Tvedt told me that the law in Washington State did not permit me to argue an entrapment defense at the same time as a diminished capacity defense. She told me that we had to choose between diminished capacity and entrapment, and that we could not do both. She said this to me many times.

11. By "diminished capacity" I understood her to mean the argument that because my medications caused a "steroid psychosis," I was not in my right mind when talking to informant Kultin about his suggestion that I hire Russian hitmen, and that I was instead in a

“fantasyland.” I understood her to be telling me that if I presented such a “fantasyland” defense, then I could not present an entrapment defense.

12. I always wanted to present an entrapment defense. There never was any disagreement between me and my attorneys about this strategy. We all agreed that my defense at trial was to be an entrapment defense. And we all agreed that there was no basis to present a “steroid psychosis” defense.

13. Attorney Tvedt specifically cautioned me (when we were practicing my testimony in case I did end up testifying) that I had to be careful *not* to make any references to my medications because if I did then we wouldn’t be allowed to argue entrapment.

14. Besides the possibility of a “steroid psychosis” defense, no other evidence of psychological or mental vulnerability was ever discussed. This leads me to believe that none of my attorneys ever even thought of the possibility of presenting such evidence. The only other possible explanation for not presenting such evidence is that they thought that if they did present learned helplessness evidence then they couldn’t argue the entrapment defense, because learned helplessness was (to them) a form of a diminished capacity defense and if such a defense was presented then presentation of an entrapment defense was not permitted.

DATED this 27th day of November, 2015.

A handwritten signature in black ink, appearing to read "Michael Mockovak", written over a horizontal line.

Michael E. Mockovak
Petitioner

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.
3. On December 15, 2015, I caused to be served *VIA EMAIL and US MAIL* one copy of the following document on:

James M. Whisman
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue, W554
Seattle, WA 98104
Jim.Whisman@kingcounty.gov

Entitled exactly:

**THIRD DECLARATION OF PETITIONER MICHAEL E.
MOCKOVAK**

DATED: December 15, 2015.


DEBORAH A. GROTH
Legal Assistant to James E. Lobsenz

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of,

MICHAEL E.
MOCKOVAK,
Petitioner.

NO. 69390-5-I

THIRD DECLARATION OF
RONALD L. MARMER

I, Ronald L. Marmer, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I have personal knowledge of the facts set forth here.

2. This is the third declaration I have executed in this case. I make this third declaration to correct certain erroneous information that is contained in the *State's Supplemental Response Related to Learned Helplessness Defense* dated October 16, 2015.

3. On page 21 of the *State's Supplemental Response* the State asserts:

In the second declaration Mr. Marmer makes clear that he and Ms. Tvedt were discussing a learned helplessness defense, perhaps as late as September, 2010. It was in April, 2010 that Ms. Tvedt told Mr. Marmer that the team could not pursue both diminished capacity and entrapment. The team continued to consider learned helplessness evidence, even though it had indicated that a diminished capacity defense could not be brought along with an entrapment defense. Ms. Tvedt never told Marmer that she could not raise learned helplessness at the same time as entrapment.

THIRD DECLARATION OF RONALD L.
MARMER – 1

(Emphasis added).

4. The prosecutor's brief seeks to create the incorrect impression that Ms. Tvedt and I discussed learned helplessness. To be clear, Ms. Tvedt and I *never* discussed learned helplessness. Nor did I ever discuss learned helplessness with Jeff Robinson or Joe Campagna. Throughout the entire time leading up to the trial, and throughout the trial itself, the subject of learned helplessness was *never* mentioned by *any* of the defense attorneys.

5. I did not even know the phrase "learned helplessness" until long after the trial was completed. I first learned about learned helplessness from attorney Lobsenz when he explained it to me.

6. Prior to the trial, I discussed with attorney Tvedt the fact that Mockovak's physician must have diagnosed him as suffering from depression because the physician had prescribed an anti-depressant medication called Celexa. I suggested that the defense team explore the effects of depression and the specific effects of Celexa on Mockovak's mental state. I do not believe that Tvedt or the other lawyers consulted an expert on depression or an expert on the effects of Celexa.

7. Tvedt told me that Mockovak's physician also had prescribed a steroid to address a respiratory problem, and they were exploring whether that steroid could cause a person to engage in unusual behavior, including

violent behavior. Tvedt explored this possibility. Tvedt told me that they consulted an expert to see whether the steroid that Mockovak had been taking caused him to become psychotic and engage in “steroid rage”. Tvedt later told me that the expert was not likely to conclude that Mockovak exhibited other symptoms that would be consistent with steroid rage.

8. Prior to Mockovak’s trial, Mockovak’s attorneys *never* indicated that they had considered whether the long-term effects of childhood sexual abuse made Mockovak more susceptible or vulnerable to entrapment.

9. I understood from Tvedt that they had to choose between a defense of diminished capacity and a defense of entrapment. Tvedt never suggested that they could present evidence concerning childhood sexual abuse as part of the entrapment defense. To the contrary, she stated that they had to be careful not to present evidence concerning Mockovak’s mental state that might prevent them from obtaining a jury instruction on entrapment.

10. After the trial, I met with attorneys Robinson and Tvedt to discuss sentencing. I suggested to attorneys Tvedt and Robinson that it would be desirable to obtain information that the prosecutors themselves had used when they were seeking long sentences for persons convicted of

sexual abuse of children. I told them it seemed likely that the prosecutors often contended that a defendant convicted of sexually abusing a child should receive a long sentence because the child victim would suffer lasting psychological damage that would continue to afflict the child in his or her later adult life. I suggested that they collect materials on what King County Prosecutors had said on this subject in the past, and use it to bolster the contention that Mockovak's uncle had caused lasting psychological damage to Mockovak. Robinson said that they had attorneys in his law firm who were former prosecutors and who had worked on sex abuse crimes. Robinson said he believed those former prosecutors had access to the prosecutors' materials on sex abuse and they might still have a copy of the prosecutors' manuals. Robinson also stated that he would obtain the prosecution's sentencing materials from a recent case that had been in the news to see what the prosecutors had said about the long-term effects of sex abuse upon the victim.

11. In that same meeting after the trial, I was the one who raised with attorneys Tvedt and Robinson that it would be desirable to retain experts to analyze the long-term effects of sexual abuse.

12. I also suggested retaining experts to analyze the effects of depression, the specific effects of Celexa, and any amplifying effects of low-dose steroids on persons with Mockovak's history of psychological

trauma, depression, and mood swings (a point that I believed their earlier expert had not considered).

13. I made the point that they should find a local expert on childhood sexual abuse who could examine Mockovak. That local expert then could explain how Mockovak's past might make him more susceptible to suggestions, including suggestions that played upon his fear that others are taking advantage of him and manipulating him. I told them that they needed to have someone with expertise and experience in the treatment of survivors of childhood sexual abuse to explain the type of psychological damage that led Mockovak to commit the crimes he had been convicted of.

14. I told the attorneys that another expert should explain the connection between sexual abuse and aberrant conduct later in life in an understandable way, the same way Oprah might ask someone on her TV show to explain why a victim of childhood sexual abuse would do such a thing later in life.

15. In response to my suggestions, Tvedt and Robinson told me that they knew of a local expert who could explain the long-term effects of childhood sexual abuse.

16. Tvedt and Robinson did get a report from Dr. John Conte on this general subject, and I read it.

17. Dr. Conte's report did not contain any explanation as to why Mockovak's childhood sexual abuse would lead him to commit the crimes that he was being sentenced for. The important point, which was missing, was to explain how someone who had suffered sexual abuse as a child would be more likely to engage in aberrant conduct later in life. Conte did not examine or test Mockovak and his report said *nothing* about Mockovak specifically.

18. The prosecutor made the same observation at the sentencing hearing when she said: "While the State in no way intends to downplay the significance of such childhood trauma, there is absolutely no evidence in this case that that experience led to this crime" *Sentencing Hearing Transcript of 3/17/11*, at 75.

19. I read the sentencing memorandum that Tvedt and Robinson ultimately filed. Only two sentences in the entire defense *Sentencing Memorandum* attempt to make a causal connection between Mockovak's sexual abuse and the events that occurred with Kultin. On page 15, lines 15-17 of the *Memorandum* state: "The results of the years of abuse had a major impact on Dr. Mockovak's emotions and thoughts as he dealt with Daniel Kultin. How could it possibly be otherwise?"

20. Although there was a fairly lengthy section of the *Sentencing Memorandum* devoted to the argument that the "failed entrapment"

defense was itself a recognized statutory mitigating factor under Washington State law (*Sentencing Memorandum*, Part III, pages 23-30), there was no connection between that section of the memorandum and the earlier section of the memorandum (*Sentencing Memorandum*, Part II, Section B, pages 6-15) which discussed “Childhood Sexual Abuse.” The memorandum gave the impression that the only point of mentioning Mockovak’s childhood sexual abuse was to engender pity for Mockovak as a victim. The sentencing memorandum did not attempt to connect childhood sexual abuse with the entrapment defense.

21. The sentencing judge echoed the prosecutor’s remarks, stating that nothing she said “should be taken as trivializing or ignoring” what she had been told about the years of childhood sexual abuse that Mockovak suffered; she was unpersuaded that being a victim of childhood sexual abuse constituted a basis for a sentence below the standard range. *Transcript Sentencing Hearing Transcript*, at 119 & 121.

22. More importantly, since trial counsel offered *no evidence* to the jury about Mockovak’s childhood sexual abuse, let alone any connection between the long-term effects of childhood sexual abuse and the psychological effects that would make a victim more susceptible to the kinds of conduct presented at the criminal trial, the jury had *no facts and no expert testimony* to allow them to take into account how Mockovak’s

history of sexual abuse would have made him more vulnerable to entrapment.

DATED this 13th day of December 2015.



Ronald L. Marmer

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

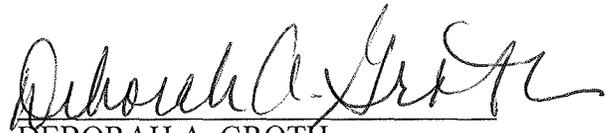
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Entitled exactly:

THIRD DECLARATION OF RONALD E. MARMER

DATED: December 15, 2015.



DEBORAH A. GROTH
Legal Assistant to James E. Lobsenz