

No. 69390-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of MICHAEL E.
MOCKOVAK

Petitioner.

UNDER RESTRAINT IMPOSED BY A JUDGMENT OF THE KING
COUNTY SUPERIOR COURT
The Honorable Palmer Robinson

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

The State's response to Mockovak's PRP is remarkable in two respects. First, the State offers no evidence to contradict Mockovak's evidence. Second, the State offers speculation which is easily shown to be without record support. Mockovak filed declarations from no less than nine people (plus himself), including five lawyers, a psychologist, a retired FBI agent, a retired homicide detective, and a paralegal. The State did not file any declarations and thus conceded every fact Mockovak alleged.¹

The State's only chance of persuading this Court not to grant this PRP is to hope that this Court will never examine the record that belies the State's contentions. With respect to every claim raised the State simply ignores the record. Instead, the State simply speculates that there might be a factual basis that would explain trial counsel's conduct.

The settled procedural rules adopted in *In re Rice, supra*, preclude that approach when deciding a PRP. "If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." *Rice*, 118 Wn.2d at 886. If the Petitioner offers such affidavits then the burden of production shifts to the State:

The State's response must answer the allegations of the petition

¹ See RAP 16.9; *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

and *identify all material disputed questions of fact*. RAP 16.9. In order to define disputed questions of fact, *the State must meet the petitioner's evidence with its own competent evidence*.

Rice, 118 Wn.2d at 886 (emphasis added). If the State does this, and establishes the existence of material disputed issues of fact, then the appellate court will direct the superior court to hold a reference hearing in order to resolve the disputed factual questions. *Id.* at 887. If the State fails to identify any material disputed issues of fact, then the appellate court must accept the Petitioner's factual allegations and decide the case on the basis of these undisputed facts. In this case the State has ignored the directive of RAP 16.9 to "identify in the response all material disputed issues of fact." Indeed, the State has simply ignored the facts altogether and has provided nothing to support its speculative assumptions.

To assist the Court this reply brief groups Petitioner's claims into two clusters. The first addresses trial counsel's ineffective assistance by failing to present evidence of Petitioner's learned helplessness from years of childhood sexual abuse, failure to present a jury instruction that told the jury of the subjective test for entrapment, and failing to present material evidence to impeach Kultin and Klock. The second cluster presents claims based upon the illegal recording of private conversations: violation of due process based upon bad-faith forum shopping, violation of the Tenth Amendment, ineffective assistance of counsel ("IAC") for failing to

move to suppress, and violation of Wash. Const., art. 1, § 7. Each claim in both clusters states an independent basis for granting this PRP.

II. ARGUMENT

A. **INEFFECTIVE ASSISTANCE BASED ON FAILURE TO PRESENT EVIDENCE OF LEARNED HELPLESSNESS AND SUGGESTIBILITY (Ground Six).**

The essence of the entrapment defense is the contention that the idea for a crime originated with a law enforcement agent who then induced the defendant to commit a crime that he “had not otherwise intended to commit.” RCW 9A.16.070. Similarly, when an adult sexually abuses a child, invariably the idea to commit a sexual act originates with the abusing adult who then persuades, pressures, or intimidates the child into participating in sexual conduct that the child was not predisposed to engage in. When sexual abuse is repeatedly perpetrated, the child “learns” that resistance is futile and it becomes easier and easier for the adult to manipulate the child into complying with his requests and demands. Later in life, the experience of having repeatedly succumbed to the abuser’s insistent demands renders the victim more vulnerable to entrapment because it has become engrained in the victim’s personality that resistance is futile. *See Decl. William Foote*, ¶¶ 5-8. Thus there is a clear relationship between childhood sexual abuse and entrapment of the victim later in life. *Decl. Foote*, ¶¶9-11; *Decl. Novick-Brown*, ¶17.

Despite the obvious connection between the two, Attorney Robinson, Mockovak's trial counsel, failed to present any evidence of Mockovak's childhood sexual abuse. Thus the jury never learned that he was exceptionally vulnerable to manipulation by others like the government's undercover agent Daniel Kultin. The State labors to explain Robinson's failure and advances a series of speculative suggestions as to why there might have been some sensible "strategic" reason for failing to present evidence of the childhood sexual abuse. But these speculations are unsupported by any evidence, conflict with the case law, and fail to rebut Mockovak's evidence which shows that Robinson's failure is attributable to the simple fact that he did not know the law.

Robinson did not understand that entrapment involves a *subjective* inquiry into the mind of the defendant. Moreover, he mistakenly believed that he had to choose between presenting an entrapment defense or a psychological defense. Indeed, precisely because entrapment is a subjective inquiry into the defendant's mind, it is highly appropriate to support an entrapment defense with psychological evidence which shows that he was very susceptible to the inducements of others.

1. More Than One Year Before Trial Began Trial Counsel Knew Mockovak Was a Victim of Childhood Sexual Abuse.

The State speculates that perhaps the reason trial counsel did not present evidence about the psychological impact of childhood sexual

abuse on Mockovak's ability to resist entrapment by Kultin was that counsel did not learn about the sexual abuse until after the jury returned its verdict. *R-PRP* at 73. The State offers no evidence to support its speculation, and in fact such speculation is unfounded.

Trial counsel learned about Mockovak having been a victim of childhood sexual abuse from John Gonsiorek. *Decl. Gonsiorek*, ¶ 5. Within a few weeks of Mockovak's arrest in November of 2009, Gonsiorek told defense counsel Colette Tvedt that Mockovak had been molested by his uncle (and also later by a therapist). *Id.* Thus, Mockovak's attorneys knew about the childhood sexual abuse for more than one year prior to the time trial began in January of 2011. *Id.*²

In addition to being a close friend of Mockovak's since 1978, Gonsiorek is a retired clinical psychologist who practiced for over thirty years and who has a long list of scholarly publications to his credit. *Id.*, ¶¶ 1-2 & attached vita. "Although it is not likely that [he] used the technical phrase 'learned helplessness' when speaking with Tvedt, Gonsiorek did explain" to attorney Tvedt

that people who are repeatedly sexually abused as a child tend to develop the attitude that resistance to, or escape from the abuser,

² Chicago attorney Ronald Marmer also attests to the fact that at least five months before trial Attorney Tvedt made it clear to him that she was well aware that Mockovak had been a victim of childhood sexual abuse. *Second Marmer Declaration*, ¶¶ 6-8.

is futile, and this becomes part of their general response to people who seek to manipulate them.

Id., ¶ 6 (emphasis added). Gonsiorek “also informed Tvedt about Mike’s chronic lack of self-protectiveness, his relationship problems, and other features of his history that [he] thought might assist in understanding his situation and preparing a defense.” *Id.*, ¶ 7.

Gonsiorek spoke to Tvedt about the need to retain an expert to testify about Mockovak’s vulnerable psychological state, and explained that he personally could not be that expert, although he could testify as a fact witness to some of Mockovak’s behavior that he had observed:

In the first part of 2010, on a visit to Mike in Seattle, I met face to face with Tvedt, and reiterated the same points as in ¶¶ 5-7. I also explained that I reacted to Mike’s history by developing in the early 1980’s a professional focus on male victims of sexual abuse and on exploitation by therapists, publishing and educating in these areas, and providing forensic testimony in such cases; and that I had developed expertise in these areas. ***I also explained that professional ethics prevented me from serving in an expert witness capacity in Mike’s case, and suggested that other experts with such expertise might be helpful in his defense.***

I learned from Mike that it was very likely that the defense would be presenting a defense of entrapment at trial. ***I told her*** that in my opinion ***Mike’s history as a victim of childhood sexual abuse 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.***

Id., ¶¶ 8-9 (emphasis added). Tvedt said they would consider calling Gonsiorek as a fact witness, but ultimately he was never called to testify.

Id., ¶¶ 10-11. Gonsiorek met with Tvedt again after trial and before

sentencing, and again he “explained to her that [he] believed the long term harmful psychological impact of his childhood sexual abuse was very relevant to the issue of his culpability.” *Id.*, ¶12.

2. Expert Testimony That Mockovak Suffered From Learned Helplessness and Suggestibility Was Readily Available.

The State speculates that Mockovak’s attorneys might not have been able to find an expert who could testify that Mockovak (like most victims of childhood sexual abuse) was psychologically damaged by the years of abuse that he suffered. *R-PRP* at 73. The State offers no support for its speculation and again its speculation is unfounded.

Forensic psychologist Dr. Natalie Novick-Brown has examined Mockovak and reports that indeed Mockovak *does* suffer from the predictable long-term effects of childhood sexual abuse. *Decl. Novick-Brown*, ¶14. Based upon psychological testing and her interviews of Mockovak, she diagnosed him as suffering from Post-Traumatic Stress Disorder (“PTSD”) and Major Depressive Disorder. *Id.*, ¶¶3-7. She found a consistency between her testing results and the types of mental defects that research has found to be associated with childhood abuse:

Dr. Mockovak suffered extreme childhood maltreatment over much of his childhood (i.e., ten years of sexual abuse by an uncle, frequent physical and emotional abuse by his alcoholic father, and neglect by his mother). Dr. Mockovak’s objective test results and questionnaire responses were consistent with the valid MMPI results he obtained in his initial evaluation. Together, ***testing revealed*** an external locus of control, deficient ego mastery,

defective inhibition, *suggestibility, and learned helplessness*. His comments as events spiraled out of control in 2009 were consistent with these test results.

Id., ¶8 (emphasis added).³

Novick-Brown reports that “extensive neurological study in recent years” has produced “a great deal of information regarding permanent neurochemical changes produced by uncontrollable stressors (e.g., long-term childhood sexual abuse).” *Id.*, ¶15. “Childhood maltreatment weakens brain connectivity between the prefrontal cortex and the amygdala, and between the prefrontal cortex and the hippocampus (which regulates fear responses).” *Id.* Novick-Brown found that Mockovak’s psychological test results are consistent with the types of adverse brain development that are associated with childhood abuse.⁴

3. Novick-Brown Confirms That Mockovak’s Childhood Abuse Was “Directly Relevant” to His Vulnerability to Entrapment.

Just as Gonsiorek had said to attorney Tvedt (*Decl. Gonsiorek*, ¶¶ 5-9), Novick-Brown found an obvious connection between Mockovak’s mental

³ See also ¶13: “His mental defects involved cognitive deficits and traits associated that he’d developed in response to his childhood trauma which included . . . suggestibility and learned helplessness.”

⁴ “Objective cognitive testing found significant difficulty in verbal memory, which indicated temporal lobe dysfunction, and a high level of suggestibility, which indicated dysfunction in the prefrontal cortex.” *Id.*, ¶9. “[His] test results, particularly findings indicating dysfunction in the prefrontal cortex, are consistent with neuroimaging research that finds links between childhood maltreatment and attenuated structural and functional development of the neocortex during childhood, including the anterior cingulate, the orbitofrontal and dorsolateral prefrontal cortex.” *Id.*, ¶15 (footnotes omitted).

defects and his response to Kultin's persistent entreaties to proceed:

Responses on questionnaires were consistent with MMPI results and indicated that Mr. Mockovak had an external locus of control. The latter means *he typically perceives external events to be beyond his personal control and consequently gives up easily (i.e., learned helplessness). These constructs are directly relevant to his offense conduct.*

Id., ¶9 (emphasis added).

Suggestibility (an executive function controlled in the prefrontal cortex) indicates that Dr. Mockovak was highly inclined to acquiesce to Kultin just as he had acquiesced to his uncle in childhood. The tendency to acquiesce was an ingrained aspect of his personality . . . that had been reinforced in him over his ten-year history of repeated sexual abuse. These dynamics plus the deficient inhibition identified in his MMPI explain why *his mental defects rendered him unable to keep resisting Kultin's repetitive suggestion.*

Id., ¶14 (emphasis added). *See also* ¶15: “[S]tudies of adults with PTSD 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.”

4. The State Erroneously Speculates That Perhaps Mockovak Did Not Want His Childhood Abuse to Be Made Public.

The State also speculates that perhaps trial counsel did not present evidence of learned helplessness because Mockovak did not want the facts about his childhood sexual abuse to be made public. *R-PRP*, at 78-79. The State offers no support for that speculation and it is also incorrect. *See Second Decl. Michael Mockovak*, ¶¶4-6.

5. Testimony on Learned Helplessness and Suggestibility Would Have Greatly Strengthened the Entrapment Defense By Explaining that Mockovak's Ability To Resist Kultin Was Substantially Impaired.

If Mockovak's trial lawyers had understood the law governing entrapment, they would have heeded the advice given to them by Gonsiorek, they would have sought out an expert to test and diagnose Mockovak. Had they done that, they could have presented expert testimony to show that Mockovak has a diminished capacity to resist repeated pressure from other adults to engage in conduct that Mockovak does not want to engage in, and which he is not predisposed to engage in:

Dr. Mockovak's ability to resist the suggestion that he resort to criminal activity – in this case hiring people to kill his business partner – was substantially impaired by the cognitive deficits associated with the PTSD caused 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. While a normal person would have the ego strength to resist such pressure, Dr. Mockovak was not (and is not) a normal person because he was subjected to years of sexual abuse as a child. Because of this experience, he developed psychological impairments that made him particularly vulnerable to manipulation by others.

Entrapment is a specific form of manipulation where a government agent suggests the commission of a criminal act to another person who is *not* predisposed to commit the crime at issue and then manipulates that person into committing the offense. *Compared to normally-constituted persons, Dr. 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.* From that experience he "learned" he was helpless, and this learned helplessness continues to afflict him as an adult.

Consequently, as an adult his ability to reject suggestions of criminal activity put to him by others is substantially diminished.

Decl. Novick-Brown, ¶¶16-17 (emphasis added).

6. Washington Courts Have Admitted Expert Testimony About Learned Helplessness and Suggestibility For Decades.

The State speculates that maybe Mockovak’s trial judge would not have allowed expert testimony about learned helplessness or suggestibility because it is unclear whether Mockovak can show that such testimony “would have been admissible.” *R-PRP* at 73. But the State ignores decades of settled Washington law that recognizes its admissibility.

The Supreme Court has repeatedly held that testimony about learned helplessness is admissible in cases where women asserting self-defense seek to show that their abuse caused psychological damage that reduced their ability to see that there were ways of escaping from their abuser. *See State v. Allery*, 101 Wn.2d 591, 596-97, 682 P.2d 312 (1984) (error to exclude testimony about “a phenomenon known as ‘learned helplessness,’ “a condition in which the woman is psychologically locked into her situation” with her abuser, in order “to explain why” she “would not leave her mate, would not inform police or friends”).⁵

⁵ *Accord State v. Kelly*, 102 Wn.2d 188, 190, 685 P.2d 564 (1984) (“‘learned helplessness’ . . . lead[s] to a feeling of surrender and a failure to realize or know options available to escape the relationship.”); *State v. Stark*, 158 Wn. App. 952, 958, 244 P.3d 343 (2010) (expert testified defendant “developed ‘learned helplessness’”). *See also State v. Dejarlais*, 88 Wn. App. 297, 303, 944 P.2d 1110 (1997) (recognizing that
(Footnote continued next page)

Indeed, despite the State's attempt to portray learned helplessness as a topic of questionable admissibility, prosecutors have themselves introduced evidence of learned helplessness. While first recognized as a proper subject of testimony for defense experts, in *State v. Ciskie*, 110 Wn.2d 263, 265, 751 P.2d 1165 (1988), the Court recognized that the prosecution "may appropriately offer the same type of expert testimony to assist the trier of fact in understanding the mental state of a crime victim."⁶

In *State v. Janes*, 121 Wn.2d 220, 234, 850 P.2d 495 (1993), the Court extended recognition of the admissibility of such evidence to cases where children had been subjected to long term abuse, noting that a "key characteristic of the [battered child] syndrome is known as 'learned helplessness.'" For an abused child "all doors of escape seem closed." *Id.* The *Janes* Court held that "as a general matter, evidence of the battered child syndrome is admissible to help prove self-defense . . ." *Id.* at 236.⁷

battered women "are vulnerable and in a condition of 'learned helplessness'" which explains why woman would did not want to have sex with defendant would simply submit to repeated acts of unwanted intercourse).

⁶ Similarly, in his declaration retired FBI agent Dan Vogel notes that "[s]exually abused children do develop learned helplessness" and that this "does make them more vulnerable to entrapment . . ." *Decl. Vogel*, ¶27.

⁷ As Dr. Novick-Brown notes, the relationship between learned helplessness and abusive mistreatment has been well accepted for decades: "Learned helplessness has been the subject of multidisciplinary study since the mid-1960s. Originally developed to explain why exposure to aversive stimuli in a classical conditioning context would produce failure to learn how to escape, the construct has been the subject of extensive neurological study in recent years to the point where there now is a great deal of information regarding permanent neurochemical changes produced by uncontrollable stressors (*e.g.*, long-term childhood sexual abuse)." *Decl. Novick-Brown*, ¶15.

The State's suggestion that a trial court would not have allowed expert testimony about learned helplessness as a product of childhood sexual abuse simply flies in the face of the law. Indeed, if counsel had offered such evidence and the trial court had excluded it, such an exclusion would have been clear reversible error under *Allery*, *Kelly*, and *Janes*.

7. Trial Counsel Did Not Know the Law. They Mistakenly Believed That If They Presented Diminished Capacity Testimony, They Could Not Also Present an Entrapment Defense.

The State claims that Mockovak has offered “no evidence . . . as to why” trial counsel failed to present evidence of childhood sexual abuse in support of entrapment. *R-PRP* at 79. But this is not true.

The State simply ignores the evidence that Mockovak's trial attorneys believed – erroneously – that the law forbade them from presenting both a diminished capacity and an entrapment defense at the same time. Tvedt told Ronald Marmer that the defense “had to pick between the defenses . . . it was ‘an either/or’ proposition and that we could not do both.” *Marmer Decl.*, ¶14. “She said that to assert entrapment one must admit the crime charged.” *Id.* Similarly, in open court Attorney Robinson stated that one “has to admit to the offense before he can even plead the defense of entrapment.” *RP VIII-A* at 15, *ll.* 10-12.⁸ Robinson's statement is fully consistent with what Tvedt told Marmer about Washington law.

⁸ See Appendix A for an index to the many volumes of the report of proceedings.

But both attorneys were wrong. As noted in the cases previously cited in his opening brief,⁹ the law does *not* require defendants to admit the offense in order to plead entrapment, and does *not* require an either/or choice between entrapment and diminished capacity. The State has not responded to these cases and has not addressed the undisputed fact that Mockovak's attorneys did not know that they *could* present both defenses.

Instead, the State cites irrelevant case law from other jurisdictions holding that it is not deficient conduct for counsel to "choose one strategy over another." *R-PRP*, at 74-75. But here there was no need to "choose one strategy over another" because an entrapment defense and expert testimony about psychological deficits that rendered the defendant exceptionally vulnerable to entrapment were not inconsistent, were both available, and could be simultaneously asserted. Indeed, psychological evidence of a substantially impaired ability to resist entrapment is not "a newly-proposed defense" as the State mischaracterizes it in its brief. It is simply scientific evidence that supports the entrapment defense that was presented and argued to the jury.

In sum, the State's failure to acknowledge and respond to the evidence that Mockovak's attorneys did not know the law of entrapment, and that

⁹ *State v. Galisa*, 63 Wn. App. 833, 822 P.2d 303 (1992); *Mathews v. United States*, 485 U.S. 58, 62 (1988); *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007).

they did not realize that they could present diminished capacity evidence in support of entrapment, amounts to a tacit concession of those critical points. Given the attorneys' failure to know the law, it was deficient conduct to fail to present this evidence.

8. Attorney Robinson Incorrectly Believed That The Test for Entrapment Was An Objective Test.

The State also ignores the fact that Attorney Robinson did not understand that the test for entrapment under Washington law is subjective. In his opening brief Mockovak noted that Robinson "did not understand entrapment was a subjective inquiry." *PRP*, at 109. Mockovak presented concrete evidence of Robinson's mistaken belief that the entrapment inquiry was governed by an objective standard. *PRP*, at 110, quoting *Decl. Marmer*, ¶16. Marmer attests to the fact that Robinson told him that entrapment was *not* a subjective inquiry. *Id.*

And yet in its response the State misrepresents Mockovak's argument. Perhaps the State's brief simply omitted the word "not" by mistake; for whatever reason the State claims that Mockovak is arguing that his trial counsel did not present evidence of childhood sexual abuse "because counsel believed the entrapment inquiry was subjective." *SR-PRP* at 79, citing *PRP*, at 106-08. But this is the exact *opposite* of what Mockovak said in his opening PRP brief: Mockovak argued that Robinson mistakenly believed that entrapment was governed by an *objective* test. *PRP*, at 110.

The State goes further astray when it says Mockovak is engaging in “pure speculation” as to what Robinson thought. There is no speculation about that point: Marmer’s declaration attests to the fact that Robinson told Marmer the entrapment defense is governed by an objective test. *Decl. Marmer*, ¶16. This is actual evidence of what Robinson thought.¹⁰

9. Because Trial Counsel Were Mistaken About Two Critical Components of Washington Law, The State Cannot Brush Aside Their Massive Blunder By Labeling It a Strategic Decision.

The State ignores the case law regarding trial counsel’s “tactical” decision making. The State seeks shelter behind the general principle that “whether to call expert witnesses is generally tactical” and tactical decisions cannot serve as a basis for an ineffective assistance of counsel argument. *R-PRP* at 74, citing *In re Cross*, 180 Wn.2d 664, 700, 327 P.3d 660 (2014). But the State ignores the equally well-settled corollary principle that a “tactical” or “strategic” decision that is based on an incorrect understanding of settled law *can serve* as the basis for an IAC claim, because it is deficient conduct not to be familiar with clearly established law. Defense counsel’s mistakes of law do not qualify as reasonable strategic choices under *Strickland*.¹¹

¹⁰ Since Robinson’s statement to Marmer is not offered for the truth of the matter asserted (indeed, what Robinson asserted was legally incorrect and thus untrue), it is admissible to show Robinson’s state of mind under ER 803 (a)(3).

¹¹ *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000) (attorneys who failed to search public records for mitigation evidence about Williams’ childhood because “they
(Footnote continued next page)

In this case trial counsel's "strategic choice" was shockingly unreasonable. They thought they could not present both a diminished capacity defense and an entrapment defense, so they made a choice for the latter. They were wrong. They could have presented both. There was no conceivable reasonable basis for foregoing the available diminished capacity evidence, especially since it so dramatically reinforced the key elements of the entrapment defense. Because he had been sexually abused for years as a child, Mockovak was psychologically vulnerable to people who were trying to pressure him into doing something he did not want to do. *Decl. Foote*, ¶7; *Decl. Novick-Brown*, ¶¶16-17. But the jury never knew this because trial counsel erroneously believed they could not make this argument while presenting an entrapment defense.

10. The State Ignores The Strength of The Entrapment Defense, Which Was Partially Successful And Resulted in Acquittal of the Murder Charges Involving Bradley Klock.

The State's last refuge is to claim that none of this would have made any difference. *R-PRP* at 74, 80. Ignoring the fact that for six months (May through October of 2009) Mockovak kept *refusing* to accede to Kultin's suggestion that he employ Kultin's Russian Mafia

incorrectly thought that state law barred access to such records" held ineffective); *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) (failure to move to suppress was deficient conduct, not reasonable strategy, because it was based on "ignorance of the law"); *Washington v. Hofbauer*, 228 F.3d 689, 702 (6th Cir. 2000) ("failure to object . . . constitutes deficient conduct when that failure is due to . . . lack of knowledge of controlling law, rather than reasonable trial strategy.").

friends to kill Dr. King, the State tries to focus all attention on the statements that Mockovak made at the very end of this six month period, on November 6 and 7, when he finally decided to give in to Kultin and to hire hitmen as Kultin had been urging him to do. *See R-PRP* at 86.¹²

Of course the fact that the defendant eventually agreed to go along with law enforcement's criminal suggestion is present *in every single criminal case where the entrapment defense is raised*. The entrapment inquiry would never even arise if the defendant had not finally agreed to engage in the criminal activity.¹³ So the State's approach to this case, if accepted, would essentially eliminate entrapment as a defense altogether. And yet we know from the Legislature's codification of the defense in RCW 9A.16.070 that the recognition of entrapment defense is an important part of the express public policy of the State, and it was also judicially recognized as a common law defense long before enactment of the modern criminal code in 1975. RCW 9A.04.010.

The inquiry is not, as the State would suggest, could a rational jury have rejected the entrapment defense even if trial counsel had presented evidence of the long-term psychological effects of his childhood sexual

¹² "When the time came to finalize the plan, Mockovak was unflinching, calculating and certain . . ."

¹³ As the Court said in *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 180 (1984), "Entrapment occurs when . . . the accused is lured or induced *into committing* a crime he had no intention of committing." (Italics added).

abuse. The proper inquiry is whether there is a reasonable probability – a probability that undermines our confidence in the jury’s verdict – that such expert testimony might have led the jury to acquit Mockovak of the charges of conspiring to kill Dr. King. And given the facts of this case – where the jurors **did acquit** Mockovak of the charge of conspiring to kill Bradley Klock – the only logical answer to the *Strickland* prejudice inquiry is *of course there is such a reasonable probability*.

Moreover, we know from the comments the jurors themselves made that many of them found the case very difficult to decide, found the conduct of Kultin, the government’s agent, to be very troubling, and acknowledged that their decision could easily have gone the other way. After the trial nine of the jurors were interviewed and they said:

Well, *it was not clear cut at all. Very difficult.* So for the last two, or for the luring and inducing, and for reasonable persuasion. That was not clear cut. . . [I]t came down to our judgment. If it had just been on those two things, *it may have swung the other way.*

CP 789-90 (Juror #2) (Appendix B).

I strongly felt that Kultin played such a critical role in *coercing Mockovak to do something that he wouldn’t otherwise have done.* It was Kultin pushing him to do it.

CP 790 (Juror #6) (Appendix B).

I felt . . . Kultin was reeling [sic] . . . Mockovak in

CP 789 (Juror #1) (Appendix B).

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, were really like, ‘Oh my God, are you serious, you can really do that?’ . . . *It was really hard to determine, whether he was leading Dr. Mockovak*, or whether he was just playing a role.”

CP 789 (Juror #4) (emphasis added) (Appendix B).

In light of the acquittal on the Klock count; the jurors’ comments about how hard it was to decide the case; the fact that Agent Carr initially was not particularly concerned about any danger; the fact that later Carr still thought Mockovak could simply be venting or blowing smoke; the fact that Carr still did not know what Mockovak’s true intentions were as late as November 4, 2009; and the fact that *it took six months* for Kultin to wheedle, coax, and frighten Mockovak into *finally going along* with Kultin’s criminal plan; all demonstrate that there is a *very* large and reasonable probability that if trial counsel’s conduct had not been deficient (in so many ways), the jury might very well have acquitted Mockovak of all the charges. *Strickland’s* prejudice prong is easily met here.

B. TRIAL COUNSEL’S LACK OF FAMILIARITY WITH EXISTING CASE LAW AND WITH THE ENTRAPMENT STATUTE LED HIM TO SUBMIT AN ERRONEOUS JURY INSTRUCTION (Ground Two).

Mockovak has urged this Court to reconsider its direct appeal ruling that his trial counsel’s proposal of the WPIC instruction on the

defense of entrapment was not a denial of the right to effective representation. In its opposition brief here, the State never comes to grips with the heart of the matter: the WPIC instruction *never* informs the jury that the test for entrapment is, at a minimum, primarily subjective. Indeed, the WPIC instruction *never mentions the subjective test at all*. Thus, the State's argument here, that entrapment has both objective and subjective components, misses the mark because even if the State were correct that entrapment includes an objective component, the WPIC instruction never informs the jury about the subjective component and therefore fails to inform the jury about that portion of the test.

The State also engages in a shell game. It concedes that on direct appeal “[Mockovak] argued that in Washington entrapment is a wholly subjective inquiry.” *R-PRP*, at 52. It further concedes that Mockovak argued that WPIC 18.05 was faulty because it called for an objective inquiry. *Id.* at 52. It concedes that “Mockovak discussed *State v. Lively* to show that the test for entrapment was subjective,” and that he argued that WPIC 18.05 misstated the law by failing to inform the jury of the subjective nature of the test. *Id.* at 53-54. Finally, the State notes that this Court rejected Mockovak's arguments in his direct appeal. *Id.*, at 54. But in making those arguments the State fails to make any mention of the fact that this Court's rejection was based upon the *procedural* ground of

waiver and *not* on the *merits* of Mockovak's argument.

The State simply ignores this Court's express statement in its opinion in the direct appeal that "we decline to consider [this] untimely argument," because "it was raised for the first time at oral argument." *Slip Opinion*, at 16. Put another way, the State concedes that Mockovak in fact did raise the issue in the briefing in the direct appeal, but then seeks to take advantage of the denial of the appeal based upon the Court's mistaken belief that Mockovak had not raised the issue in his briefing.

Mockovak also notes that his PRP provides this Court with additional information concerning his trial counsel's deficient conduct. In his direct appeal, this court stayed this PRP pending resolution of the direct appeal (*Order of 11/19/12*) and declined to lift that stay and to consolidate the PRP with the direct appeal. (*Order of 5/23/13*). As a result, this Court was not in a position to take into account the expert opinion of Attorney Ford, which is part of the PRP record, and which plainly states that Attorney Robinson's conduct in proffering the jury instruction was deficient. Nor did this court have as a part of the record in the direct appeal Attorney Robinson's admission in his declaration that he relied upon a young lawyer to conduct the legal research and prepare the jury instructions. Nor did this Court have available in the direct appeal record the declaration of the young lawyer who did the legal research and

who acknowledges his failure. *See Decl. Campagna*, ¶¶ 5, 15-16.

In this PRP Mockovak asks this Court to decide for the first time – on the merits – whether WPIC 18.05 misstates the law, whether trial counsel should have known that, and whether it was deficient conduct for him to propose WPIC 18.05 notwithstanding *Lively* and the statutory definition of entrapment.

1. This Court Overlooked The Arguments In the Direct Appeal Briefing That the WPIC Instruction Is Fatally Flawed Because It Fails to Inform the Jury of the Subjective Test for Entrapment.

First, this Court refused to consider Mockovak’s argument that the entrapment instruction was flawed because it failed to inform the jury that “a defendant’s entrapment defense must be evaluated pursuant to a subjective standard and not an objective standard.” *Slip Opinion*, at 16, n.9. This Court said, “we decline to consider [this] untimely argument,” because “it was raised for the first time at oral argument.” *Id.* But as the State concedes in its response, Mockovak raised that argument in his direct appeal briefing. *R-PRP* at 53-54.¹⁴

¹⁴ In *both* Mockovak’s opening and reply briefs in the direct appeal he made exactly that point. *See* COA No. 66924-9-I, *Brief of Appellant*, at 37-38 (“The jury is supposed to use a purely *subjective standard* when resolving the only two factual questions that constitute the defense of entrapment”); *Reply Brief*, at 25, citing *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996). In its direct appeal opinion this Court stated that “there was no case law at the time of Mockovak’s trial indicating that WPIC 18.05 contained an incorrect statement of the law.” *Slip Opinion*, at 16-17. But *State v. Lively*, 130 Wn.2d 1, 19 921 P.2d 1035 (1996), which existed long before Mockovak’s trial, held that when deciding whether to accept an entrapment defense a jury does *not* use an objective test
(Footnote continued next page)

The State argues that this Court should not consider Mockovak's contention that the WPIC instruction was erroneous because a PRP "is not a forum to relitigate issues already considered on direct appeal." *R-PRP* at 51, citing *In re Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994). But this court is not being asked to "relitigate" an issue "already considered on direct appeal."¹⁵ This Court declined to rule on the issue in the direct appeal, based upon a mistaken belief that the issue had not been timely presented. And in the direct appeal, this court never had an opportunity to consider the evidence that Mockovak could submit only with his PRP – the declarations of Attorneys Ford, Robinson, and Campagna.

2. The State's Argument That Entrapment Is "Primarily" Subjective Cannot Rescue WPIC 18.05 Because WPIC 18.05 Fails to Inform the Jury That There Is Any Subjective Component.

In a section of its brief entitled in part: "WPIC 18.05 is a Correct Statement of the Law," the State attempts to defend trial counsel's failure

and must use a subjective test. *See Brief of Appellant*, at 41 & 76.

¹⁵ At the same time that it claims Mockovak is reasserting an argument that was decided and "already considered," the State also accuses Mockovak of presenting "a different ground for relief merely by alleging different facts, asserting different legal theories, or couching the argument in different language." *R-PRP* at 51. Thus the State simultaneously argues that Mockovak is raising (1) the *same* claim that this Court previously rejected on the merits and (2) a "different ground" based on a "different legal theory." The State does not explain how Mockovak's PRP claim can simultaneously be both the same as, and different from, his direct appeal claim.

In fact Mockovak's claim is *the same claim which this Court declined to consider the first time around in the direct appeal*. It has not changed. The claim has always been that the WPIC, which trial counsel proposed and which the trial court gave, (1) conflicted with the statute, RCW 9A.16.070, (2) conflicted with the existing case law; and (3) never informed the jury that entrapment was judged by a subjective standard.

to realize that WPIC 18.05 was a flawed instruction. *R-PRP*, at 51. But the State's argument actually confirms that WPIC 18.05 *misstates* the law.

The gist of the State's argument is that WPIC 18.05 correctly includes a reference to an objective component of the defense of entrapment.¹⁶ But the State is forced to admit that the defense of entrapment is "primarily" a subjective inquiry. *R-PRP* at 54. That admission hardly breaks new ground because Washington law has long recognized that the proper test is subjective. *See, e.g., State v. Ziegler*, 19 Wn. App. 119, 121, 575 P.2d 723 (1978). Mockovak continues to maintain that the jury must decide *only* those facts dealing with the defendant's subjective state of mind,¹⁷ and that only the trial judge decides whether law enforcement's conduct was objectively reasonable.¹⁸ But for purposes of this PRP it does not matter whether the test for entrapment is

¹⁶ The State claims *Lively* shows that "the conduct of police is relevant too." *Id.* at 55.

¹⁷ The State says Mockovak's contention that entrapment is governed solely by a subjective test is a "Novel Argument" that is "Unsupported by the Statute or Case Law." *R-PRP* at 54. And yet 18 years *before Lively*, this Court said that the test for entrapment was purely subjective, and that it had been purely subjective for years before that: "The statutory definition of entrapment contained in RCW 9A.16.170 is but a legislative *reiteration of the 'subjective test' for that defense*, as it is applied in both the federal courts and in our State Supreme Court." *Ziegler*, at 121 (emphasis added). As far back as 1966 Washington courts recognized that entrapment turned on what was going on in the mind of the defendant. *See State v. Gray*, 69 Wn.2d 432, 434, 418 P.2d 725 (1966).

¹⁸ According to the State, since the court in *Lively* said it was "true" that the action of the State was "integrally involved," this means that there is an objective component to the entrapment inquiry. But the State's conduct is "integrally involved" with the entrapment inquiry simply because the jury must decide whether the conduct of the police was *what put the idea of committing a crime into the defendant's mind*. That is a subjective inquiry into what was going on in the defendant's mind. That is *not* an objective inquiry into what would be going on in the mind of a "reasonable person."

entirely subjective or *primarily* subjective. Because WPIC 18.05 refers *only* to the objective test, and *nowhere* refers to what even the State concedes is the “primarily” subjective test, WPIC 18.05 fails to state the correct legal standard.

Even if the entrapment defense is only “primarily” subjective, as the State contends, WPIC 18.05 *never* told the jury about the subjective test that “primarily” governs the entrapment defense. Even worse, the language in WPIC 18.05 that sets out the test for entrapment, mentions only an objective standard, and never tells the jury that a subjective standard governs entrapment under Washington law.

3. Trial Counsel’s Performance Was Deficient Because He Proposed an Incorrect and Prejudicial Jury Instruction.

The State does not come to grips with the evidence that Mockovak has submitted with his PRP, evidence that could not be part of the record in the direct appeal. Mockovak has submitted the Declaration of Attorney Tim Ford, who opines that trial counsel’s conduct was deficient when he proposed WPIC 18.05. In Ford’s expert opinion the “basic research [that] any lawyer handling an entrapment case would do” would show that there was a plausible argument that WPIC 18.05 misstates the law, and that there was no sound strategic reason for Attorney Robinson to propose it. *Decl. Ford*, ¶¶ 6.2.2, 6.2.3. The State has offered nothing to rebut Ford.

Mockovak has also submitted the declaration of the young lawyer

who conducted the legal research and prepared the jury instructions.

Attorney Campagna agrees with Attorney Ford's conclusion:

There was no strategic or tactical reason for offering an entrapment instruction that contained the 'reasonable amount of persuasion' language from WPIC 18.05, and no strategic or tactical reason for failing to challenge the inclusion of that language in the instruction presented to the jury."

Decl. Campagna, ¶16. The State has not offered any counter declaration to rebut the young lawyer's admission of his error.

Mockovak has submitted with his PRP the declaration of trial counsel, Attorney Robinson, who acknowledges that he relied upon his young associate to research the law and prepare the jury instructions:

I have read the declaration of Joseph Campagna dated April 23, 2012. I agree with the statements made by Mr. Campagna regarding the WPIC pattern instruction on entrapment, which we proposed to the trial judge, and which the trial judge gave.

Decl. Robinson, ¶ 4. The State has no counter declaration to rebut Robinson's account of how the error came about, nor does the State have any counter declaration to rebut Robinson's statement that he agrees there was no strategic or tactical reason for presenting the erroneous instruction.

In sum, *all* the attorneys agree that it was deficient conduct not to challenge the language of the WPIC instruction on entrapment.

None of that evidence was part of the direct appeal. Now that this evidence is before the Court in this PRP, it is entirely appropriate for the Court to consider the issue of deficient conduct in light of the un rebutted

declarations of Attorneys Ford, Campagna, and Robinson.

The State also ignores the evidence that while Robinson did not know that the test was a subjective test, Mockovak's other trial attorney, Colette Tvedt, *did* know this. *See Marmer Decl.*, ¶15. Unfortunately, Tvedt was not the attorney who prepared the defendant's proposed jury instructions; attorney Campagna did that. *Decl. Campagna*, ¶¶4-5. In his post-trial conversation with Ronald Marmer, Robinson revealed that he mistakenly thought that the test was an objective test. *Marmer Decl.*, ¶16. On direct appeal this Court did not have this evidence.

In a case where everyone knew that the defense was going to be entrapment – the law enforcement agents knew this from the very beginning of their decision to employ an undercover informant (RP VII, 48, 50; RP X, 137), and the trial judge noted this as well (RP VIII-A, 72) – it is simply incredible that Mockovak's two trial attorneys did not even agree on whether the test for entrapment was objective or subjective, and that lead counsel left it up to an inexperienced associate attorney to draft their proposed jury instructions. Based upon Petitioner's un rebutted evidence, this Court should hold that trial counsel's conduct was deficient.

4. Submission of an Instruction Which Failed to Explain The Subjective Nature of Entrapment was Tremendously Prejudicial.

For the reasons previously outlined in section A(10), *infra* on pages 17-20, trial counsel's failure to propose a jury instruction that told

the jury that the test for entrapment was a subjective test, was extremely prejudicial. As stated by Juror Nos. 2 & 4, this was a “[d]ifficult case” that easily could have “swung the other way”; a case in which it was “really hard to determine whether [Kultin] was leading Dr. Mockovak” CP 789 (Appendix B). If the jurors had been correctly instructed on entrapment, the verdict almost certainly would have gone the other way.

C. INEFFECTIVE ASSISTANCE: FAILURE TO IMPEACH KULTIN (Ground Seven).

1. Kultin Said He Believed Mockovak “Must be Spying” on Klock.

The State concedes that Kultin testified that (1) Mockovak told him that he had discovered that Klock was going to take a trip to Europe; (2) the trip presented a good opportunity for something to happen to Klock; (3) Mockovak’s foreknowledge of Klock’s travel plans concerned him “because it suggested to Kultin that Mockovak might be spying on Klock”; and (4) this concern about spying was what “sparked his visit to the FBI agent in Portland.” *R-PRP* at 64-5. *R-PRP* at 64-65, citing to 11 RP 124, 126; 14 RP 38. The State admits that Klock testified that he told no one of his travel plans, and therefore “Mockovak would have had to have [had] access to [his] email in order to know about that” 9 RP 192. Finally, the State concedes that in closing argument Robinson “accused Kultin of inventing the whole conversation” in which Mockovak supposedly told Kultin about Klock’s travel plans. *R-PRP* at 66.

At the same time the State asserts that “Kultin never testified that Mockovak said he hacked into Klock’s email, and [he] never accused Mockovak of that.” *R-PRP* at 65. The State’s word play does a disservice to the record. Literally speaking, Kultin never used the word “hacked” and never explicitly accused Mockovak of personally “hack[ing] into Klock’s email.” But Klock *did* explicitly make this accusation as the trial prosecutor noted in her closing. RP XII, 128-29.¹⁹ And Kultin *explicitly* stated that Mockovak’s comments about Klock’s travel plans led him to conclude that he “must be spying or something because I don’t know how else he would get that kind of information about Brad Klock.” RP X, 38.

The point is that Kultin testified that Mockovak’s knowledge of Klock’s travel plans showed that Mockovak had Klock under surveillance and that Mockovak was looking for “a good time” to have something happen to Klock. Inducing the jury to believe that Mockovak had been spying on Klock seriously undermined Mockovak’s entrapment defense.

2. Trial Counsel Failed to Use Readily Available Impeachment Evidence To Discredit (a) Kultin, By Showing That Kultin Was Concealing His Own Unimpeded Access to Klock’s Computer and His Close Relationship to Klock; and (b) Klock, By Showing That Klock Had A Big Motive to Retaliate Against Mockovak.

Robinson knew that Kultin’s testimony was damaging. That is why he

¹⁹ “What did Brad Klock tell you? . . . There’s no way Mockovak would know about this unless he was hacking into my email.”

argued in closing that Kultin was lying on this point, and that is why the trial prosecutor argued that Kultin was telling the truth. RP XII, 36-39, 60 (prosecutor); RP XII, 128-29 (Robinson).

All along Robinson was in possession of evidence that showed that *Kultin – not Mockovak – had access* to Brad Klock’s laptop computer, and yet Robinson did not use this fact to impeach Kultin. Both Kultin and Klock worked for the company that Mockovak and King owned together. As the company’s IT director, Kultin had the skills to easily extract information from Klock’s computer. RP V, 89. Kultin also provided IT services to the company where Klock worked after King and Mockovak fired him. So Kultin was in a position to acquire the facts that enabled him to make up the lie that Mockovak purportedly told Kultin about Klock’s travel plans. There is no conceivable strategic reason for trial counsel’s failure to elicit testimony regarding Kultin’s easy access to Klock’s computer. Had he done so, he could have eviscerated Kultin’s contention that Mockovak “must be spying” on Klock.

Robinson also had in his possession powerful evidence of Klock’s motive to retaliate against Mockovak. Mockovak personally “dove into the investigation” into Klock’s theft from the company and Mockovak “was intent on getting Klock prosecuted.” *See R-PRP, Appendix J*, at p.1. As noted by the investigator who looked into Klock’s embezzlement,

Mockovak “reasonably believed [Klock] had both stolen from him and lied to him,” and Mockovak was pleased when Klock was arrested for stealing from Clearly Lasik. *Id.*, at 1-2.; *See also Third Decl. James Lobsenz*, ¶5. It would have been easy for the jury to infer that Klock had it in for Mockovak. But trial counsel failed to present this evidence.

Attorney Robinson also was in possession of evidence that Klock and Kultin had such an exceptionally close relationship that Klock enlisted Kultin’s help in dealing with problems caused by Klock’s angry ex-girlfriends. *Klock Deposition* at 240-48, attached as Appendix A to *Third Decl. Lobsenz*. And Kultin went to work for Klock’s company at the very same time that Klock was suing Mockovak’s company.

All of this evidence would have been even more compelling in light of other evidence showing that Klock and Kultin were in cahoots. As retired FBI Agent Dan Vogel has noted, “[p]hone records revealed that Kultin had been in constant contact with Klock throughout 2009,” but Kultin concealed this contact from the FBI. *Decl. Vogel*, ¶17. A log of Kultin’s cell phone calls admitted at trial showed that on August 3, 2009 Kultin actually called Klock first, three minutes before he called Agent Carr to inform Carr that Mockovak had just asked to meet with Kultin so he could “talk about that thing,” which Kultin interpreted as a statement that he wanted to talk about killing Klock. RP VII, 21-22 and Tr. Exh. No. 47.

But Kultin never told Agent Carr about his phone contact with Klock. RP VII, 22; RP X, 6. Instead, Kultin concealed all his phone contacts with Klock from Agent Carr, and also concealed the fact that he was working for Klock at the same time that he was working with the FBI. RP VII, 24, 26; RP X, 7, 71-72.²⁰

The jurors were troubled by those calls, and they questioned Kultin's veracity. For example, one juror said "Kultin seemed to have a lot of holes in his testimony." CP 788 (Appendix B). Another said Kultin "was a bit questionable" and noted that Kultin had "no explanation for why he had so many calls and text messages" to Klock. CP 788 (Appendix B).

In her closing, the prosecutor mocked the suggestion that Klock and Kultin were working together, and defense counsel struggled to explain why it made sense that they would do so. RP XIV, 37-39. Trial counsel's failure to present key evidence of motive and opportunity, to cross-examine Kultin and Klock on these points, and to argue those facts in closing, clearly constitutes deficient conduct. If the jurors had known the facts about (1) Mockovak having Klock arrested for stealing from the medical clinic; (2) Kultin's easy access to Klock's computer; and (3) the relationship between the two men; it is quite likely that Mockovak would

²⁰ "Q. And you kept from the FBI the fact that you were having contact with the person that was supposedly the victim . . . You kept that from the FBI? A. Yes."

not have been found guilty. As one juror said, it would not have taken much for the jury to have “swung the other way.” CP 790 (Appendix B).

D. DUE PROCESS VIOLATION BASED ON BAD FAITH FORUM SHOPPING (Ground Three).

1. Four Related Claims Concern Law Enforcement’s Successful Maneuvering That Allowed It to Both Gain the Advantages, and Avoid the Disadvantages, of State Law, By Switching from Federal Court to State Court.

Four of Mockovak’s grounds for relief involve law enforcement’s successful (so far) attempt to pick and choose which laws to follow and which laws to ignore. State court offered two powerful advantages: (i) a far more attractive burden of proof rule for entrapment, thus making it far easier to convict Mockovak, and (ii) far more onerous sentencing laws that provided for much lengthier imprisonment once a conviction was obtained. But state court also offered one disadvantage. The Washington Privacy Act prohibited the recording of private conversations without the consent of all participants, and it prohibited the admission of evidence collected in violation of the Act. Federal court prosecution offered the advantage of not having to be bound by those restrictions. Wanting to secure both the advantages of state court and federal court, law enforcement devised a scheme to suddenly shift the case from federal to state court. This scheme was based upon two lies. First, law enforcement claimed that it recently realized that it might be difficult to prove the

nexus to interstate activity that had to be proved in a federal prosecution. Second, it claimed that it only recently realized that Mockovak's conduct was covered by state criminal laws as well as by federal laws.²¹

Mockovak has challenged the legality of law enforcement's sudden shift to state court on three grounds, and he has challenged his trial attorney's failure to challenge law enforcement's tactics on a fourth ground. He submits that by purporting to obtain legal permission to violate state criminal laws, and by misrepresenting the truth to a state court judge about the reasons for the sudden shift to state court after collecting evidence under the less restrictive provisions of federal law, law enforcement (1) violated due process; (2) violated the Tenth Amendment by transgressing the boundary between the spheres of state and federal sovereignty; and (3) violated the Washington State constitutional guarantee of freedom from intrusion into private affairs. By failing to move to suppress the evidence collected, Mockovak's trial attorney allowed law enforcement to get away with these three constitutional violations, and thereby perpetrated a fourth constitutional violation: (4) denial of the Sixth Amendment right to effective assistance of counsel.

²¹ Detective Peters has noted how utterly unbelievable it is to think that it didn't dawn on Detective Carver for six months that a person who commits the federal offense of Murder for Hire also commits the Washington State criminal offense of Solicitation of Murder. *Peters Decl.* at ¶¶ 23, 29.

The failure to move to suppress eviscerated the adversary process. Law enforcement selected the laws it wished to be governed by and ignored those it didn't wish to obey. Mockovak's counsel stood aside and let law enforcement's conduct go unchallenged even though he was confident he would have won a suppression motion which would have forced abandonment of the state court case and recharging in federal court. Thus, a suppression motion provided a means of depriving law enforcement of the advantages of state court that it had secured by its three violations of the federal and state constitutions, and the failure to make such a suppression motion constituted a fourth constitutional violation.

The State maintains that none of these arguments carries any force because the advantages of state court over federal court are not as clear as Mockovak contends. Thus the State claims these advantages did not provide a bad faith motive for the sudden switch to state court. But in fact, it is very clear that these advantages were enormous. Just as Mockovak's own lawyer stated at the sentencing hearing, without anyone contradicting him, the difference between state and federal court prosecution was the difference between the state court outcome of convicting Mockovak and sending him to prison for 20 years and the likely outcome of Mockovak simply "going home" if the case had been tried in federal court. RP 3/17/11, at 114.

2. The Claim of Concern About the Ability to Prove the Nexus Element In Federal Court is Transparently Bogus.

According to the State, the switch from federal to state court was not done in bad faith. Instead, although it cites *nothing* to support it, the State simply asserts that the switch was dictated by a lack of evidence to prove the “nexus” element of the federal offense of Murder for Hire, 18 U.S.C. §1958, by showing that the defendant used the mail or some other instrument or facility of interstate or foreign commerce:

What started as a federal prosecution became a state prosecution when *the federal prosecutors said*, just before the planned “hit” was to be committed, *that there was an insufficient nexus to justify federal prosecution.*

R-PRP at 45 (emphasis added).

The entire notion that federal prosecutors might ever have had difficulty proving the “nexus” element of Murder for Hire is absurd. It is well established that even “intrastate telephone calls involve the use of a facility in interstate commerce.” *United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2008). *Accord United States v. Richeson*, 338 F.3d 653, 660 (7th Cir. 2003). From the very beginning of their relationship, Mockovak and Kultin communicated by telephone. *See* RP VI, 76: RP VII, 22. Moreover, two of the recorded conversations are themselves telephone

conversations. *See Exhibit 54, Trans. of 11/7/09.*²² In light of the case law recognizing that a telephone is a “facility of interstate commerce” (even when used only to make intrastate calls), the contention that federal prosecutors doubted their ability to prove a nexus to interstate commerce is ridiculous. Precisely because it is so absurd, it shows how desperate the State is to come up with some explanation for the switch to state court that avoids the conclusion that the switch was motivated by a *bad faith* desire to shop for a judicial forum where the rules for trial and sentencing were far more advantageous to the prosecution than they were in federal court.

The State’s assertion that “the federal prosecutors said . . . that there was an insufficient nexus to justify federal prosecution” is simply false.²³ The Carr Memo specifically states the exact opposite. First Carr wrote that the three recordings made in November after the state court granted Carver’s application for authority to record all showed that there was strong evidence of a federal nexus:

In these recordings, SA CARR believed a strong federal nexus was discovered: 1) the transfer of funds from a Canadian bank account to a US bank account and 2) Travel by MOCKOVAK from Seattle to Portland and from Portland to Seattle. In this trip, MOCKOVAK recovered a King family photo from a Vancouver

²² The FBI’s cover sheet to this transcript, attached to this brief as Appendix D, states “The following is a transcript of a consensually monitored telephone conversation which occurred on November 7, 2009. Parties to this conversation are between Source and Michael ‘Mikie’ Mockovak.” (Attached as Appendix D.)

²³ Notably, the State has not offered any declaration from any federal prosecutor.

office and transported it to the source for the “hitmen” to use in their efforts to locate the King family in Australia.

Carr Memo at 5 (Appendix F to Peters Declaration).

Second, Carr wrote that although *the federal prosecutors agreed with him* that the case *could* be prosecuted in federal court, they recommended prosecution in state court because the state court sentencing guidelines provided for a much harsher sentence than the advisory federal sentencing guidelines, and because the state prosecutors wanted the case:

On 11/10/2009, this information was relayed to AUSA LOMBARDI and AUSA Todd GREENBERG. ***Both agreed that with some follow-up investigation, there appears to be a federal nexus and the crime a violation of federal law.*** They, however, felt that *due to sentencing guidelines* and the fact that King County had shown an interest in the case, the best course of action was to continue a state prosecution.

Id., at 5-6 (emphasis added). Two days after this meeting Mockovak was arrested and four days later he had been charged in state court. *Id.* at 6.

The concrete evidence of bad faith simply cannot be ignored. After taking advantage of the more lenient federal law governing the recording of private conversation, law enforcement switched the case to state court to take advantage of the state’s tougher sentencing guidelines.

3. The State Misrepresents Federal Case Law Regarding Entrapment and the Burden of Proof.

Moreover, while Agent Carr never admitted that it was part of the motivation for the switch, state court offered a far more favorable burden

of proof rule on the defense of entrapment. By going to state court, the prosecution avoided having to disprove entrapment beyond a reasonable doubt. In an effort to diminish the magnitude of this enormous advantage offered by the state court, the prosecution seriously misrepresents Ninth Circuit case law on entrapment and the burden of proof. The State asserts that “federal entrapment law is not as clearly beneficial to Mockovak as he pretends.” *R-PRP* at 37. The State claims that even if the case had been tried in federal court under federal entrapment law, it is not clear that Mockovak would have persuaded the trial judge that he was entitled to an instruction on the entrapment defense.²⁴

The State purports to rely upon *United States v. Skarie*, 971 F.2d 317 (9th Cir. 1992) as support for its claim that perhaps a federal judge would not even have given an entrapment defense instruction. The State misrepresents the *Skarie* case as holding that “the defendant must present undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act. . . .” *Id.* at 320, quoted in *R-PRP* at 38. Thus, the State intimates that such “undisputed” and “patently clear” evidence must be presented before the defendant is entitled to have

²⁴ The prosecution ignores inconvenient facts such as the trial judge’s comment that it was obvious from the very start that entrapment was going to be an issue at the heart of the case: “you know, nobody could read this cert. and come away from it without thinking that . . . who put whom up to what is, if not at the heart of this case, pretty close to it.” *Trans.* 12/6/10 at 72

the jury instructed on entrapment. But in fact, the defendant in *Skarie* “defended on a theory of entrapment ***and the jury was instructed on that theory.***” *Id.* (Emphasis added). The jury convicted Skarie, but on appeal her conviction was reversed because the Ninth Circuit held that no rational jury could have found that the prosecution carried its burden of disproving entrapment beyond a reasonable doubt. The Court held that Skarie was entrapped *as a matter of law*.

The language quoted by the State was lifted out of context. The full quotation is: “*To be entitled to acquittal as a matter of law* on the basis of entrapment, Skarie must point to ‘undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act’ by government agents.” *Id.* at 320 (emphasis added). The Ninth Circuit held that because she *did* meet that higher standard she was “entitled to acquittal as a matter of law.”

Mockovak’s evidence of entrapment was obviously very strong, since the jury *acquitted* him of conspiring to kill Klock, and several jurors expressed their surprise at how much pressure the informant was allowed to put upon Mockovak to finally get him to go along with the plan to kill King. *See Appendix B* (CP 787-791). Under settled Ninth Circuit law, if he had he been tried in federal court an entrapment instruction would have

been given.²⁵ The prosecutors knew this, so they took the case to state court where it was much easier for them to win a conviction.

4. The State Court Sentencing Guidelines Provide for Much Lengthier Sentences, and They Are Mandatory Whereas the Federal Sentencing Guidelines are Only Advisory.

Mockovak has noted that a federal sentence for his crimes would be much shorter than the state sentence he received. The State says that this “seems to be a serious overstatement.” *R-PRP* at 39. But the evidence which Mockovak has presented shows that all the parties, state and federal, *were in agreement* on this point.

Federal Prosecutors. According to the FBI Agent in charge of the investigation, the federal prosecutors, AUSA Vince Lombardi and AUSA Todd Greenberg, “felt that *due to sentencing guidelines* and the fact that King County had shown an interest in the case, the best course of action was to continue a state prosecution.” (*Carr Memo*, at 5-6) (Appendix E to Opening Brief In Support of PRP) (emphasis added).

²⁵ The Ninth Circuit has repeatedly held that “[o]nly slight evidence will create the factual issue necessary to get the [entrapment] defense to the jury, even though the evidence is weak, insufficient, inconsistent, or of doubtful credibility.” *United States v. Gurolla*, 333 F.3d 944, 951, 957 (9th Cir. 2003) (emphasis added) (*reversing* defendant Ortega’s conviction even though his “entrapment defense was not strong.”). *Accord United States v. Becerra*, 992 F.2d 960, 963 (9th Cir. 1993) (*reversing* LaRizza’s conviction because “[a]lthough [the trial court] may have viewed LaRizza’s testimony as incredible or weak, he did present some evidence of entrapment.”); *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989) (same, *reversing* conviction); *United States v. Kessie*, 992 F.2d 1001, 1004 (9th Cir. 1993) (*reversing* conviction); *United States v. Pohelman*, 217 F.3d 692, 698 (9th Cir. 2000) (*reversing* conviction). *Notaro v. United States*, 363 F.2d 169, 174 n. 6 (9th Cir. 1966) (“*The ‘burden’ is insignificant.* The issue of entrapment is presented ‘however incredible’ . . . it might appear to the trial court or to (the appellate) court.”) (emphasis added). Moreover, under federal law the jury must be instructed that the Government must prove that the defendant was predisposed to commit his crimes *prior* to his contact with government agents because “a defendant cannot lawfully develop a predisposition during the course of dealing with the government.” *United States v. Davis*, 36 F.3d 1414, 1431 (9th Cir. 1994).

Mockovak's trial attorneys, Robinson and Tvedt. Mockovak's lawyers consistently advised Mockovak that they thought the federal sentencing guidelines were far more lenient than the state court sentencing guidelines. *Decl. Mockovak*, ¶¶14-15.²⁶

Attorney Robinson stated in open court that "it was a tactical decision to file in King County Superior Court," and that "they made that decision, your Honor, **because the sentencing guidelines in state court provide for a harsher penalty than the guidelines in federal court . . .**" RP 12/6/10, at 15 (emphasis added).²⁷ Robinson repeated this observation a moment later when he said that "the penalties are significantly different [in the two forums], and so one can understand the tactical choice to charge the case in state court." *Id.*

When Robinson made these statements in open court, **no one contradicted him.** A federal prosecutor, AUSA Brian Kipnis, was present at this state court hearing, representing the FBI. *Id.* at 5. Three more lawyers were also in attendance representing the FBI (Greg Jennings, Bruce Bennett, and Carrie Rodger), as well as "two FBI agents". *Id.* at 6. AUSA Kipnis spoke at length during the hearing, but **neither Kipnis nor any other federal prosecutor ever contradicted attorney Robinson's assertion** that they chose to forego federal prosecution and elected state court prosecution because of the harsher state sentencing guidelines. *Id.* at 29-50. When Kipnis attempted to distance the federal authorities from the

²⁶ "Mr. Robinson told me that if I were tried and convicted in federal court I would face a sentence of about five years" and "if I were convicted in state court, I'd be looking at a sentence of something like 20 years."

²⁷ See also *Trans.* 12/6/10 at 66 ("There are huge advantages that the prosecution in this case has taken advantage of by placing it in this jurisdiction . . .")

state court charging decision, the Superior Court judge rejected his attempt to evade responsibility for the decision to file the case in state court. *Trans.* 12/6/10, at 38.

Attorney Robinson pointed out the biggest sentencing difference between the two jurisdictions was the *mandatory* nature of the sentencing guidelines in state court versus the advisory nature of the federal sentencing guidelines:

[T]hey have taken advantage of every benefit of a state prosecution, sentencing guidelines that if . . . I can't come to you and say: You know what? *The U.S. Supreme Court has said these aren't mandatory.* [²⁸] You don't have to give him 15 to 20 years. *I can't say that here [in state court], because they are mandatory,* and everybody connected with the prosecution team knows that.

Id. at 65 (emphasis added).

The Judgment & Sentence in this case shows that the standard range for Solicitation of Murder 1^o was 187.50 to 249.75 months. (Appendix A to Opening Brief in Support of PRP, at 2). Thus absent an exceptional mitigating circumstance a state court judge sentencing Mockovak was *absolutely required* to impose a sentence of *at least 15*

²⁸ The Supreme Court held the federal sentencing guidelines were purely advisory in *United States v. Booker*, 543 U.S. 220, 259 (2005) (striking down 18 U.S.C. §3553(b)(1)). Since 2005 federal judges are free to impose sentences below the guideline range without having to first find any exceptional mitigating circumstance. *State* court sentencing judges *cannot* do that. *See State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719 (1986) (rejecting challenges to statute that requires judge to impose a sentence within the standard range absent a finding of an exceptional circumstance).

years and 7 months. (Appendix A, at 2). As the State itself recognizes, if Mockovak had been tried and convicted in federal court for the offense of Murder for Hire, the judge could have imposed a sentence of any length between zero and ten years, but could not have exceeded ten years because that is the statutory maximum for the offense. *R-PRP*, at 39.²⁹ Ultimately Mockovak received a sentence of *double the maximum* length that he could have received in federal court.

In sum, there is very strong evidence that law enforcement acted in bad faith in switching the case from federal to state court prosecution. In this PRP the State has failed to offer any declarations or affidavits to rebut the evidence offered by Mockovak. Moreover, the State's arguments now advanced at the eleventh hour stand in stark contradiction to the State's earlier conduct. In the trial court, when Attorney Robinson directly accused law enforcement of coming to state court to secure the tactical advantages outlined above, neither the state nor federal prosecutors

²⁹ The State attempts to argue that Mockovak could have been charged and convicted in federal court of conspiracy to commit murder in the first degree under 18 U.S.C. §371 and 18 U.S.C. §1111. But the State is mistaken. In order to prosecute under 18 U.S.C. §1111 the Government must prove that the offense was committed “[w]ithin the special maritime and territorial jurisdiction of the United States.” There could be no such claim here, so the only statute the federal government could have charged under was 18 U.S.C. §1958. That is why when Agent Carr applied to his supervisor for permission to engage in “Otherwise Illegal Activity” he listed the offense under investigation as Murder for Hire under that statute. (PRP Appendix B at 1). So prosecution under 18 U.S.C. §1111 was never possible. Moreover, even if it had been possible, a judge sentencing for that offense can impose any sentence between zero and 20 years and thus is not required to impose a sentence of incarceration for any minimum period of time.

present denied the charge. The un rebutted evidence of a bad faith motive for law enforcement's conduct compels the conclusion that due process was violated by the shifting of this case to state court.

E. VIOLATION OF THE TENTH AMENDMENT (Ground Five).

1. A 10th Amendment Claim, Like Any Other Manifest Constitutional Error, Can Be Raised for the First Time in a PRP.

The State contends that Mockovak cannot raise a Tenth Amendment claim for the first time in this PRP under RAP 2.5(a) because “even if the state officer did violate the state law while working with a federal investigation,” according to the State such conduct “is not manifest constitutional error.” *R-PRP* at 50. But the State never explains *why* purporting to obtain federal authorization to violate Washington's criminal laws “is not manifest constitutional error.”

The State gives the appearance of not understanding the nature of Mockovak's claim. It is not simply that a state officer violated a state criminal law. The crux of this claim is that “the FBI” expressly approved the commission of criminal acts “by purporting to authorize a state agent and a federal agent working together, to repeatedly commit an act which is defined as a criminal offense under Washington law” *PRP, Grounds for Relief*, ¶5. The question raised is whether the federal government can “authorize” any law enforcement officer, state or federal, to deliberately violate the criminal laws of the State within which they are operating.

On a written “OIA admonishment” form the FBI’s Confidential Human Source, Daniel Kultin, acknowledged that he had “only” been “authorized to engage in the illegal activity as set forth in the written or oral authorization.” *Trial Exhibit 59*.³⁰ Kultin’s signature and the fact of his admonishment were attested to by three people: two FBI Agents (Carr and Woodbury), and one Seattle Detective (Len Carver). *Id.*³¹

The State baldly asserts that federal approval for the violation of state criminal laws does not constitute “manifest constitutional error.” The State seems to agree that such conduct violates the Tenth Amendment and does constitute “constitutional error.” But without citing any case law, the State seems to suggest that this particular constitutional error does not constitute “*manifest*” constitutional error in this case.

As the Supreme Court recently said, “it is well established that a constitutional issue can be raised for the first time in a PRP if the petitioner demonstrates actual prejudice.” *In re Nichols*, 171 Wn.2d 370,

³⁰ A copy of Exhibit 59 was attached to Mockovak’s direct appeal opening brief. Another copy of this exhibit is attached to this brief as Appendix E.

³¹ Somewhat mysteriously and inexplicably, Kultin signed the admonishments on August 2, 2009, nine days before he began violating RCW 9.73.080. But Agent Carr and Detective Carver did not sign the same form until February 24, 2010, more than five months later, even though Detective Carver purportedly signed as a “witness” to the act of admonishment, and even though Carr supposedly administered the admonishments. Moreover, although Kultin was supposedly told he was authorized to engage in the illegal activity on August 2, 2009, the request to engage in “otherwise illegal activity” was not approved until August 10, 2009, when the request was approved and signed by Agent Turley. See p. 4 of *Notification of Authority Granted*, attached as Appendix B to the PRP opening brief. This document was Exhibit No. 63 at Mockovak’s trial.

374, 256 P.3d 131 (2011). In this case the State argues that Mockovak cannot raise his Tenth Amendment claim now because “this argument was never raised below” and because his trial “counsel deliberately chose not to seek suppression of evidence.” *SR-PRP* at 50. In *Nichols* the Supreme Court rejected this same argument. *Nichols*, 171 Wn.2d at 375.³²

2. Actual Prejudice is Easily Shown.

Of course in a PRP the petitioner must demonstrate that he suffered actual prejudice from the claimed error. *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). In this case such a showing is easily made. For if the FBI had not “authorized” the criminal activity of recording Mockovak’s conversations with Kultin, there would not have been any recordings to offer in evidence against Mockovak at his trial.³³

Nevertheless, the State claims “Mockovak cannot show actual prejudice from any alleged Tenth Amendment violation.” *R-PRP* at 50. But the State does not explain *why* this is so. It appears as if the State may be arguing that only the sovereign state of Washington suffers any injury from a violation of the Tenth Amendment. Mockovak notes that the

³² “[W]e hold that a petitioner can raise an art. 1, §7 claim for the first time in a PRP.”

³³ The State asserts that even without the “federally-approved” recordings there still would have been the November recordings which were made after a state court authorized recording. But the State glosses over the fact that the evidence in support of the state court application came entirely from the previously made federal recordings. Without the federal recordings, law enforcement would have had no basis to assert that it had probable cause to believe that more recordings would reveal evidence of a crime.

Supreme Court has emphatically rejected this contention.³⁴

The State has offered no plausible reason why the blatant violation of the Tenth Amendment committed in this case by federal agents should not result in vacation of Mockovak's conviction. A conviction secured on the basis of evidence gathered by federal law enforcement officers who deliberately chose to violate the criminal laws of the State of Washington should not be permitted to stand. This case should proceed, if at all, in federal court with all of the advantages and disadvantages of federal law.

F. INEFFECTIVE ASSISTANCE: Failure to Move to Suppress (Ground One)

1. Under the State's New Legal Theory, That Neither The Trial Prosecutors Nor Detective Carver Ever Had the Temerity to Offer, Mockovak's Conversation With Kultin Was Exempt from the Consent Requirement of the Privacy Act Under the "Unlawful Requests" Exception. But There Is No Record Support for this Contention.

The State's appellate counsel has come up with a strained legal theory regarding the recording of the Kultin/Mockovak conversations that previously no prosecutor and no law enforcement officer ever even suggested might apply. The State now contends that the recording of conversation between Mockovak and informant Daniel Kultin was

³⁴ See *Bond v. United States*, 180 L.Ed.2d 269, 280 (2011): "The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular and redressable."

completely *exempt* from the “all persons” consent requirement of the Privacy Act. *See* RCW 9.73.030(1). According to the State, no judicial authorization was ever needed to record this conversation because RCW 9.73.030(2) exempts any conversation which conveys unlawful requests for the infliction of bodily harm. This theory is advanced without offering *any* support for its underlying premise that the conversations actually contained any such requests. Without citing to any place in the record where such requests can be found, the State simply asserts globally that all of the recorded conversations contained such unlawful requests.

There is no truth to this assertion. The very first recording – (made on August 11, 2009) – actually contains Mockovak’s strenuous protestations that he did *not* want Kultin to hire men to kill Bradley Klock. This illegally recorded conversation contains his repeated emphatic *rejection* of the criminal suggestion made by the government’s informant.

As it became increasingly clear that Mockovak was never going to ask Kultin to hire anyone to kill Klock, Kultin repeatedly offered to arrange for hitmen to kill Dr. Joseph King, but for months Mockovak failed to succumb to those repeated entreaties as well. By that time the State had finally obtained a judicial authorization to record Mockovak’s conversations, that authorization was fatally tainted because it was obtained by using evidence from the earlier conversations which had been

recorded without any judicial authorization. There is no evidence to support the State's contention that the "requests for bodily harm" exception applied to Mockovak's earlier conversations with Kultin. That is precisely why no one ever made this argument.

On the contrary, in the Superior Court there was *unanimous* agreement that the recordings made before the switch to state court were made illegally. Only now, in this PRP proceeding, does the State come forward with the suggestion that judicial authorization to record was not required because some unidentified portions or pieces of these conversations conveyed requests to have others inflict bodily harm. Prior to submission of the State's PRP brief *no one ever suggested this*.

- The law enforcement officers who investigated this case – Agent Larry Carr and Detective Leonard Carver – never suggested this.
- The lead prosecutor (Susan K. Storey) never suggested this.
- The Superior Court Judge (the Honorable Julie Spector), who granted the detective's request for judicial authorization to record without the consent of all parties, never suggested this.
- After the trial in this case, three expert witnesses – one criminal defense lawyer (Timothy K. Ford) and two law enforcement officers (Don Vogel and Susan Peters) – have all stated that they *agree* with the law enforcement officers and attorneys who participated in this case that the one-party consent recordings made in August and October of 2009 were made illegally.
- Even Mockovak's trial attorney Jeffrey Robinson *agrees* (1) that law enforcement broke the law when they made these recordings, and (2) that if he had made a motion to suppress them he would

have won that motion, the evidence would have been suppressed, and the state court case would have been dismissed.

2. The “Unlawful Requests” Exception in RCW 9.73.030(2) “Must Be Strictly Construed.”

The Privacy Act generally provides that it is illegal to record any private conversation without the consent of all participants. RCW 9.73.030(1)(b). RCW 9.73.030(2) then sets forth this exception:

Notwithstanding subsection (1) of this section, . . . conversations . . . (b) *which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands*, . . . may be recorded with the consent of one party to the conversation.

(Emphasis added).

Under *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980)

(emphasis added), this exemption must be strictly construed:

[The defendant] argues that *an overbroad interpretation of the “catchall” phrase could negate the privacy act protections whenever a conversation relates in any way to unlawful matters. The defendant is certainly correct* in asserting that such an overbroad construction of the catchall provision would be inconsistent with the legislative intent underlying the entire privacy act. *The legislature intended to establish protections for individuals’ privacy and to require suppression of recordings of even conversations relating to unlawful matters* if the recordings were obtained in violation of the statutory requirements. RCW 9.73.030, 9.73.050. *The exception contained in RCW 9.73.030(2)(b) must be strictly construed* to give effect to this legislative intention underlying the general statute. [Citations omitted]. Thus, *RCW 9.73.030(2)(b) must be interpreted as exempting from the act only communications or conversations “which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,” of a similar nature.*

3. **This Exception Does Not Apply to This Case. After Months of Investigation Agent Carr “Was Not All That Concerned” and Felt There Was Not Enough to Open an Investigation. Carr Thought Mockovak Was Just “Blowing Smoke”. No One Believed That a Request to Commit An Act of Bodily Harm Had Been Made.**

From the very beginning, law enforcement was unsure of what Mockovak’s true intentions were toward Bradley Klock. After Klock was fired he brought suit for wrongful discharge seeking roughly three-quarters of a million dollars. RP IV, 9, 54; RP V, 180. Because business was down, Kultin, the company’s Director of Information Technology, and an immigrant from Russia, had his salary cut. RP V, 89, 129; RP VII, 107, 109. According to Kultin, in April of 2008 and in March of 2009 Mockovak jokingly asked him if he was a member of the Russian Mafia and if he was “packing.” RP VII, 53, 114-15. Saying he did not want to put words in his mouth, Kultin claimed that in early 2009 Mockovak said “something like, you know, maybe in a joke way” about Klock, and asked if Kultin knew “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 he was not sure if Mockovak was serious. RP VII, 121.

Kultin contacted George Steuer, an FBI agent based in Portland, Oregon. RP VII, 126-127. Steuer said Kultin should contact the Seattle FBI office, so Kultin did and wound up meeting with Agent Carr in early May. RP VII, 29, 127-28. Kultin told Carr that Mockovak had not said

anything about Klock since March. RP VII, 43. Carr testified that when Kultin first told him his story, “as an investigator, [I] was not all that concerned.” RP VI, 71. Knowing that angry people often say things they don’t mean, when Kultin talked to him in May, he “did not feel as an FBI agent that there was enough information to open an investigation on Dr. Mockovak.” RP VI, 71. Carr instructed Kultin “never ever to bring up the subject” of Russian Mafia hit men with Mockovak, and to just wait and see if Mockovak brought up the subject again. RP VI, 70.

A month later, in June, Kultin and Carr met again and Kultin “confirmed nothing else had occurred.” RP VI, 72. Mockovak had *not* raised the subject of having anything bad happen to Klock. RP VI, 72. On June 16, 2009, the Portland FBI agent sent Carr an e-mail asking him if he had ever “opened up a case.” RP VIII, 48. Carr’s response is telling: “Not yet. It’s starting to look like the doctor was just blowing smoke.” RP VII, 55. *See* Trial Exhibit No. 60 (copy attached as Appendix C). This shows that Carr did *not* think that Mockovak had conveyed any “unlawful requests” to Kultin to hire anyone to kill Klock.

At this point Carr ignored his own previous instructions never to bring up the subject on his own; he told Kultin to tell Mockovak that he was going to Los Angeles to visit a friend who had contacts with the Russian Mafia. RP VI, 73. Carr said he wanted to see if Kultin could

“spark some type of conversation” that would enable Carr “to get a better idea of what Mockovak was thinking” RP VI, 73. Kultin did as instructed. He told Mockovak he was going to visit someone who had connections to the Russian Mafia; but he reported back to Carr that his comment failed to elicit anything that suggested Mockovak was thinking of committing any murder. RP VI, 76. Carr acknowledged: “[T]hroughout May, June and July, . . . Mockovak did not broach the subject of a hit during that time period.” RP VII, 56. At this point in time, Carr said he “thought the case wasn’t going anywhere.” *Id.*

4. The Very First Recorded Conversation of August 11, 2009 Provides Conclusive Evidence that RCW 9.73.030(2) Was Not Applicable. When Kultin Offers to Hire Hitmen to Kill Klock, Mockovak Unambiguously Replies: “No, no, no, no.” In This Recording Mockovak Never Requested That Anyone Harm Klock and He Refused to Make Such a Request When Entreated to Do So.

On August 3, 2009, Kultin called Carr and reported that Mockovak had telephoned him and said that he wanted to talk to Kultin about “that thing, or something to that effect.” RP VI, 77. Kultin acknowledged that Mockovak did not say what “that thing” was, but Kultin “felt” that it had something to do with a murder for hire plot. RP VI, 76. Kultin told Carr that he had arranged to meet with Mockovak on August 5th so Carr arranged to meet with Kultin on August 4th, and he brought Seattle Police Detective Len Carver to that meeting. RP VI, 79. As of August 4th Carr *still* felt he had insufficient evidence to think Mockovak was seeking to do

bodily harm to anyone. Although Kultin had reported that Mockovak wanted to talk about “that thing,” Carr testified

[W]e weren’t sure what the doctor wanted to talk about. I mean they were still involved in a business relationship. “That thing” could have been literally anything.

RP VI, 80.

On August 5, 2009, Kultin met with Mockovak and afterwards he reported to Carr what transpired at their meeting. According to Kultin, Mockovak was very angry with Dr. King and thought that Dr. King was hurting their medical practice, and that Dr. King was a snake. RP VI, 84. According to Kultin, after discussing Dr. King “they put Dr. King aside and then started talking about Brad Klock.” RP VI, 85. Kultin claimed that although Mockovak never said the word “kill” or “murder,” he asked Kultin, what the next step would be if he wanted to do something. RP VI, 85. Kultin told Carr that he answered by saying that he didn’t know, and that he would ask his friend in Los Angeles and then get back to Mockovak. RP VI, 85.

The first recorded conversation took place on August 11, 2009. As of that date, Mockovak had never “convey[ed] threats of extortion, blackmail, [or] bodily harm” to Kultin, or to anyone else. Nor had he ever “conveyed” to Kultin, or to anyone else, any “unlawful requests or demands” that someone else commit such an act. It is undisputed that as

of that date, Mockovak had *never* asked anyone to kill or assault Brad Klock; nor had he ever asked anyone to kill or assault Dr. Joseph King. Nevertheless law enforcement went ahead and recorded the August 11, 2009 conversation.

The transcript of the August 11th conversation reveals that no such threat or request was ever made. It is undisputed that during that conversation Mockovak told Kultin that he did *not* want to hire anyone to kill Klock because he thought it was likely that Klock's lawsuit was going to be thrown out by the courts.

Furthermore, the transcript of the August 11th conversation shows that it was Kultin, not Mockovak, who brought up the subject of Dr. King when he suggested that maybe Dr. King had deliberately vandalized Mockovak's car. *Trans. 8/11/09* at 28. When Mockovak complained that Dr. King had been pocketing Costco rebate checks that should have been paid to their company, Kultin expressed his amazement and asked Mockovak: "Are you sure he's not Jewish?" *Trans. 8/11/09* at 30.

Kultin told Mockovak that he had "made some calls . . . about the thing we talked about . . . about Brad" and his contacts in Los Angeles said "they can do it." *Id.* at 34. Kultin said the contacts were his "childhood friends" and Mockovak replied simply, "Okay." *Id.* at 35. When Mockovak said he wanted to get a little more information, Kultin

responded that he had “dealt with these people before” and said that “they’re serious.” *Id.* at 36. When Kultin said his friends could make a hit look like a street robbery Mockovak said simply, “Really?” *Id.* at 37.

Undeterred by Mockovak’s hesitancy to accept his suggestion to hire Russian hitmen, Kultin simply forged ahead and pressed for a commitment *which Mockovak repeatedly refused to give him*:

Source: When ... when do you want it done?
Mockovak: Well ...
Source: before the deposition or after?
Mockovak: ***No, no, no, no. I want to go ahead and have the deposition happen first ...***
Source: Okay.
Mockovak: ***... to see what’s gonna happen.***
Source: Okay. Okay.
Mockovak: Because first of all, I think there’s some chance after the deposition that ***this whole thing may disappear.***
Source: Okay.
Mockovak: That’s what our attorney says.

Trans. 8/11/09, at 43 (emphasis added).

Kultin tried to persuade Mockovak that hiring the hitmen to kill Klock was just a smart business decision because Klock could cost the company a lot of money if he won his lawsuit. But instead of accepting Kultin’s plan, Mockovak reiterated that he was ***not*** agreeing to go ahead with a hit, and that he wanted to see whether Klock’s deposition would cause Klock’s lawsuit to go away:

Source: . . . but I look at it . . . look at it, but he [Klock] . . . he can get anywhere from maybe over a hundred

thousand dollars from company

Mockovak: Exactly.

Source: . . . all the way to what seven hundred thousand?

Mockovak: Yeah, I know.

Source: It's business. I mean we're talking business, you know.

Mockovak: No, I agree. I agree. And he's . . . he's, um, *so I want the depositions to happen first.*

Source: Oh.

Mockovak: And then, *because it may just go away at that point.*

Source: Okay.

Mockovak: *And then to revisit.*

Source: Okay.

Mockovak: Ideally, as I said before, I wanted to have the whole practice split up with me and Joe before anything like this happens.

Source: Okay.

Mockovak: Just because . . .

Source: But depending on the outcome of the deposition . . .

Mockovak: Yeah, basically.

Source: . . . and what the lawyers say.

Mockovak: *I wanna ... I want to see what ...*

Source: Okay.

Mockovak: . . . *the outcome of the deposition is first.*

Source: See what the lawyers tell us.

Mockovak: Yeah.

Source: Yeah.

Mockovak: Because our lawyer thinks that he may be able to embarrass Bradley . . . Brad so bad that, you know, because he's got all this other information on him that it may be so evident that it's not gonna . . . that he won't move forward.

Tr. 8/11/09 at 44 (emphasis added).

But Kultin raised objections to Mockovak's "wait and see" approach and suggested the hitmen might be displeased if they learned that Mockovak was not ready to simply hire them now:

Source: ***But the thing is***, you know, if . . . ‘cause ***this is serious stuff we’re talking about.***
Mockovak: Oh . . .
Source: ***And I don’t want ‘em to like, “Ah, let’s just wait and”*** I mean.

Trans. 8/11/09 at 45 (emphasis added).

At this point, Mockovak emphasized that he wanted Kultin to make it “very clear” to the hitmen that Mockovak had *not* made any decision to employ them:

Mockovak: ***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.***

Trans. 8/11/09 at 45-46 (emphasis added).

Kultin tried to persuade Mockovak to hire the hitmen now by remarking that they might increase their price if he delayed hiring them; but Mockovak again said “no” – another seventeen times – to Kultin:

Source: But, you got to make . . . you know, money-wise . . .
..
Mockovak: Yeah, yeah.
Source: . . . and they’ll need it, you know, right away
Mockovak: Oh, I know, I know. Oh, ***no, no, no*** . . .
Source: This is not something ...
Mockovak: ... ***no, no, no, no*** ...
Source: And the price might change too . . .
Mockovak: ... ***no, no, no, no, no*** ...
Source: ... you got to understand.
Mockovak: ... ***no, no, no, no, no.***
Source: Might ... it might go down, it might go higher.
Mockovak: No, I’m not ... I’m not ... I’m not going to quibble

Source: about that.
Okay.

Trans. 8/11/09 at 46-47.

Kultin said the hit men could do the hit either in the U.S. or in 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 told Mockovak the hitmen were connected to the Sergei Mikhailov crime organization, and that Kultin had seen Mikhailov from a distance with his bodyguards many times. *Id.* at 58-60.

Kultin warned Mockovak not to mess around with Mikhailov:

Source: You go to Moscow, and you ... if you get into some 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. Now, you can say that, but . . . but, if you’re not really know what you’re talking

Mockovak: Yeah.

Source: . . . if you’re just saying it to say it

Mockovak: Yeah.

Source: . . . you know, forget about it, yeah, ***Mikhailov will come after your family.***

Trans, 8/11/09 at 61 (emphasis added).

Mockovak then changed the subject and he asked why Kultin had “offered” him the idea of killing Klock. Although Kultin initially dodged the question, he eventually admitted that he was the one who had first suggested that people could be hired to kill Bradley Klock:

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.

Trans. 8/11/09 at 62 (emphasis added). Kultin said that he suggested killing Klock because Klock's lawsuit was "draining the company" and "affecting everybody." *Id.* Given the ongoing expense of defending the lawsuit, Kultin urged Mockovak to hire hit men to kill Klock saying, "he's not going to go away. So let's make him go away."³⁵ *Id.* at 62-63 (emphasis added). Kultin pressed the idea of killing Klock, telling Mockovak, "It's easy. It's Russians man." *Id.* at 69.

Suddenly, *Kultin* suggested that after Klock was killed, Mockovak should then hire the Russians to kill his business partner Dr. King. He told Mockovak that after Klock was murdered, "then, once the practice is free, we can talk about Joe." *Id.* at 69-70. This was the first time that anyone mentioned the possibility of murdering Dr. King. Mockovak responded that "that would only be if . . . that has to happen" *Id.* at 70.

Returning to the subject of killing Klock, Mockovak told Kultin that "to be honest, *to me that whole conversation is a last resort,*" but

³⁵ At trial Kultin acknowledged that "let's make him go away meant let's kill him. RP X, 34.

Kultin warned him not to anger the hit men. *Id.* at 83. Mockovak explicitly told Kultin—twice—not to engage the hitmen because he had not made any decision to do that, and Kultin responded that he really wanted to be able to hire the hitmen the next time he spoke to them:

Source: But, I just don't want to drive the people, you know.

...

Mockovak: ***No, you know, don't say anything to anyone.***

Source: ... because they ... I'll ...

Mockovak: ***Don't say anything to anyone.*** You just need to say that, you know, um, again, this was a ... ***I want to have the deposition done*** ... I want to ...

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.

Source: [Unintelligible].

Tr., 8/11/09 at 83-84 (emphasis added).

When his meeting with Mockovak ended, Kultin met up with Carr in a parking garage. *Id.* at 140. Carr acknowledged that after listening to the recording of the August 11th conversation, he simply could not tell if Mockovak was seriously contemplating hiring someone to kill Klock. After he listened to the August 11 recordings Carr “thought, well *maybe he's venting or he's blowing off some smoke*, wait until after the depositions” RP VII, 71 (italics added). Retired FBI agent Dan Vogel reviewed the August 11 recording and concluded that it shows

“intimidation, manipulation, and entrapment attempts by Kultin”

Decl. Vogel, ¶19.

5. Applying the Williams Rule of Strict Construction, The Recording of the August 11th Conversation Was Illegal Because At No Time Did Mockovak Convey Any Request to Have Someone Perpetrate An Act of Bodily Harm.

In its PRP Response the State simply ignores the contents of the August 11th conversation. Without ever discussing what was said, and without a single citation to the record, the State pretends that the bodily harm exemption justified recording the conversation. But as shown above, there is no factual basis to record the conversation without obtaining a court order authorizing such recording. As the transcript itself demonstrates, Mockovak repeatedly instructed Kultin *not* to make any arrangements to hire anyone to kill Klock.

Under the strict construction rule of *Williams*, “9.73.030(2)(b) must be narrowly construed” The statute “exempt[s] from the act *only* . . . conversations “which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,” of a similar nature. (Emphasis added). Since no such requests were conveyed, nothing in the August 11, 2009 conversation was exempt. If a suppression motion had

been made the Superior Court would have been required to grant it.³⁶

6. Instead of Relying on the “Requests for Bodily Harm” Exemption, Law Enforcement Decided to Seek A State Court Order “Allowing the Source to Record” His Conversations with Mockovak.

On November 4th, Detective Carver applied to a State court for an order authorizing him to record more conversations. RP VII, 68-69. His decision to seek a Superior Court order *is completely inconsistent with the State’s new PRP theory* that law enforcement didn’t need any judicial authorization because the recordings were covered by the unlawful-requests-for-bodily-harm exemption. If that were true, then there would be no need to get a court order allowing continued recording. But Carver and Carr recognized that something *had* changed and they now felt that they needed to get judicial approval.

What changed? Carver told the Court that up until October 29 it had never occurred to him that prosecution in state court was possible and that he had always thought the case would be brought in federal court:

Investigators did not initially consider any prosecution of crimes in State court. It was not until October 29, 2009, that investigators identified state crimes as additional possible crimes being committed in this investigation.

Appendix E to Peters Declaration, at 11. But at the end of October

³⁶ FBI Agent Carr and Seattle Detective Carver recorded two more conversations without obtaining a court order permitting such recording. The State offers no record support to justify those violations of the Privacy Act. Law enforcement proceeded based on federal law and an FBI supervisor’s authorization to violate the Act.

investigators suddenly realized that it was also possible to bring charges in state court. They had always believed that “[t]here is probable cause to believe” that Mockovak had committed a *federal* crime: “the felony crime of Conspiracy to Commit Murder, 18 U.S.C. 1111 and 1117 . . .” *Id.* at 2.³⁷ But suddenly on October 29, Carver claims that he realized for the first time that violation of those federal statutes was “also a violations [sic] of Washington State law, Criminal Conspiracy to Commit Murder in the 1st Degree, Criminal Solicitation to commit Murder, in violation of 9A.28.030 and 9A.32.030 respectively.” *Id.* at 2-3.³⁸

Carver claims that “once the possibility of a state [court] prosecution came to investigators[’] attention,” they decided to “investigate” the parallel state crimes “in addition to” the federal crimes, and “to seek authority pursuant to Washington State law, to record all subsequent conversations between KULTIN and MOCKOVAK.” *Id.* at 11. On November 4 Carver thought that state court prosecution was merely “a

³⁷ Carver, perhaps because he is a state law enforcement officer, referred to the wrong section of the federal criminal code. 18 U.S.C. §1111(b) provides for the prosecution of murder as a federal crime when it is committed “within the special maritime and territorial jurisdiction of the United States.” This phrase is defined in 18 U.S.C. §7(3). Mockovak’s conduct did not take place at sea or in a federal territory, and thus did not occur at a location where there is federal jurisdiction to charge murder under §1111. In this case, as FBI Agent Carr noted (in Trial Exhibit No. 63, Appendix B to Petitioner’s Opening Brief in Support of PRP) when he sought approval to engage in “Otherwise Illegal Activity,” the federal crime under investigation was “Murder for Hire,” 18 U.S.C. §1958, which covers murders committed with the use of any facility of foreign or interstate commerce. *Id.*

³⁸ *Peters Decl.* at ¶¶ 23, 29.

possibility.” Moreover, he represented it as an *unlikely* possibility by claiming that he was applying for a state court judicial authorization order only out of “an abundance of caution.”

The State misrepresents Carver’s position. Instead of a mere “possibility,” the State claims that a “change in approach” from federal court to state court was “*dictated* by unforeseen circumstances” when the “investigators were told” that the U.S. Attorney believed there might be an insufficient nexus for federal charges.” *R-PRP*, at 21 (emphasis added). But this is simply untrue. No “change in approach” was dictated. The investigators continued to believe that a federal nexus *could* be proved.

The State cites to the *Carr Memo* but fails to cite to any particular page. In fact, instead of supporting the claim of a “dictated” change in approach, the Memo *says the exact opposite*. Carr wrote that when it was decided to apply for a state “court order allowing the source to record,” he *still* believed that the case was going to be prosecuted in federal court:

SA Carr was left with the impression that the case was still going to be a federal prosecution and the state court order was merely relief should a strong federal nexus [an element of the federal crime of murder for hire] not avail itself.

Appendix F to Peters Declaration, at p. 5 (emphasis added).

Thus *both* the FBI Agent and the Seattle Detective acknowledged that ***if the unexpected happened*** – *if the case wound up in state court* – ***then*** they were going to need a state court order authorizing recording

because without such an order the recording would be inadmissible in state court. Carr explicitly noted that if the case did end up in state court they would need a state court judicial order “*allowing* the source to record” Mockovak’s conversation with Kultin. *Carr Memo* at 5.

The State cannot explain away the factual record claiming that the application was just a belt and suspenders approach. Carr and Carver both knew that they were engaging in activity that was illegal under state law. That’s why when they were thinking only about federal court prosecution they had taken the step of getting the approval of Carr’s FBI supervisor to engage in what the FBI calls “Otherwise Illegal Activity.” RP VII, 99-100.³⁹ *See also Appendix C to Opening Brief in Support of PRP.*⁴⁰ Carr and Carver both knew that a state court order was a prerequisite for the admissibility of recordings in state court. Moreover, the state court prosecutor who wound up prosecuting the case, Susan K. Storey, also endorsed Detective Carver’s application. Under the heading, “Application Approved” she signed the *Application for Authority to Intercept and Record Communications*. *Appendix E to Decl. Peters*, ¶18. If, as the State’s PRP counsel now suggests, a court order was unnecessary because the “request-for-bodily-harm” exception covered all the recordings, the

³⁹ “If only one person agrees then it’s illegal . . . under state law.”

⁴⁰ “By signature below the SAC . . . approves the consenting party’s Otherwise Illegal Activity”

prosecutor and the officers would have included that ground in their application. But they said no such thing.

Instead, as retired FBI Agent Dan Vogel has noted, Carver's application seemed to imply that a federal magistrate had already approved the recording of Mockovak's conversations, when in fact the "federal process" that was used to obtain approval merely involved the approval of an FBI supervisor *Decl. Vogel*, ¶18 (Carver "appears to be misleading the judge"). *See also Decl. Peters*, ¶¶24-27. Notably, the State has not presented any counter declarations to rebut Vogel or Peters.

7. The State Cannot Avoid the Doctrine of the Fruit of the Poisonous Tree. Once Law Enforcement Engaged in Illegal Recording, the Later Recordings Would Also Be Barred.

If a suppression motion had been made, the later recordings ostensibly made with Superior Court authorization would also have been suppressed. The prosecution used evidence from the previously illegally recorded conversations to obtain the court order authorizing the later November recordings. Citing to *State v. O'Neill*, 103 Wn.2d 853, 700 P.2d 711 (1985), the State suggests that although the August and October recordings were made in violation of state law, it was still permissible to use evidence from them as the basis for probable cause to believe that a felony was being committed which then justifies the issuance of a state court order authorizing recording under RCW 9.73.030(2)(b).

But the State ignores the critical passage from *O'Neill* which distinguishes it from this case. In *O'Neill* eleven recordings were made by federal officers who did not comply with the Washington Privacy Act. 103 Wn.2d. at 856. The “sheriff’s office was not involved in obtaining them.” *Id.* The information from those federal recordings was then given to state officers, who included it in their application for a state court order authorizing them to make more recordings. Because they were *not* involved in the original recordings, their use as a basis for the state court authorization order was held to be permissible:

Here *the Pierce County Sheriff’s deputies were not involved* in the FBI wiring of the informant and the obtaining of the 11 federal recordings. No suggestion has been made herein as to any collusion for the purpose of avoiding the requirements of Washington law.

O'Neill, 103 Wn.2d at 871 (emphasis added). In this case *the exact opposite* is true. Detective Carver was heavily involved in the earlier “federal” one-party consent recordings.⁴¹

The State argues that even if the trial court would have suppressed

⁴¹ He was with Agent Carr when Kultin was provided with a body recording device and was briefed on what law enforcement was looking for. RP VI, 94. He was present when Kultin was given the standard admonishments that the FBI gives to all informants. RP VI, 88. Carver went with Agent Carr to all of law enforcement’s pre-recording meetings with Kultin except one (November 7th). RP X, 134-35; RP VI, 79. He instructed Kultin on how to avoid entrapment, and told him how to speak with Mockovak in order to get good evidence. RP X, 135-36. Together with Carr, he sought permission from an FBI agent for authority to have the informant engage in “Otherwise Illegal Activity.” Thus, in this case, unlike in *O'Neill*, the state officer was *not* justified in using evidence from the federal recordings to obtain a state court judicial order.

“the first three federally-approved recordings, there was still sufficient information available from unrecorded conversations to establish probable cause.” *R-PRP*, at 42. But the most recent unrecorded conversation between Kultin and Mockovak took place on August 5. The State could hardly have contended that on November 4 probable cause existed to believe that Bradley Klock’s life was in danger because Mockovak had arguably expressed some interest in having Klock killed on August 5.⁴² There is nothing to support the State’s contention that Kultin’s report about the content of the unrecorded conversation of August 4 sufficed to establish that there was probable cause to believe “a human life [wa]s in danger” on November 4. (RCW 9.73.050(1)(a)).

Relying upon *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983) and *State v. Babcock*, 168 Wn. App. 598, 279 P.3d 890 (2012), the State also contends that the later November conversations would have been admissible without any judicial authorization order because they were admissible “planning” conversations. “Planning among co-conspirators to implement an *earlier* [unlawful] request is behavior

⁴² Law enforcement knew from the August 11 recording that Mockovak had repeatedly told Kultin on that day that he did *not* want to hire anyone to harm Klock, and that he wasn’t even going to decide whether he would ever do that until after Klock was deposed. Moreover, by November 4, 2009 law enforcement knew that Klock was not going to be deposed until January of 2010, and besides Kultin had already told Carr that Mockovak was no longer interested in having Klock killed. And Kultin never claimed that on August 4 that Mockovak had expressed a desire to hire anyone to kill King.

indirectly reaffirming and detailing the underlying request.” *Caliguri*, at 508. Therefore, any *post*-request planning conversation that came *after* a request had been made to hire hitmen would be covered by the exemption in RCW 9.73.030(2)(b). But the State simply ignores the fact that these cases hold that before a conversation can qualify as an exempt “planning” conversation, it must be preceded by a conversation in which one of the participants makes a request to hire someone to inflict bodily harm.⁴³ Since no unlawful request was made prior to November 4, 2009, all the earlier conversations were inadmissible because they were illegally recorded without Mockovak’s consent.

8. The State Has Failed to Respond to Mockovak’s Analysis That All of The Recordings Would Have Been Suppressed Under *State v. Manning* For Failure to Satisfy RCW 9.73.090(3)(f).

Mockovak raised “a second, wholly independent ground for suppressing” the recordings made in November of 2009. *PRP Brief* at 64. Carver’s application for judicial authority to record private conversations did not satisfy the requirement of RCW 9.73.090(3)(f) of setting forth “[a]

⁴³ The *Babcock* case, cited by the State, is plainly distinguishable from this case: “*At their first meeting*, Babcock said that ‘he wanted to have a couple killed and identified Turner and Lieutenant Bartkowski as the targets.’” *Id.* at 602 (italics added). Since the first conversation contained an unlawful request to kill people it was exempt under RCW 9.73.030(2)(b), and thus the planning discussion at the next meeting was also exempt.

In the present case, *the exact opposite occurred*. At the first recorded meeting (August 11th) Mockovak repeatedly *rejected* Kultin’s suggestion that hitmen be hired to kill Bradley Klock. (“No, no, no, no.”). Nor was any unlawful request made in the two later October conversations. Since no earlier unlawful request had ever been made, the subsequent November conversations are not covered by *Caliguri* or *Babcock*.

particular set of facts showing that other normal investigative procedures . . . have been tried and have failed or reasonably appear . . . to be too dangerous to employ.” Carver tried to meet this requirement by asserting that a recording would provide law enforcement with better evidence with which to meet an anticipated entrapment defense. But this Court rejected that same argument in *State v. Manning*, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996). The State simply has not responded to this *second* IAC claim based upon a failure to bring a motion to suppress under *Manning*.

9. The State Has Not Offered Any Evidence To Rebut Mockovak’s Evidence Showing That He Preferred To Be Tried in Federal Court. Evidence That He Did Not Want to Plea Bargain Simply Shows That He Wanted to Go To Trial.

Mockovak submitted voluminous amounts of evidence that shows that he preferred to be tried in federal court, and that he said so back in 2010 well before his state court trial began in 2011.⁴⁴ The State has not produced any evidence to rebut Mockovak’s evidence. Instead, the State

⁴⁴ See *Mockovak Decl.*, ¶33: “I was also very pleased to hear [attorney Robinson] argue strenuously that the judge should dismiss the case after giving the federal authorities [the opportunity] to charge me in federal court, because I wanted the case to be tried in federal court, not state court.” See also *Decl. Mockovak*, ¶21: Mockovak wrote, “I very much preferred to be tried in federal court”; *Decl. Lobsenz, Appendix D*: in an email to attorney Tvedt he described an order dismissing the state case and resulting in a recharging in federal court as the “favorable outcome” that he was hoping for; *Decl. Marmer*, ¶26: Mockovak approved of the strategy of trying to move the case to federal court; *Marmer*, ¶28: “He . . . was optimistic that the case would end up in federal court.”; *Decl. Lobsenz*, ¶¶19-22 & with emails from Mockovak to his trial counsel: “We decided there is a big advantage in being in Federal court and I still think that advantage applies”; December 31, 2010: “The advantages of Federal court seem large.” *Appendix D to Decl. Lobsenz*, ¶17.

notes that Mockovak told his attorney that he did not want to plea bargain in state court and he wanted a speedy trial. *R-PRP*, at 36-37. The State points to Robinson's statement that Mockovak "was adamant that he was innocent" and that he "would not consider allowing us to ask for a sentence as low as five years in an attempt to resolve the case." *Decl. Robinson*, ¶ 17, quoted in *R-PRP*, at 36.

But a refusal to plead guilty does not indicate a preference for either state court or federal court. Moreover, under the circumstances of this case, since a refusal to plead guilty is a decision to go to trial, his refusal to plead inferentially *supports* Mockovak's assertion that he preferred to be tried in federal court, because everyone agreed that he had a better chance of being acquitted in federal court due to the far more favorable federal burden of proof rule on entrapment.⁴⁵ Naturally a defendant committed to going to trial and intending to present entrapment as a defense would prefer a trial in the forum where the prosecution has to disprove entrapment beyond a reasonable doubt.

Relying on ¶18 of Robinson's declaration, the State says that *Robinson*

⁴⁵ See *Decl. Robinson*, ¶15; *Decl. Marmer*, ¶ 21 ("Ms. Tvedt and I agreed that due to this difference in the burden of proof, Dr. Mockovak would have a much better chance of winning an acquittal if he were tried in federal court."); *Decl. Doyle*, ¶6 ("Mr. Robinson acknowledged that in federal court the burden of proof rule for entrapment was much more favorable to defendants than the counterpart rule in Washington State court."); *Decl. Ford*, ¶5.27 ("federal law would be significantly more favorable to Dr. Mockovak than state law with regard to his defense of entrapment").

made a strategic decision not to try to move the case because *Robinson* “concluded that [the defense] would be better off in state court.” Citing to *Taylor v. Illinois*, 484 U.S. 400, 418 (1988), the State notes that “trial counsel is responsible for making strategic decisions even over the client’s objections.” As a legal proposition this is certainly true, but it is also wholly irrelevant to the question of whether trial counsel’s strategic choice was objectively unreasonable and constitutes ineffective assistance of counsel. There was no IAC claim in *Taylor*.⁴⁶ The Supreme Court’s statement was simply that trial counsel has the *authority* to make all but a very few strategic decisions. But the Court did not say that an unreasonable strategic decision was immune from attack on ineffective assistance of counsel (“IAC”) grounds. Indeed, the Supreme Court said the exact opposite and has held on more than one occasion that a strategic choice that counsel made was objectively unreasonable.⁴⁷

Mockovak’s claim is that it was objectively unreasonable for Robinson to fail to make the suppression motion that probably would have gotten the state court case dismissed, and would have resulted in a federal court

⁴⁶ Instead, the claim raised in *Taylor* was an alleged denial of the Sixth Amendment right to compulsory process. The Court concluded that the exclusion of a defense witness as a sanction for noncompliance with a discovery rule “is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment and find no constitutional error on the specific facts of this case.” *Id.* at 402.

⁴⁷ See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (holding state court’s “deference to counsel’s strategic decision” was erroneous because counsel’s alleged strategic choice was “objectively unreasonable”).

prosecution. Whether or not it was a good or bad idea for Mockovak to refuse to authorize plea bargaining in state court is irrelevant to that claim. His case was in state court. If his case had been in federal court he also would have refused to plea bargain because he wanted to be acquitted at trial. Receptiveness to plea bargaining is simply not probative of which forum (state or federal) Mockovak preferred.

As Attorney Ford has concluded, attorney Robinson had “no sound strategic reason not to” make the suppression motion which he expected would be successful, result in state court dismissal, and lead to charging and trial in federal court. *Ford Decl.*, ¶¶ 5.2 & 5.2.3.

Whenever there is even a small chance that a suppression motion will be granted, it is deficient conduct for counsel not to bring the motion. There is simply no down side to making a suppression motion. Denial of a suppression motion cannot possibly make things any worse than they are for the defendant, and granting the motion will make things better.

In *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004), the Court considered trial counsel’s failure to make a motion to suppress a baggie of methamphetamine found during execution of a search warrant of somewhat doubtful validity. The Court considered the deficiency and the prejudice prongs of the *Strickland* test separately. Failure to move to suppress was held to be deficient conduct because key evidence might

have been suppressed and there was no reason not to seek suppression. *Id.* at 130. Normally there is a “presumption that defense counsel’s conduct is not deficient,” but that presumption is rebutted “where there is no conceivable legitimate tactic explaining counsel’s performance.” *Id.* The Court could not think of any reasonable basis for choosing *not* to move to suppress. The argument that the warrant was invalid “was available to counsel and his failure to challenge the search based upon an invalid warrant cannot be explained as a legitimate tactic. Therefore, “counsel’s conduct was deficient.” *Id.*⁴⁸

The same is true in this case. Everyone agrees that the argument that the recordings had to be suppressed was “available” to defense counsel and everyone (except the State’s PRP counsel) agrees that the case for suppression was very strong. There simply was no objectively reasonable basis for failing to move to suppress the State’s key evidence.

10. The State Does Not Endorse Any of Attorney Robinson’s Justifications for Failing to Make a Suppression Motion.

Attorney Robinson has said that even though he thought he could win a suppression motion and get the entire state case dismissed, he decided it would be better not to win the case in state court. *Decl.*

⁴⁸ *Cf. State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009) (failing to move to sever the trial of different counts was deficient conduct because there was nothing to lose by attempting to get the charges severed).

Robinson, ¶¶ 12-13. The State does not dispute Attorney Robinson's assessment that if the case had been dismissed in state court it would have been refiled in federal court. Nor does the State deny that there is a huge difference in the burden of proof on the issue of entrapment⁴⁹ which makes federal court a far more favorable venue for a defendant planning to assert an entrapment defense.

Robinson says that he made a strategic choice to stay in state court because the state court discovery rules were more favorable to the defense than the federal discovery rules. *Decl. Robinson*, ¶13. Mockovak has previously pointed out that there was no reason that Robinson could not have secured *both* the advantages of broader discovery offered by state court, *and* the two advantages offered by federal court – a more favorable burden of proof on entrapment and more lenient sentencing guidelines. *PRP* at 65-69. Robinson could have *first* obtained all the discovery available in state court, and *then* brought his motion to suppress – which Robinson and Ford agree the defense probably would have won, leading to state court dismissal and charging in federal court.

Robinson claims that by the time he obtained all the discovery

⁴⁹ In federal court the prosecution must disprove entrapment beyond a reasonable doubt. *Jacobson v. United States*, 503 U.S. 540, 549 (1992); *United States v. Tom*, 640 F.2d 1037, 1041 (9th Cir. 1981). In state court “the defendant [is] required to prove the defense of entrapment by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 13, 931 P.2d 1035 (1996).

available in state court it was “*too late* to make a motion to suppress the tape recordings” because by that time “motions were already supposed to have been filed.” *Decl. Doyle*, ¶¶ 9-10. Attorney Ford has flatly rejected Robinson’s explanation on the grounds that Robinson was simply wrong – it was *not* too late. *Decl. Ford*, ¶ 5.2.5. Indeed, Robinson could simply have checked a box on the standard pretrial form. *Id.* The State has made no effort to defend Robinson’s reasoning and offers no evidence or contrary opinion to dispute Ford’s construction of the criminal rules.

Robinson’s “strategic” choice was based on the erroneous belief that he could not secure both the advantages of liberal discovery in state court and a favorable burden of proof rule for a better chance of an acquittal in federal court. He was wrong. He could have had both if only he had been better acquainted with the criminal rules for Superior Court. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986).⁵⁰

In defense of his decision not to even try to get the case thrown out of state court, Robinson states that he thought the “caliber” of federal court

⁵⁰ “The trial record in this case clearly reveals that Morrison's attorney *failed to file a timely suppression motion, not due to strategic considerations*, but *because*, until the first day of trial, *he was unaware of the search* and of the State's intention to introduce the bedsheet into evidence. *Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on “strategy,” but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense* and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned.” (Emphasis added)

prosecutors might be higher than the “caliber” of state court prosecutors.⁵¹

The prosecution has made no attempt to argue either (1) that there is such a “difference in caliber” or (2) that any such “caliber” difference reasonably justified failing to move to suppress, thereby giving up the burden of proof and sentencing advantages that federal court offered.

11. The Failure to Move to Suppress was Devastatingly Prejudicial.

a. There is Far *More* Than a Reasonable Probability That A Motion to Suppress Would Have Been Won.

The State argues that if defense counsel had brought a suppression motion he clearly would have lost it. *R-PRP*, at 34 (such a motion “would have been fruitless.”). Indeed, the State contends he would have lost it *completely* and that *none* of the prosecution’s evidence would have been suppressed. This argument is based solely on the assertion that the “unlawful requests/bodily harm” exception to the Privacy Act (RCW 9.73.030(2)(b)) would have covered all of the State’s recorded evidence. But as Mockovak has shown, this assertion is unfounded. The State has *asserted* that all the recordings contained Mockovak’s repeated “unlawful

⁵¹ “In my judgment, the caliber of the prosecutors would be at least as good as the prosecutors in state court . . .” *Decl. Robinson*, ¶14. Robinson also asserted that federal prosecutors have significantly lower caseloads and try many fewer cases than state court prosecutors. *Id.* Whatever truth there might be to this general observation, it has little application to this case. Mockovak’s state court prosecutors had more than one year from the time charges were filed in 2009 to prepare for the trial which did not begin until January 2011. Moreover, their case did not require a lot of trial preparation. It was easily presented simply by playing the many hours of recordings of Kultin’s conversations with Mockovak. All they had to do was decide which portions of the tapes to play.

requests” that hitmen be hired to kill Bradley Klock and Joseph King. But the State has offered *nothing* to prove this assertion and has not identified a single passage in the hundreds of pages of conversation transcripts where any such request was made. In fact, as the transcripts of the recordings show, no such request was made until November 6, 2009.

Moreover, the State’s new theory is totally at odds with the thinking of Mockovak’s trial counsel. Attorney Robinson reports that he “felt that there was a very good possibility that I could get these conversations suppressed if I made . . . a [suppression] motion.” *Decl. Robinson*, ¶6. He believes that if he had made such a motion, *all* the recorded conversations, and all testimony as to what Kultin saw and heard during these conversations, would have been suppressed:

The recorded conversations fell into two groups. First, there were conversations which occurred without any judicial authorization at all. These recorded conversations occurred on August 11, October 20 and October 22 of 2009. . . . ***I knew that if I moved to suppress the first group of recorded private conversations pursuant to RCW 9.73.050, there was a very good chance that I would win such a motion and these conversations would all be suppressed.***

The second group of conversations includes those conversations which King County Superior Court Judge Julie Spector authorized These . . . occurred on November 6, 7 and 11 of 2009. . . .

[T]he second group of recordings was a “fruit of the poisonous tree” because it was derived from the earlier illegal set of recordings for which there was no judicial authorization. I believed that if I moved to suppress the second group of recordings that I probably would win that motion as well.

Decl. Robinson, at ¶¶7-9 (emphasis added). Ford also thinks Robinson would have won: “I agree . . . that if a motion to suppress these recordings and conversations had been filed, it likely would have been granted with regard to all five recorded conversations.” *Decl. Ford*, ¶5.2.1.

Robinson also believes that had he brought a suppression motion, not only would he have won it, but in addition “*the State prosecutors would have [had] to dismiss the state court prosecution* because it would be impossible for them to proceed with their case in state court. . . . I knew that a successful motion to suppress all the recordings *would put an end to prosecution . . . in state court.*” *Decl. Robinson*, ¶11 (italics added). And once again, Ford agrees with him. *Decl. Ford*, ¶ 5.2.2.

b. While Mockovak Need Not Establish It, There is a Reasonable Probability That He Would Have Been Acquitted Had He Been Tried in Federal Court.

In order to satisfy *Strickland* a defendant has to meet the prejudice prong of the *Strickland* test. Therefore he must show that absent his counsel’s deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In this case, as noted above, if counsel had made the suppression motion, and if he had won it, *there never would*

have been any state court trial at all.⁵²

12. The Record Is Adequate for This Court to Rule That Petitioner Received Ineffective Assistance of Counsel. If This Court Believes That Each Recording Must be Tested Individually, Then It Should Remand to the Superior Court For That Analysis.

This Court has ample record support to conclude that Mockovak has established his IAC claim and should grant the relief requested by vacating the convictions and ordering a new trial. Alternatively, if this Court believes that each recording must be tested individually, this Court should order a reference hearing at which the Superior Court can make whatever additional factual determinations are deemed necessary. *Cf. State v. Robinson*, 171 Wn.2d 292, 306, 253 P.3d 84 (2011).

G. VIOLATION OF ARTICLE 1, §7 (Ground Four).

1. The State's Reliance on Clark and Salinas Is Misplaced.

Citing to *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996) and

⁵² While it seems likely that there would have been a federal indictment and a federal trial, it does not follow that the *Strickland* prejudice requirement extends into the anticipated federal trial that would have followed. In other words, to obtain relief from his state court conviction, Mockovak does *not* have to make a showing that there is a reasonable probability that he would have been acquitted at such a federal trial. Mockovak is not challenging any federal conviction, and he need not make any showing regarding the probable outcome of a hypothetical federal trial that never took place. But even assuming, *arguendo*, that *Strickland's* prejudice requirement does extend this far, Mockovak has met it. *See* Section II(A)9), *infra*, at pp. 17-20.

At the state court sentencing hearing attorney Robinson stated his belief that if Mockovak had been tried in federal court he would have been acquitted of everything. Robinson said the difference in the burden of proof meant that Mockovak would have been “going home” if he had been “tried at 7th and Stewart” – the federal courthouse – instead of “going to prison” because he had been “tried at Third and James.” RP 3/17/11, at 114.

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992), the State asserts, “It is well established that some one-party consent recordings violate the Privacy Act[,] but even those do not violate article 1, §7.” But this is a clear misstatement of what these cases hold.

In both of these cases the Court held that *there was no violation of the Privacy Act*. Since there was no violation of Privacy Act, the Supreme Court simply never had any occasion to decide whether a violation of the Privacy Act *also* established a violation of article 1, §7.

Both *Clark* and *Salinas* involved conversations about drugs. In *Clark* the police applied to Superior Court “for authorization pursuant to RCW 9.73.090(5)⁵³ to record conversations between [an informant] and prospective drug dealers,” and the “trial court granted the application.” *Clark*, 129 Wn.2d at 216-17. The *Clark* court held that the conversation at issue was not a “private conversations” because the informant “was a complete stranger to the defendant[.]” and the conversation was essentially the same as identical conversations that he “had with a great many other strangers who approached asking for cocaine.” *Id.* at 227. Each conversation “was a brief and routine sales conversation, just like any other, conducted or initiated on the street with a stranger. Each could not

⁵³ That statute applies to conversations about “controlled substances,” “legend drugs” “or imitation controlled substances.”

have been intended or expected to be private, secret or confidential”
Id. at 231. Since there was no reasonable expectation of privacy, they were not “private conversations,” there was no violation of the Privacy Act, there was no basis for any assertion of an entitlement to be free from an intrusion into private affairs absent a warrant, *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994), and thus no valid art. 1, §7 claim.

In the present case, Kultin was *not* a stranger to Mockovak; he was Mockovak’s employee. Unlike the informant in *Clark*, Kultin was *not* meeting total strangers on public streets, engaging them in essentially identical conversations, and asking them if they wanted to buy illegal drugs. Unlike *Clark*, there was no court order authorizing recording based upon RCW 9.73.050(5) because there never was probable cause to believe that Mockovak and Kultin would be discussing illegal drug transactions.

Instead, as every single actor in this case has recognized, Kultin’s conversations with Mockovak *were* private conversations and they *were* covered by the Privacy Act. Since the Act statutorily grants Mockovak an entitlement not to have his private conversation recorded without a judicial order authorizing such recording, the unauthorized recording of his conversations was *both* a violation of the Privacy Act and an intrusion into his private affairs in violation of art. 1, §7.

The State also purports to rely on the *Salinas* case, another case

involving the recording of conversations about drug dealing. In *Salinas* law enforcement relied upon RCW 9.73.230. Pursuant to that statute, “a King County Police Chief . . . authorized the . . . recording of any conversations regarding the sale of drugs between [informant] Davis and the potential buyer(s).” *Salinas*, at 194. The Supreme Court found that the requirements of the statute were “scrupulously followed.” *Id.* at 195. *Salinas* argued that the statute violated art. 1, §7. He argued that the Legislature did not have the power to exempt such conversations about drugs from the Privacy Act’s general requirement that all participants in a private conversation must consent before any lawful recording can occur.

Unlike the defendant in *Salinas*, Mockovak is not claiming that any part of the Privacy Act is unconstitutional, and Mockovak’s case does not involve any conversation about drugs. Most significantly, unlike the defendant in *Salinas*, Mockovak *is* claiming that the Privacy Act was violated. *Salinas* held that where the Privacy Act was *not* violated, there also was no violation of art. 1, §7. But *Salinas* says absolutely nothing about whether there is a violation of art. 1, §7 when government officers *do* violate the Privacy Act by unlawfully recording private conversation.

The Privacy Act guarantees that in the absence of any applicable exemption, private conversations will not be recorded absent strict compliance with the statute. Thus the Act itself creates a constitutional

entitlement to freedom from governmental intrusion into private conversations absent a valid authorization because by definition “private conversations” are part of the “private affairs” protected by art. 1, §7.

2. The Art. 1, § 7 Claim is Independent of the IAC Claim And It Does Not Require Proof of Deficient Conduct By Counsel.

Mockovak’s art. 1, §7 claim is distinct and separate from his IAC claim based upon trial counsel’s failure to move for suppression. In an IAC claim a PRP Petitioner must establish that his attorney’s conduct was deficient. Assuming, *arguendo*, that Mockovak has not shown deficient conduct, and therefore has not established a Sixth Amendment violation, he is nevertheless entitled to relief on his art. 1, §7 claim. To prevail on that claim he does not need to establish deficient conduct. He need only demonstrate that there was an intrusion into his private affairs without authority of law, and he submits that this has been shown.

III. CONCLUSION

Mockovak’s trial counsel repeatedly failed to provide competent representation in a criminal case. Trial counsel failed

- 1) to present evidence of the defendant’s vulnerable psychological state that would have strengthened his entrapment defense;
- 2) to object to the instruction that misstated the law of entrapment.
- 3) to cross-examine the State’s key witness with powerful impeachment evidence that he had in his possession; and
- 4) to make the suppression motion that he himself believes would

have resulted in dismissal of the prosecution's case.

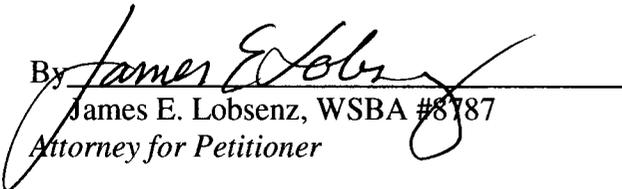
Mockovak was acquitted on the charge of conspiring to murder Klock. If trial counsel had rendered effective representation, there is a reasonable probability Mockovak would have been acquitted of the other charges as well. In addition,

- 5) the bad faith conduct of law enforcement in shifting from a federal forum to a state forum in order to maximize the tactical advantages offered by each, violated Due Process;
- 6) law enforcement transgressed the Tenth Amendment boundary between the federal government and the State of Washington; and
- 7) law enforcement sullied the integrity of the state courts by using evidence obtained from an intentionally illegal intrusion into constitutionally protected private affairs in violation of art. 1, §7.

Petitioner asks this Court to vacate all of his convictions. This case should proceed, if at all, in federal court with all of the advantages and disadvantages of federal law.

Respectfully submitted this 6th day of February, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA #8187
Attorney for Petitioner

APPENDIX-A

Vol. No.	Hearing
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-B

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Honorable Palmer Robinson

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

THE STATE OF WASHINGTON,
Plaintiff,
v.
MICHAEL MOCKOVAK,
Defendant.

No. 09-1-07237-6 SEA
DECLARATION OF
DAVID SNYDER

I, DAVID SNYDER, hereby declare and state as follows:

1. I am a Washington state private investigator, license number 2945.
2. I am CEO and Agency Principal at "David Snyder PI & Associates, Inc.", located at 601 Union Street, Suite 4200, Seattle, WA 98101.
3. I graduated *Magna Cum Laude* from the University of Washington with a B.A in social science. I completed a yearlong certificate program in forensics at the University of Washington. I am a graduate of the Reid School of Interview and Interrogation Techniques. I am a member of the Washington Association of Legal Investigators and the Washington Association of Criminal Defense Lawyers, and regularly attend continuing legal education seminars.
4. I was hired by Schroeter, Goldmark and Bender to do investigation for the defense in the above entitled cause. As part of that investigation I attempted to conduct interviews with all of the jurors after the verdict was returned. At present, I have

DECLARATION OF
DAVID SNYDER - 1

SCHROETER GOLDMARK & BENDER
500 Central Building • 810 Third Avenue • Seattle, WA 98104
Phone: 206-622-8000 • Fax: 206-622-2305

1 completed interviews with nine out of fourteen jurors.¹ Based on these interviews, I
2 make the following representations based on the comments made to me by the jurors.

3 5. All of the jurors said they were confident that they returned the correct verdict based
4 on the evidence and the instructions they were given. All indicated that they obeyed
5 the court's instructions and did not consider any information that was not introduced
6 at trial and admitted by the court. They also indicated that there was no outside
7 influence on the jurors as they deliberated.

8 6. The jurors said that they had serious doubts about the credibility of Daniel Kultin.
9 Some of the comments included the following:

10 • "I thought I could probably trust him as far as I could throw him." "He was very
11 secretive." "There was a whole lot more going on than he was willing to share."
12 (Juror No. 10)

13 • "The informant was a rather shady character and that was uncomfortable no
14 matter how you slice it." "You listen to that Kultin guy and he sounds sleazy, and
15 he doesn't sound reliable."
16 (Juror No. 3)

17 • "Daniel Kultin seemed to have a lot of holes in his testimony."
18 (Juror No. 4)

19 • "Carr and Kultin, I wouldn't trust them any further than I could throw a piano."
20 (Juror No. 12)

21 • "I thought he was a bit questionable." "Kultin forgot a lot of things. No
22 explanation for why he had so many calls and text messages over the summer"
23 (Juror No. 1)

24 • "He did not seem very reliable. There were times he didn't seem very bright,
25 because we had just talked about one thing, and a half hour later he couldn't
26 remember it. So whether or not it was just nerve racking sitting up there, or he
was just being very evasive on purpose, I'm not sure.
(Juror No. 2)

• "I think Daniel Kultin is some of the lowest scum of the earth. And I think the
FBI made a terrible mistake believing that this person, Daniel Kultin, had
anything of value to add to their case."
(Juror No. 6)

¹ Juror No. 9 spoke to me in detail but after consideration asked that his comments not be included. I have not included them for that reason. The jurors are referenced by number. If the court requests their names, the defense will supply them.

DECLARATION OF
DAVID SNYDER - 2

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- [question] Did you trust Daniel Kultin? [reply] "No. He's certainly somebody I would not want to have as a friend."
(Juror No. 8)

7. The jurors also indicated that the defense presented significant evidence of entrapment, and came very close to proving that Dr. Mockovak had been entrapped. The comments included the following:

- "Kultin seemed to be encouraging Mockovak. With reaching out as a friend. And it did strike me as weird that all the meetings were...social meetings. They were at restaurants. It felt to me like Mockovak was in a delicate place. And was reaching out for friendship. And was vulnerable. And that Kultin really capitalized on that. And that was an uncomfortable fact."
(Juror No. 10)

- "I don't think that someone should be able to go as far as the informant in this case did."
(Juror No. 3)

- "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, were really like, 'Oh my God, are you serious, you can really do that?'...The kind of friendship building, and the camaraderie that went on in the process. We all have watched cop shows on TV and the movies, and what they can get away with, and what Jack Bower gets away with and what Daniel Kultin gets away with are entirely different. But it surprised us that he could have that much relationship building, and bonding activity, while wearing a wire. We were all, or many of us were quite amazed that he could say and do so many of the things that he did. It was really hard to determine, whether he was leading Dr. Mockovak, or whether he was just playing the role."
(Juror No. 4)

- "Daniel, he is the one that is doing the pushing, and the FBI instructed him to push. And FBI contradicted themselves. On one side, you have Carr testifying that he told Daniel not to push, but then we see that Carr was having Daniel open many doors, and push Dr. Mockovak closer and closer, and then through."
(Juror No. 12)

- "I think Mockovak did actually seem hesitant at times. And I felt that at those moments, Kultin was reeling." [question] Reeling Mockovak in? [reply] "Right."
(Juror No. 1)

- "Well, it was not clear cut at all. Very difficult. So for the last two, or for the luring and inducing, and for reasonable persuasion. That was not clear cut. And it

DECLARATION OF
DAVID SNYDER - 3

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came down to our judgment. If it had just been on those two things, it may have swung the other way."
(Juror No. 2)

- "I was one of the hold-ups for getting a decision made sooner, because I strongly felt that Kultin played such a critical role in coercing Mockovak to do something that he wouldn't have otherwise done. It was Kultin pushing him to do it."
(Juror No. 6)
- "I had a feeling that if it weren't for [Kultin], this whole deal would have just evaporated. While he may not have been bringing it up, he was enabling it."
(Juror No. 8)

8. After speaking to jurors about the facts, I attempted to re-contact them to ask their opinion on sentencing. I was able to re-contact eight of the nine jurors I previously spoke to. I told them that Dr. Mockovak did not have a prior criminal record. I did not give them any additional information about Dr. Mockovak. All eight of these jurors expressed, in varying degrees, a belief that Dr. Mockovak deserves leniency at sentencing. Their comments included the following:

- "Well, I don't see him as a threat to society. And I'm guessing that once he gets out, they'll be some action on taking away his medical license. And he'll be suffering for the rest of his days whether he's in jail or not. So, I hate to take a father away from a child. But on the other hand, as a mother, this is sort of coming at me from the family point of view, I'd hate to see a child think that your dad can plot to kill somebody, and that is okay. But certainly, if he was remorseful, maybe five years and some community service, I could go for that. With his talents, and education, I mean there's no doubt that he's a gifted surgeon, and he probably still has something useful to give to society. And I don't feel like he's a threat to the average person. And putting him away in jail is probably not a good use of our tax payer dollars."
(Juror No. 10)
- "I'm not taking sides with Dr. Mockovak." "I have to look at Dr. King and his family, and consider what they've been through, and their anxiety." "But I would certainly feel comfortable if Judge Robinson erred on the side of leniency. I don't see Dr. Mockovak as being a vicious person that is a danger to society. I think Dr. Mockovak just got caught up in a world of personal hurt."
(Juror No. 4)
- "I would be comfortable with house arrest, or probation. I hope Judge Robinson will take my views into consideration. I hope she will be lenient in handing out the sentence. Dr. Mockovak's professional career and life is already ruined by this dumb mistake he made. And he should be given a second chance instead of a long jail sentence."
(Juror No. 12)

DECLARATION OF
DAVID SNYDER - 4

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APPENDIX-C

CARR, LAWRENCE (CTD)(FBI)

From: CARR, LAWRENCE D. (SE) (FBI)
Sent: Tuesday, June 16, 2009 4:33 PM
To: STEUER, GEORGE K. (PD) (FBI)
Subject: RE: Daniel Kulin

UNCLASSIFIED
NON-RECORD

Not yet, it is starting to sound like the doctor was just blowing smoke. I have been waiting to see what happens after the deposition but it keeps getting pushed back. I have a meeting set up with Dan for next week to open him as a source to operate him on other matters.

From: STEUER, GEORGE K. (PD) (FBI)
Sent: Tuesday, June 16, 2009 1:14 PM
To: CARR, LAWRENCE D. (SE) (FBI)
Subject: Daniel Kulin

UNCLASSIFIED
NON-RECORD

Hey Larry,

Did you folks ever open a case that I can attribute/upload his FD-302?

George

SA George K. Steuer
FBI Portland, Squad 6
1500 SW 1st Avenue, Suite 400
Portland, OR 97201
Tel.: (503) 552-5428 office
Tel.: (503) 552-5382 fax
Tel.: (503) 522-9567 mobile
E-Mail: george.steuer@ic.fbi.gov

UNCLASSIFIED

UNCLASSIFIED

APPENDIX-D

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/25/2010

1D8

The following is a transcript of a consensually monitored telephone conversation which occurred on November 7, 2009. Parties to this conversation are between Source and Michael "Mikie" Mockovak.

DK

04074 MEM

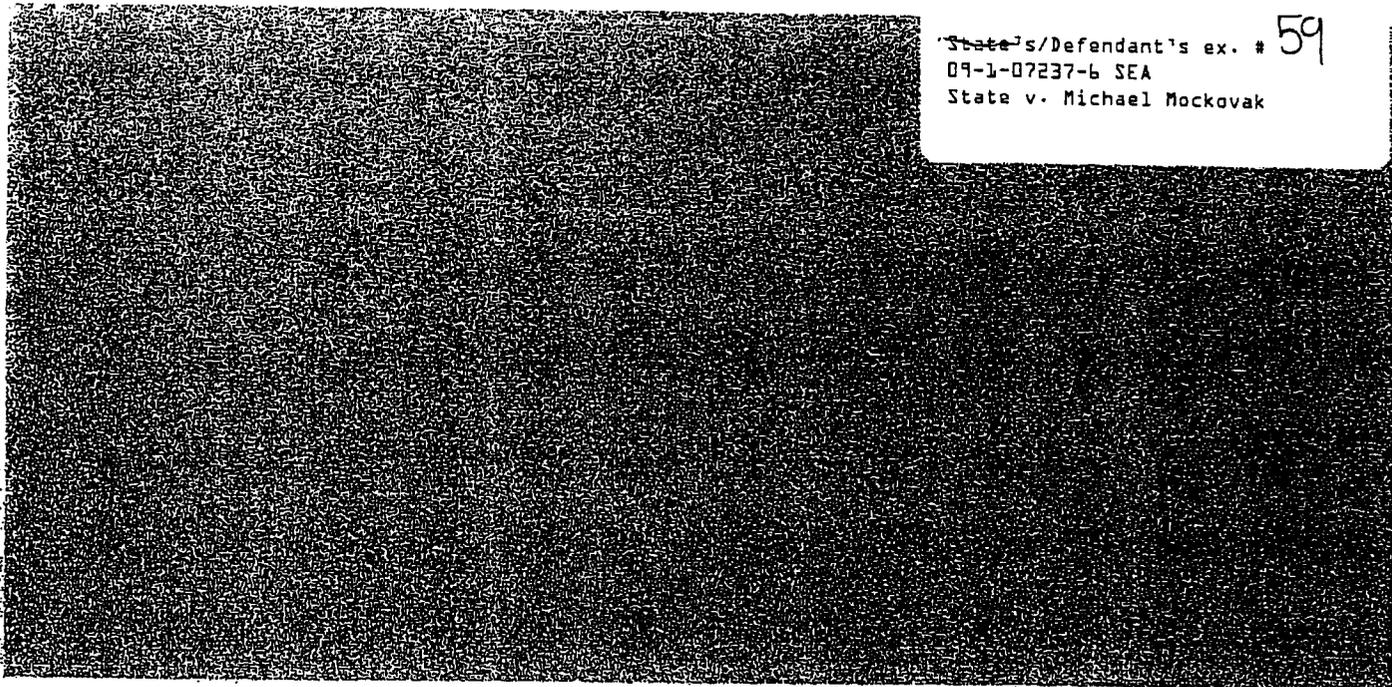
Investigation on 11/07/2009 at Seattle, Washington

File # 166C-SE-95743 Date dictated N/A

by SA Lawrence Carr
TFO Leonard Carver

056s1s01.302

APPENDIX-E



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: *[Handwritten Signature]*

Date: 08/02/09 signed on 2/24/10

Agent Signature: X *[Handwritten Signature]*

Date: 2/24/10

Agent Printed Name: C.W. Woodbury

Witness Signature: X *[Handwritten Signature]*

Date: 2/24/10

Witness Printed Name: Len Currier - SPD

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of
MICHAEL E. MOCKOVAK
Petitioner

NO. 69390-5-I

DECLARATION OF JOHN
GONSIOREK

I, JOHN GONSIOREK, 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 received my PhD in Clinical Psychology in 1978, and practiced for many years as a clinical and forensic psychologist in Minnesota. I began retiring in New Mexico in summer 2012, and eventually gave up my Minnesota psychology license in early 2014. I no longer practice as a psychologist, although I do serve as editor of a professional journal and continue to publish.

2. A copy of my Vita is attached to this declaration.

3. I met Michael Mockovak in June 1978, and we have had a close personal relationship since then, to the present.

4. Shortly after his arrest on November 12, 2009, I learned from Michael Mockovak's father that Mike had been arrested. In November and/or December of 2009, I contacted by phone Colette Tvedt, one of

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

Michael's attorneys, on at least one occasion, but more likely on two occasions.

5. During that phone conversation I gave Tvedt a detailed history of Mike, including the fact that during his childhood he was sexual abused for years by an uncle, and the fact that he was later abused by the therapist from whom he sought help regarding the childhood sexual abuse. I also told Tvedt about Mike's recurring mood disorder, and his history of being easily manipulated and exploited.

6. Although it is not likely that I used the technical phrase "learned helplessness" when speaking with Tvedt, I did explain that people who are repeatedly sexually abused as a child tend to develop the attitude that resistance to, or escape from the abuser, is futile, and this becomes part of their general response to people who seek to manipulate them.

7. I also informed Tvedt about Mike's chronic lack of self-protectiveness, his relationship problems, and other features of his history that I thought might assist in understanding his situation and preparing a defense.

8. In the first part of 2010, on a visit to Mike in Seattle, I met face to face with Tvedt, and reiterated the same points as in ¶¶ 5-7. I also explained that I reacted to Mike's history by developing in the early 1980's

a professional focus on male victims of sexual abuse and on exploitation by therapists, publishing and educating in these areas, and providing forensic testimony in such cases; and that I had developed expertise in these areas. I also explained that professional ethics prevented me from serving in an expert witness capacity in Mike's case, and suggested that other experts with such expertise might be helpful in his defense.

9. I learned from Mike that it was very likely that the defense would be presenting a defense of entrapment at trial. I told her that in my opinion Mike's history as a victim of childhood sexual abuse 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.

10. It was my understanding from Mike that it was very likely that I would be called as a fact witness to testify regarding things I had observed in him that might be relevant to his trial.

11. My recollection is that when I met with Tvedt in the first part of 2010, the possibility that I might be called as a witness was discussed. She said she would let me know if they were going to call me as a defense witness. It was not until November or December of 2010 that I learned from Mike that I would *not* be called as a fact witness in his trial.

12. After the trial ended in February of 2011, I learned that Mike had been convicted. Shortly thereafter, I met with attorney Tvedt again to help her prepare for sentencing. At that meeting I again explained to her that I believed the long term harmful psychological impact of his childhood sexual abuse was very relevant to the issue of his culpability.

DATED this 2nd day of January 2015.



John Gonsiorek

VITA
JOHN C. GONSIOREK
(1.7.14 version)

Mailing address: 1810 Calle de Sebastian, #F-2
Santa Fe, NM 87505
(952) 994-1386
e-mail: jgonsiorek@comcast.net

EDUCATION:

UNIVERSITY OF MINNESOTA, Minneapolis, MN,
Doctor of Philosophy, Clinical Psychology; Minor: Personality & Measurement; June,
1978
Master of Arts, Clinical Psychology; Minor: Personality & Measurement; August, 1977

STATE UNIVERSITY OF NEW YORK, Binghamton, NY
Bachelor of Arts, Anthropology; Minor: Psychology; May, 1973

REGIS HIGH SCHOOL, New York, NY
Diploma, June, 1969

PROFESSIONAL EXPERIENCE

Training Placements:

Minneapolis VA Hospital	1975-1977
Walk-In Counseling Center	1975-1976
Hennepin County Court Services	1975
University of Minnesota Hospital Psychology Clinic	1974
Hennepin County General Hospital	1974

Internship rotations at the Minneapolis VA Hospital included: inpatient psychiatry, outpatient mental health, vocational rehabilitation, chemical dependency, aphasia, general medical and surgical evaluations, neuropsychology, cancer and kidney unit evaluations, student health service, and adolescent inpatient psychiatry.

Employment History:

Professor, Clinical Psychology Department, Argosy University, Twin Cities	2009-2013 (Retired)
Associate Professor, Clinical Psychology Department, Argosy University, Twin Cities	2008-2009
Core Faculty, Clinical Psychology Program, Capella University	2004-2007

Consultant, Family & Children's Service, Minneapolis	2004-2006
Behavioral Health Consultant, Blue Cross Blue Shield Minnesota	2002-2003; 2005-2011
Consultant, College for Bishops, Episcopal Church	2001-2008
Consultant, Minneapolis VA Hospital, Psychology Service	1979-2001
Clinical Psychologist, Independent Practice	1980-2004
Consulting Psychologist, Guest House, Rochester, MN (a substance abuse treatment program for Roman Catholic clergy)	2001-2004
Consultant, Minnesota Center for Arts Education	1999-2000
Consultant, Integra	1999-2000
Clinical Director, North, Clawson, & Bolt (a quality assurance, utilization review, and managed care organization) Sacramento, CA	1987-1994
Associate Director of Training, MN School of Professional Psychology	1990-1991
Consultant, Minnesota Department of Health, AIDS/STD Unit	1991-1992
Director, Psychological Services, Twin Cities Therapy Clinic	1981-1991
Consultant, Hennepin Cty. Red Door HIV Clinic	1990
Consultant, Abbott-Northwestern Chemical Dependency Unit	1989-1990
Consultant, Ramsey and Hennepin Counties Community Health Departments (to develop, implement, and supervise HIV infection prevention programs)	1987-1988
Consultant, Pyramid Mental Health Center	1986-1988
Consultant, State of Minnesota Department of Health (to develop and coordinate training on psychosocial aspects of AIDS patients and outreach service to seropositive individuals).	1985-1988
Consultant & Director of Quality Assurance, Metropolitan Clinics of Counseling (HMO).	1984-1987
Consultant, Muscala, Emerson, & Associates (chemical health agency).	1984
Consultant, Domestic Abuse Project	1984
Staff Clinical Psychologist, Mt. Sinai Hospital, Mental Health Unit	1984-1985
Consultant, College of St. Catherine, Counseling Office	1983-1984
Clinical Psychologist, Blackmore and Associates (private group psychiatric practice).	1982-1990
Consultant, Parkview West Adolescent Chemical Dependency Program	1982-1984
Consultant, Eden Day Chemical Dependency Program	1980-1982
Examiner, Hennepin County Probate Court, Civil Commitment	1980-1983
Clinical Director, Lesbian & Gay Community Services	1979-1980
Clinical Psychologist, Abbott-Northwestern Outpatient Mental Health Clinic	1979-1980
Professional Associate, Lesbian & Gay Community Services	1979
Member, Review Board, Minnesota Security Hospital	1979-1981
Clinic Director, Walk-In Counseling Center	1978-1981
Clinical Psychologist, University of Minnesota Hospitals, Department of Physical Medicine and Rehabilitation	1977-1978
Counselor, Carleton College Counseling Service	1977-1978
Psychology Associate, Minneapolis VA Hospital (Internship)	1975-1977

Clinical Training Fellow, National Institute of Mental Health 1973-1975

Teaching Experience:

Professor, Clinical Psychology Department, Argosy University, Twin Cities 2009-2013
Associate Professor, Clinical Psychology Department, Argosy University, Twin Cities 2008-2009
Core Faculty, Clinical Psychology Program, Capella University (developed and taught psychopathology, ethics, diversity, consultation/supervision, & forensic psychology courses) 2004-2007
Adjunct Faculty, Clinical Psychology Program, Capella University 2002-2004; 2007
Adjunct Faculty, Clinical Psychology Program, Argosy University, Twin Cities Campus 2002-2006
Clinical Assistant Professor, Clinical Training Program, Department of Psychology, University of Minnesota (taught objective personality assessment) 1992-2012
Faculty, Minnesota School of Professional Psychology (taught objective personality assessment, gay/lesbian issues, psychological assessment and professional ethics) 1988-1991
Clinical Assistant Professor, Clinical Training Program, Department of Psychology, University of Minnesota 1979-1988
Clinical Assistant Professor of Health Care Psychology, School of Public Health, University of Minnesota 1979-1984
Instructor in Psychology, Extension Division, University of Minnesota 1979-1981

Volunteer Experience

Member, Planning Commission, City of Excelsior 1999-2002
Vice-Chairperson 2001-2002
Member, Charter Commission, City of Excelsior 1999-2002
Examiner of candidates for the Diplomate in Clinical Psychology, American Board of Professional Psychology 1997-1998
Member, Board of Directors, Psychotherapy Training Institute, St. Paul, MN. 1990-1993
Chairperson, Minnesota Task Force on Gay and Lesbian Youth 1984-1987
Consultant, Hennepin County Youth Diversion (project on juvenile male prostitution) 1984-1987
Volunteer Team Supervisor or alternate, and training staff for supervisor training program, Walk-In Counseling Center 1982-1987
Ad Hoc Committee on Psychological Licensure, Minnesota Psychological Association 1981-1982
Annual Meeting Planning Committee, Minnesota Psychological Association 1980-1981

Advisory Board, Lesbian and Gay Community Services Aging Project	1978-1979
Student Representative, Minneapolis VA Hospital Psychology Training Committee	1976-1977
Board of Directors, Lesbian and Gay Community Services	1975-1979
President, Board of Directors, Lesbian and Gay Community Services	1977-1979

APPOINTMENTS:

Founding Editor, <i>Psychology of Sexual Orientation and Gender Diversity</i> , (APA Div. 44 journal)	2013-present
Consulting Editor, <i>Professional Psychology: Research and Practice</i>	2007-2013
	1990-1994
Past-President, APA Division 44	1993-1994
President, APA Division 44	1992-1993
Member, Implementation Planning Committee, Joint Council on Professional Education in Psychology (JCPEP)	1991-1992
President-Elect, APA Division 44	1991-1992
At-Large Member, APA Division 44 Executive Committee	1988-1991
Site Visitor for APA accreditation (participated in three site visits)	1988-1994
Member, Minnesota Department of Health Commissioner's Task Force on AIDS	1990
Member, Minnesota AIDS Funding Consortium (allocation of funds from Ford, St. Paul, and Minneapolis Foundations)	1989-1990
Chair, Task Force on Ethical Concerns, APA Division 44	1987-1989
Allied Health Professional Staff, St. Mary's Hospital	1983-1989
Chairperson, Professional Regulation Committee, State of Minnesota	1984-1985
Department of Corrections Task Force on Sexual Exploitation by Therapists and Counselors	
Site Visitor for NIMH to evaluate potential research project on AIDS	1984
Allied Health Professional Staff (admitting privileges), Abbott-Northwestern Hospital	1982-1987
Guest Editor, Special Issue of <i>Journal of Homosexuality</i> on psychotherapy with lesbians and gay men	1982
Task Force on Sexual Orientation, and Associate Editor of Mental Health section, Society for Psychological Study of Social Issues (APA Div. 9)	1977-1982
Review Editor, <i>Journal of Homosexuality</i>	1977-1984

MAJOR WORKSHOPS, PRESENTATIONS, AND INVITED ADDRESSES:

“Entrapment by law enforcement: Overview, challenges and psycho-legal issues”, paper presented at American Psychology-Law Society (APA Div 41) Conference, Portland, OR, 2013.

“Representing clients with diminished capacities due to illness or other causes”, training presented at 2011 American Federation of Teachers Lawyers Conference, New York, New York, April 2011.

“Managing mental health problems in teachers”, training presented to legal counsel of teachers’ unions from Minnesota, Wisconsin and Illinois, St. Paul, MN, October 2010.

“Evaluating impaired helping professionals for possible return to practice”, paper presented at American Psychological Association, San Diego, 2010.

“Ethical challenges in the delegation and coordination of supervision with other professionals”, paper presented at American Psychological Association, San Diego, 2010.

“Evaluating impaired professionals for rehabilitation potential”, Pre-Conference Seminar presented at Rehabilitation Psychology 2010, 12th Annual Continuing Education Program, American Board of Rehabilitation Psychology/American Psychological Association Division 22, Tucson, AZ, February 2010.

“Taking off the mask: Dealing with homosexuality, sexual identity and addiction in clergy and religious”, Seminar presented at 8th Annual Summer Leadership Conference on Addictions, Guest House Institute, Minneapolis, July 2009.

“Maintaining Professional Boundaries and Personal Sanity Working as a Therapist in the GLBT Community”, presentation at the Institute for Human Identity, New York, New York, April 2009.

“Human sexuality, celibacy and recovery,” Plenary Lecture presented at 7th Annual Guest House Summer Conference, Minneapolis, July 2008.

“Responding to mental health problems in educators,” training presented to Education Minnesota, Alexandria, MN, June 2008.

“Challenges for psychology in addressing antireligious, religion-based, and religion-derived prejudices”, paper presented at American Psychological Association, San Francisco, 2007.

“The burden of co-occurring disorders, and complications for recovery and relating to others in ministry and community,” training presented at 6th Annual Guest House Summer Conference, Minneapolis, 2007.

“The Care of People through the Painful Disciplinary Process: The Bishop as Pastor and Disciplinarian.” Two day training for the College of Bishops, Episcopal Church, Camp Allen, Houston, TX, 2007

“Institutional barriers and the failure of leadership in the Roman Catholic Church clergy sexual abuse crisis”, paper presented at Sins against the Innocents conference, Santa

Clara University, Santa Clara, 2004.

“Returning to ministry after misconduct.” Presentation at 2nd Safe Church Conference, Nathan Network, Episcopal Church, San Diego, 2004.

“Supervision and the 2002 ethical standards” paper presented at American Psychological Association, Toronto, 2003

“Impaired clergy: evaluation, treatment, and response”, day long training presented to the House of Bishops, Anglican Church of Canada, Toronto, 2003

“Pedophiles and preventing child abuse”, training presented to the Episcopal College for Bishops, Kanuga Ctr., NC, 2003

“Male victims of clergy abuse as plaintiffs” paper presented at American Psychological Association, Chicago, 2002

"Anxiety, depression, and personality disorders: How to recognize and effectively intervene with mental health problems in teachers and other school professionals", presentation at 10th Annual School Law Conference, sponsored by Continuing Legal Education, Minnesota State Bar Association, Brooklyn Center, MN, 2001.

"Psychological aspects of impaired clergy", day-long seminar presented at the College for Bishops of the Episcopal Church, Virginia Theological Seminary, Alexandria, VA, 2001.

"Sexual orientation and adolescent development", keynote session presented at 6th Children from the Shadows conference, Hartford, CT, 1999.

"Risk management and rehabilitation with therapists who cross treatment boundaries: Keys to success" paper presented at the Fourth Int'l Conference on Sexual Misconduct by Psychotherapists, Other Health Care Professionals and Clergy, Boston, MA., 1998.

"Forensic psychological evaluations in clergy abuse" paper presented at conference on Perspectives on Sexual Abuse Committed by Clergy, Santa Clara University, Santa Clara, CA, 1998.

"Advanced topics in sexual orientation: Adolescent issues and issues of measurement and definition" seminar presented to Behavioral Health Clinic, St. Cloud Hospital, St. Cloud, MN, 1997.

"Understanding sexual orientations", workshop presented to staff at Disease Intervention Unit, AIDS/STD Prevention Services Section, Minnesota Department of Health, Minneapolis, MN, 1997.

"Developmental and mental health issues facing gay, lesbian and bisexual students", workshop presented for Counseling and Psychological Services, Northwestern

University, Chicago, IL, 1997

"Dual relationships" workshop presented to Behavior Management Systems, Rapid City, SD, 1995.

"Assessment, treatment and supervision of the professional offender" and "Assessment and treatment of male victims of sexual abuse" workshops presented at the Third International Conference on Sexual Exploitation by Health Professionals Psychotherapists and Clergy, Toronto, Canada, 1994.

"Professional boundaries" workshop at St. Francis Hospital, LaCrosse, WI, 1994

"Assessing, planning and evaluating rehabilitation of exploitative professionals" paper presented at American Psychological Association, Los Angeles, CA, 1994

"The use of psychological research on sexual orientation in political debates and courts" and "Gay and lesbian identity development" invited address and workshop at the Third Annual Lesbian and Gay Psychology-Europe Conference, Amsterdam, Netherlands, 1994.

"Definition and measurement of sexual orientation in community based research" invited address at National Institute of Mental Health and Centers for Disease Control Conference on Research issues in suicide and sexual orientation, Atlanta, GA, 1994

"Assessment, treatment and supervision of the professional who has engaged in sexual misconduct" workshop sponsored by Walk-In Counseling Center, Minneapolis, MN 1994.

"Psychotherapist insights on sexual harassment, inappropriate sexual behavior, and mental injury" invited address at Professionals at risk: Crisis in the workplace, conference by the Minnesota Institute of Legal Education, Minneapolis, 1993.

"The physician and mental health professional who commit sexual offenses: Findings and treatment issues", paper presented at Sex offenders and their victims-III, conference in Toronto, Canada. 1993

"Issues in rehabilitation and restoration to office with sexually exploitative clergy", executive session at Evangelical Lutheran Church in America Conference of Bishops, Savannah, GA. 1993

"Challenges to maintaining personal and professional integrity in lesbian and gay affirmative psychology", APA Division 44 presidential address, presented at American Psychological Association, Toronto, Canada. 1993

"The relationships between sexual abuse and sexual orientation confusion in males", paper presented at American Psychological Association, Toronto, Canada. 1993

"Health care professionals who sexually exploit: Who are they, what motivates them, and what's to be done?", plenary session given at Society for the Scientific Study of Sex Annual Meeting San Diego, CA. 1992

"Limiting the Role of Professional Misconduct: Employer and Supervisor's Roles", paper presented at American Psychological Association, San Francisco, CA. 1991

"Complaints against Psychologists - Stresses on Boards and Ethics Committees", Symposium chaired and organized at American Psychological Association, San Francisco, CA. 1991

"Psychologists in Trouble: Patterns, Dynamics and Responses", paper presented at American Psychological Association, San Francisco, CA. 1991

"Sexual Exploitation by Therapists And Clergy" Symposium chaired and organized at the Society for the Scientific Study of Sex Annual Meeting Minneapolis, MN. 1990

"Psychological and Ethical Implications of Theories of Sexual Orientation", paper presented at American Psychological Association, Boston, MA. 1990
Chair for Invited Address "Gay Affirmative Counseling and Psychotherapy in the Netherlands", American Psychological Association, Boston, MA. 1990

"Assessment as a Basis for Developing a Supervision Plan for Unethical Practitioners", Paper presented at American Psychological Association, Boston, MA. 1990

"Psychotherapy With Gay Men" a week-long series of workshops sponsored by Schorerfoundation, Amsterdam, Netherlands. 1990.

"Psychological Aspects of the Periodic Table Model of Gender Transpositions", paper presented at Society for the Scientific Study of Sex Annual Meeting, Toronto, Ontario, 1989.

"Licensing and Discipline of Health Care Professionals", presentation at Advanced Legal Education, Hamline University Law School conference, "Professionals at Risk" St. Paul, MN. 1989

Workshop on "Innovative Strategies in AIDS Prevention" at Georgia Department of Health AIDS Conference, Columbus, GA. 1989

Workshop on "AIDS: Special Issues for the Mental Health Professional" at Wisconsin Dept. of Health and Social Services, Winnebago Mental Health Institute, Oshkosh, WI. 1988

"The Implications of New Biologically Based Models of Sexual Orientation for Psychology", presentation at first Yale Gay and Lesbian Studies Conference, Yale

University. 1987

"Ethical and Boundary Issues for Gay Male Psychotherapists", paper presented at American Psychological Association, New York, NY. 1987

"Counseling the Gay Client", workshop at conference on sexual issues in counseling at Lehigh University, Bethlehem, PA. 1987

"Towards Differentiation and Moral Development", paper presented at Symposium on "Gay and Lesbian Psychotherapy: State of the Art", American Psychological Association, Washington, DC. 1986

"Mental Health Problems of Gay and Lesbian Youth", invited address at Symposium on Gay and Lesbian Adolescents, Adolescent Health Program, University of Minnesota Medical School. 1986

"Diagnostic Problems in Working with Gay and Lesbian Clients", workshop presented at Institute for Human Identity, New York, NY. 1985

"Psychosocial Aspects of AIDS", panel presentation at AIDS symposium by State of Minnesota Department of Health. 1985

"Interdisciplinary Symposium on Sexual Orientation", sponsored by the Special Program in the Humanities, Yale University. 1985

"A Primer on Suicidal Clients", workshop presented at "Is Suicide a Choice?", conference sponsored by Minnesota Psychological Association. 1984

"Thinking Clearly about Gay/Lesbian Mental Health Issues" and "The Holocaust Within: Internalized Homophobia as a Barrier to Intimacy", invited keynote address at Gay Horizons Conference, Chicago, IL. 1983

"Brief Psychotherapy and Sexual Identity Crises", workshop presented at Brief Psychotherapy Conference, Univ. of Minnesota School of Social Work. 1983

"Affirmative Models of Gay/Lesbian Mental Health", invited address at Gay Academic Union National Conference, Chicago, IL. 1982

"Adolescent Sexual Preference", workshop presented at Third Annual Adolescent Medicine and Health Care Conference on Adolescent Sexuality. 1981

"Mental Health, Sexual Orientation and Social Issues", paper presented at American Psychological Association, Los Angeles, CA. 1983

"Human Sexuality Programs: Legal Aspects", moderator of panel, and "Legal Aspects of Sexual Exploitation of Clients by Therapists", presenter at workshop, at Minnesota

Psychological Association Annual Meeting. 1981

"Final Report on Mental Health Section of the Society for the Psychological Study on Social Issues", paper presented at American Psychological Association, Montreal, Quebec. 1980

"Future Directions in Counseling with Gay Men", address at American Assoc. of Sex Educators, Counselors, and Therapists, National Symposium on Homosexuality, Atlanta, GA. 1980

"Research and Health Care Policy for Lesbians and Gay Men", in "A Symposium on Social and Natural Science Research on Homosexuality: Public Policy Implications", paper presented at American Psychological Association, New York, NY. 1979

"A Comparison of the Present State Examination and the MMPI in Psychiatric Populations", presented at the American Psychological Association, New York, NY. 1979.

PROFESSIONAL AND RESEARCH INTERESTS:

Sexual Exploitation and Other Improprieties by Professionals
Professional Ethics & Standards
Objective Personality Assessment
Sexual Orientation and Sexual Identity
Short Term Psychotherapy
Male Victims of Sexual Abuse
Forensic Psychological Evaluations in Civil and Administrative Law Contexts

LICENSES AND CREDENTIALS:

Licensed Psychologist, State of Minnesota, #LP-1236, July, 1980-January, 2014
Competencies included: individual psychotherapy, couples and family therapy, group psychotherapy, psychological testing and evaluation, behavior modification, research, consultation, teaching, mental health administration, supervision, and forensic evaluations of adolescents and adults.
Psychologist Emeritus, State of Minnesota, January 2014-present (Not a license to practice psychology)
National Register of Health Service Providers in Psychology, October, 1980-2013 (retired).

PROFESSIONAL ASSOCIATIONS:

Member, American Psychological Association (Divisions 9, 12, 29, 36, and 44)
Elected Fellow, American Psychological Association, 1989 (Divisions 12 and 44)

Elected Fellow, American Psychological Association , 1990 (Division 9)
Elected Fellow, American Psychological Association , 2009 (Division 29)
Elected Fellow, American Psychological Association, 2011 (Division 36)

HONORS:

Distinguished Contribution Award, Committee on Lesbian and Gay Affairs, American Psychological Association. 1991
Distinguished Scientific Contribution Award, American Psychological Association Division 44. 1990
Diplomate in Clinical Psychology, American Board of Professional Psychology. Active Status 1988-2013. Retired Status 2013-present.
Outstanding Volunteer Services in Community Award, Walk-In Counseling Center. 1985
Graduate School Research Grant, University of Minnesota. 1977-1978.
Honors for Distinguished Independent Work in the Division of Science and Mathematics, State University of New York, Binghamton. 1973
Phi Beta Kappa, State University of New York, Binghamton. 1973

PUBLICATIONS:

Works in progress:

Gonsiorek, J.C. (Ed.). (in preparation). *Entrapment by law enforcement: Psychological and legal issues.*

Works accepted for publication/in press:

Benkofske, M. & Gonsiorek, J. (2014, in press). Celibacy. In *The encyclopedia of human sexuality*. Malden, MA: Wiley-Blackwell

Gatermann, J. & Gonsiorek, J. (2014, in press). Youth and sexual orientations. In *The encyclopedia of human sexuality*. Malden, MA: Wiley-Blackwell

Hartenstein, C. & Gonsiorek, J. (2014, in press). Situational homosexuality. In *The encyclopedia of human sexuality*. Malden, MA: Wiley-Blackwell

Nelson, P., Suskovic, A. & Gonsiorek, J. (2014, in press). Sexual orientation and identity categories. In *The encyclopedia of human sexuality*. Malden, MA: Wiley-Blackwell

Works published:

Gonsiorek, J.C. (2014). On the enduring value of our sibling disciplines. [Review of the book *International handbook on the demography of sexuality*, Volume 5 of the *International Handbooks of Population Series*, by A.K. Baumle (Ed.)]. *PsycCRITIQUES—Contemporary Psychology: APA Review of Books*, 59 (15).

Gonsiorek, J.C. (2013). The interplay between psychological and institutional factors in developing and maintaining sexual abuse by clergy. In C. M. Renzetti & S. Yocum (Eds.) *Clergy Sexual Abuse: Social Science Perspectives*. (pp.37-59) Boston, MA: Northeastern University Press.

Gonsiorek, J.C. (2012). Love the sinner *and* the sin? [Review of the book *The science of sin: The psychology of the seven deadlies (And why they are so good for you)*]. *PsycCRITIQUES—Contemporary Psychology: APA Review of Books*, 57, (No. 44). Article 3.

Gonsiorek, J.C. (2011). Love conquers all. [Review of the book *Sex, love and mental illness: A couple's guide to staying connected*]. *PsycCRITIQUES—Contemporary Psychology: APA Review of Books*, 56, (No. 35). Article 5.

Gonsiorek, J.C. (2011). Now you see it, now you don't: When releases of information are rescinded. In W.B Johnson & G.P. Koocher (Eds.) *Ethical conundrums, quandaries and predicaments in mental health practice*. (pp.101-110) NY, NY: Oxford University Press.

Gonsiorek, J. C. (2011). Understanding self-report of sexual abuse in an initial clinical interview. In C. Silverstein (Ed.) *The Initial Psychotherapy Interview: A Gay Man Seeks Treatment*. (pp. 157-174). Elsevier Insight Publishers.

Gonsiorek, J.C. (2010, Feb. 3). Outrage is not enough. [Review of the book *Sex offender laws: Failed policies, new directions*]. *PsycCRITIQUES—Contemporary Psychology: APA Review of Books*, 55, (No. 5) Article 7.

Gonsiorek, J.C. (2009). The burden of co-occurring disorders, complications in recovery, and relating to others in ministry and community. *Guest House Review*, September, 2009. available at: <http://www.guesthouseinstitute.org/GH%20Review.html>.

Gonsiorek, J.C., Richards, P.S., Pargament, K.I., McMinn, M.R. (2009). Ethical challenges and opportunities at the edge: Incorporating spirituality and religion into psychotherapy. *Professional Psychology: Research and Practice*, 40 (4), 385-395.

Haughn, C., & Gonsiorek, J.C. (2009) The *Book of Job*: Implications for construct validity of posttraumatic stress disorder diagnostic criteria. *Mental Health, Religion and Culture*, 12 (8), 833-845.

Gonsiorek, J.C. (2009). Human sexuality, celibacy and recovery. *Seminary Journal*, 15, 1, pp. 21-26.

Gonsiorek, J.C. (2008, August 27). Pomo Homo: Yes-Yes or No-No? [Review of the book *Feeling Queer or Queer Feelings: Radical Approaches to Counselling Sex, Sexualities and Genders*]. *PsycCRITIQUES—Contemporary Psychology: APA Review of Books*, 53 (No. 35), Article 6.

Donner, M.B., VandeCreek, L., Gonsiorek, J. & Fisher, C. (2008). Unbalancing confidentiality: Protecting privacy and protecting the public. *Professional Psychology: Research and Practice*, 39, 3, pp. 369-376.

American Psychological Association. (2008). Resolution on Religious, Religion-Based and/or Religion-Derived Prejudice. *American Psychologist*, 63, 431-434. (I was one of the primary authors of this resolution that was adopted by APA).

Gonsiorek, J.C. (2006). Sexual orientation and mental health: What the behavioral sciences know about sexual orientation and why it matters. In T. Plante (Ed.). *Mental disorders of the new millennium, Volume 3*. (pp. 251-270). Westport, CT: Greenwood Press/Praeger Perspectives.

Gonsiorek, J.C. (2004). Reflections from the conversion therapy battlefield. *The Counseling Psychologist*, 32, 5, pp.750-759.

Gonsiorek, J.C. (2004). Barriers to responding to the clergy sexual abuse crisis within the Roman Catholic Church. In T. Plante (Ed.) *Sin against the innocents: Multidisciplinary perspectives on sexual abuse committed by Roman Catholic priests*. (pp. 139-153). Greenwood Press.

Gonsiorek, J. C. (2000). Foreword. In D. Davies & C. Neal (Eds.). *Pink therapy 2: Therapeutic perspectives on working with lesbian, gay and bisexual clients*. (pp. xv-xviii). Buckingham, United Kingdom: Open University Press.

Gonsiorek, J.C. (1999). Forensic psychological evaluations in clergy abuse. In T. Plante (Ed.) *Bless me father for I have sinned: Perspectives on sexual abuse committed by Roman Catholic clergy*. (pp.27-57). Westport, CT: Praeger.

Gonsiorek, J.C. (1997). Suggested remediations to "Remediation". *Professional Psychology: Research and Practice*, 28, 3, pp. 300-303.

Gonsiorek, J.C. (1996). Mental health and sexual orientation. In R. C. Savin-Williams & K. M. Cohen (Eds.). *The lives of lesbians, gays and bisexuals: Children to adults*. (pp. 462-478). Fort Worth, TX: Harcourt Brace.

Gonsiorek, J.C. (1995). A review of D. Hamer & P. Copeland. The science of desire. *Journal of sex research*, 32, (3), pp. 262-263.

Gonsiorek, J.C., Sell, R.L., & Weinrich, J.D. (1995). Definition and measurement of sexual orientation. *Suicide and life threatening behavior*, 25, Supplement, 40-51.

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Gonsiorek, J.C. (1995). Introduction. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. xiii-xv). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Background section introduction. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 1-2). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Victims section introduction. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 41-42). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Perpetrators section introduction. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 129-131). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Assessment for rehabilitation of exploitative health care professionals and clergy. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 145-162). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Boundary challenges when both therapist and client are gay males. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 225-233). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Responses section introduction. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 235-236). Newbury Park, CA: Sage Publications.

Gonsiorek, J.C. (1995). Epilogue. In J.C. Gonsiorek (Ed.). *Breach of trust: Sexual exploitation by health care professionals and clergy*. (pp. 392-396). Newbury Park, CA: Sage Publications.

Gonsiorek, J. C., Bera, W. H. & LeTourneau, D. (1994). *Male sexual abuse: A trilogy of intervention strategies*. Newbury Park, CA.: Sage Publications.

Gonsiorek, J.C. (1994). Is there hope after Bowers v. Hardwick: A review of W. R. Dynes and S. Donaldson (Eds.) *Homosexuality: Discrimination, Criminality and the Law*. *Contemporary Psychology*, 39, (2), (pp. 219-221).

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psychology: Theory, research and clinical applications. (pp. vii-ix). Newbury Park, CA: Sage Publications.

Gonsiorek, J. C. (1994). Challenges to maintaining personal and professional integrity in lesbian and gay affirmative psychology. *APA Division 44 Newsletter*, 9, (3), pp. 10-13.

Gonsiorek, J. C. (1993). Threat, stress and adjustment: Mental health and the workplace for lesbian and gay individuals. In L. Diamant (Ed.) *Homosexual issues in the workplace*. (pp.243-264). Washington, D.C.: Taylor and Francis

Gonsiorek, J. C. (1992). Help for therapists who sexually exploit clients. *Iowa Psychologist*, 37 (2), (pp.5-10)

Gonsiorek, J. (1991). Preface. In J. Gonsiorek & J. Weinrich (Eds.) *Homosexuality: Research implications for public policy*. (pp. vii-ix). Newbury Park, CA.: Sage

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Gonsiorek, J. & Weinrich, J. (1991). Definition and scope of sexual orientation. In J. Gonsiorek & J. Weinrich (Eds.) *Homosexuality: Research implications for public policy*. (pp.1-12). Newbury Park, CA.: Sage

Gonsiorek, J. (1991). The empirical basis for the demise of the illness model of homosexuality. In J. Gonsiorek & J. Weinrich (Eds.) *Homosexuality: Research implications for public policy*. (pp. 115-136). Newbury Park, CA.: Sage

Gonsiorek, J. & Rudolph, J. (1991). Homosexual identity: Coming-out and other developmental events. In J. Gonsiorek & J. Weinrich (Eds.) *Homosexuality: Research implications for public policy*. (pp. 161-176). Newbury Park, CA.: Sage

Gonsiorek, J. & Shernoff, M. (1991). AIDS prevention and public policy: The experience of gay males. In J. Gonsiorek & J. Weinrich (Eds.) *Homosexuality: Research implications for public policy*. (pp. 230-243). Newbury Park, CA.: Sage

Gonsiorek, J. (1991). Conclusion. In J. Gonsiorek & J. Weinrich (Eds.) *Homosexuality: Research implications for public policy*. (pp. 244-248). Newbury Park, CA.: Sage

Gonsiorek, J. (1991). Short term treatment of a multiply abused young man with confusion about sexual identity. In C. Silverstein (Ed.) *Gays, lesbians and their therapists: Studies in psychotherapy*. N.Y.: W.W. Norton.

Gonsiorek, J. C. (Spring, 1991). *Amicus Curiae* brief filed by American Psychological Association in case of *Kentucky v. Wasson* for the Kentucky Supreme Court. (Author

wrote parts of brief on behalf of American Psychological Association).

Swarthout, D. & Gonsiorek, J. (1990). Comparison of HIV intervention models (HIM) for men whose sexual behavior with other men puts them at risk of HIV infection/re-infection. *Register of Research on Bisexuality*. London, World Health Organization.

Gonsiorek, J. C. (1990). *Verslag van het bezoek van John Gonsiorek aan Nederland [Summaries from the visit of John Gonsiorek to the Netherlands]*. Amsterdam, Netherlands: Schorerstichting.

Gonsiorek, J. (1990). *Psychological and ethical implications of causal theories of sexual orientation*. (ERIC Document Reproduction Services No. ED 327 767).

Swarthout, D., Gonsiorek, J., Simpson, M., & Henry, K. (1989, June). A behavioral approach to HIV prevention among seronegative or untested gay/bisexual men with a history of unsafe behavior. *Proceedings of the Fifth International Conference on AIDS*. Montreal, Canada, 784.

Gonsiorek, J. C. & Brown, L. (1989). Post-therapy relationships with clients. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker and R. Conroe (Eds.), *Psychotherapists' sexual involvement with clients: Intervention and prevention* (pp. 289-301). Minneapolis: Walk-In Counseling Center.

Gonsiorek, J. C. (1989). Responding to sexual exploitation of clients by therapists: Future directions. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker, and R. Conroe (Eds.), *Psychotherapists' sexual involvement with clients: Intervention and prevention* (pp. 567-573). Minneapolis: Walk-In Counseling Center.

Gonsiorek, J. C. (1989). The prevention of sexual exploitation of clients: Hiring practices. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker, and R. Conroe (Eds.), *Psychotherapists' sexual involvement with clients: Intervention and prevention* (pp. 469-475). Minneapolis: Walk-In Counseling Center.

Gonsiorek, J. C. (1989). Working therapeutically with therapists who have become sexually involved with clients. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker and R. Conroe (Eds.), *Psychotherapists' sexual involvement with clients: Intervention and prevention* (pp. 421-433). Minneapolis: Walk-In Counseling Center.

Schoener, G. R., & Gonsiorek, J. C. (1989). Assessment and development of rehabilitation plans for the therapist. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker, and R. Conroe (Eds.), *Psychotherapists' sexual involvement with Clients: Intervention and prevention* (pp. 401-420). Minneapolis: Walk-In Counseling Center.

Gonsiorek, J. C. (1989). Sexual exploitation by psychotherapists: Some observations on male victims and sexual orientation issues. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker and R. Conroe (Eds.), *Psychotherapists' sexual involvement with*

clients: Intervention and prevention (pp. 113-119). Minneapolis: Walk-In Counseling Center.

Schoener, G. R., Milgrom, J. H., & Gonsiorek, J. C. (1989). Therapeutic responses to clients who have been sexually abused by psychotherapists. In G. R. Schoener, J. H. Milgrom, J. C. Gonsiorek, E. Luepker, and R. Conroe (Eds.), *Psychotherapists' sexual involvement with clients: Intervention and prevention* (pp. 95-112). Minneapolis: Walk-In Counseling Center.

Gonsiorek, J. C. (1989). Working therapeutically with therapists who have become sexually involved with clients. In B. C. Sanderson (Ed.), *It's never ok: A handbook for professionals on sexual exploitation by counselors and therapists* (pp. 81-90). St. Paul, MN: Program for Victims of Sexual Assault, State of Minnesota Dept. of Corrections.

Gonsiorek, J. C. (1989). Sexual exploitation by psychotherapists: Some observations on male victims and on sexual orientation concerns. In B. C. Sanderson (Ed.), *It's never ok: A handbook for professionals on sexual exploitation by counselors and therapists* (pp. 95-99). St. Paul, MN: Program for Victims of Sexual Assault, State of Minnesota Department of Corrections.

Gonsiorek, J. C. (August, 1988). *Amicus Curiae* brief filed by American Psychological Association in case of *Watkins v. U.S. Army* for United States Ninth Circuit Court of Appeals. (Author wrote parts of brief on behalf of American Psychological Association).

Gonsiorek, J. C. (1988). Mental health issues of gay and lesbian adolescents. *Journal of Adolescent Health Care*, 9, 114-122. Also published in L. D. Garnets & D. C. Kimmel (Eds.) (1993). *Psychological perspectives on lesbian and gay male experiences*. N.Y.: Columbia University Press.

Schoener, G. R., & Gonsiorek, J. C. (1988). Assessment and development of rehabilitation plans for counselors who have sexually exploited their clients. *Journal of Counseling and Development*, 67, 227-232.

Gonsiorek, J. C. (1988). Sexual exploitation by psychotherapists: Some observations relevant to lesbians and gay men. In M. Shernoff and W. A. Scott (Eds.), *The sourcebook on lesbian/gay health care (2nd ed.)*, pp. 97-103. Washington, DC: National Lesbian and Gay Health Foundation.

Gonsiorek, J. C. (1988). Current and future directions in gay/lesbian affirmative mental health practice. In M. Shernoff and W. A. Scott (Eds.), *The sourcebook on lesbian/gay health care (2nd ed.)*, pp. 107-113. Washington, DC: National Lesbian and Gay Health Foundation.

Gonsiorek, J. C. (1987). Intervening with psychotherapists who sexually exploit clients. In P. Keller and S. Heyman (Eds.) *Innovations in clinical practice: A source book (vol. 6)* (pp. 417-427). Sarasota, FL: Professional Resource Exchange.

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Gonsiorek, J. C. (1987). Book review of T. S. Stein and C. J. Cohen, Contemporary perspectives on psychotherapy with lesbians and gay men. *Contemporary Psychology*, 32, 335-336.

Gonsiorek, J. C. (January, 1986). *Amicus Curiae* brief filed by American Psychological Association in case of *Bowers v. Hardwick* for United States Supreme Court. (Author wrote parts of brief on behalf of American Psychological Association).

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mental health. In J. C. Gonsiorek (Ed.), *Homosexuality and psychotherapy: A practitioner's handbook of affirmative models* (pp. 5-7). New York: Haworth

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813-818.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Attorneys for Respondent

James M. Whisman
King County Prosecutor's Office
516 Third Avenue Room W554
Seattle WA 98104
Jim.whisman@kingcounty.gov

- Legal messenger service, for delivery on _____, to the following:
- Overnight mail service, for delivery on _____, to the following:
- Other _____.

DATED this ____ day of January, 2015.

, Legal Assistant

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of
MICHAEL E. MOCKOVAK
Petitioner

NO. 69390-5-I

SECOND DECLARATION
OF RONALD L. MARMER

2015 FEB -6 PM 2:23

COURT OF APPEALS DIV I
STATE OF WASHINGTON

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 second declaration I have executed in this case.

In ¶8 of my first declaration, dated June 11, 2012, I explained that because I am both an attorney and a friend of Petitioner Mockovak, I asked his trial attorneys Jeffrey Robinson and Colette Tvedt if I could act as co-counsel with them and thus participate in the trial of this case in the Superior Court. They told me that I could not serve as co-counsel because I had posted his bail; but they said that they would consult with me about the case as they prepared for trial. They did that, and therefore before the trial took place both Tvedt and Robinson talked to me about strategic decisions that they were making. *Id.* at ¶¶9-11.

3. I have read the *State's Response to Personal Restraint Petition* dated November 7, 2014. In that response the State argues that

SECOND DECLARATION OF RONALD
L. MARMER – 1

this Court should not find trial counsel was ineffective because they failed to present evidence that Mockovak was sexually abused by his uncle. On page 73, the State asserts that “Mockovak cannot establish deficient performance because Mockovak has not established that trial counsel knew about the past abuse”

4. The State is incorrect. Mockovak can establish that his trial attorneys knew about his having been a victim of childhood sexual abuse.

5. Long before the trial took place, I had a conversation with defense attorney Colette Tvedt. She brought up the fact that Mockovak had been sexually abused. I did not tell her about the childhood sexual abuse; she was already aware of it. She asked me if I was familiar with the fact that Mockovak had been sexually abused and I said that I was. She told me that she and Mr. Robinson were thinking about the possibility of calling me as a defense witness at trial. I responded that if they decided they wanted me to testify, I certainly was willing to do so.

6. Attorney Tvedt told me she had been speaking with Dr. John Gonsiorek, one of Mockovak’s friends, and that Dr. Gonsiorek also knew about the childhood sexual abuse. Tvedt mentioned to me that she liked Dr. Gonsiorek very much.

7. Eventually Attorney Tvedt told me that she and Robinson had decided that they were not going to call me as a defense witness. I

assumed that they had decided that Dr. Gonsiorek would make a better defense witness than I would on the subject of childhood sexual abuse and its effects on Mockovak. That made sense to me since I knew that Dr. Gonsiorek was a psychologist and a professor and I knew that sexual abuse is one of his areas of expertise.

8. Sometime after Tvedt told me that I was not going to be called as a defense witness, she told me that I could attend the mock jury sessions that I had requested the defense team to conduct. As I noted in ¶22 of my earlier declaration, the mock jury exercises were held in September of 2010. My discussions with Attorney Tvedt regarding Mockovak's childhood sexual abuse took place before the mock jury exercises were held. Attorneys Tvedt and Robinson, therefore, knew about Mockovak's childhood sexual abuse at least as early as September of 2010 — at least 4 months before trial started in January of 2011.

DATED this 4th day of February, 2015.



Ronald L. Marmer

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of
MICHAEL E. MOCKOVAK
Petitioner

NO. 69390-5-I

DECLARATION OF
NATALIE NOVICK
BROWN PhD

COURT OF APPEALS
STATE OF WASHINGTON
2015 FEB -6 PM 2:23

Declaration of Natalie Novick Brown, PhD

1. I, Natalie Novick Brown, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct.
2. I am a forensic and clinical psychologist. I am licensed in the States of Washington, Florida, and Arkansas. My resume is attached.
3. At the request of counsel, I completed a psychological evaluation of Michael Mockovak, which was summarized in a report dated November 12, 2014. In that initial evaluation, I diagnosed Dr. Mockovak with the following DSM-5 mental health conditions: Posttraumatic Stress Disorder, Persistent Depressive Disorder, and Specific Phobia, situational (Paruresis). I opined that these disorders stemmed from the ten years of sexual abuse he experienced in childhood.
4. Following my initial evaluation, defense counsel requested that I conduct a psychological evaluation of Dr. Mockovak to determine if his psychiatric disorders influenced his functioning at the time of his offense.
5. I interviewed Dr. Mockovak a second time on December 17, 2014 (5.6 hours) and administered the following tests and questionnaires:
 - Weschler Adult Intelligence Scale-IV (WAIS-IV)
 - Hopkins Verbal Learning Test-Revised (HVLTR)
 - Rey Complex Figure Test (RCFT)
 - Behavior Rating Inventory of Executive Functioning-Adult (BRIEF-A)
 - Test of General Reasoning Ability (TOGRA)
 - Gudjonsson Suggestibility Scale (GSS)
 - Minnesota Multiphasic Personality Inventory-2 (MMPI-2; administered during the initial evaluation)
 - Test of Memory Malingering (TOMM)
 - Structured Interview of Reported Symptoms-2 (SIRS-2)

Record review consisted of records listed in my initial report, which verified that Dr. Mockovak was sexually abused in childhood by his uncle; Appellant's Brief to the

Washington State Court of Appeals (11/28/11); and State's Response to Personal Restraint Petition (11/7/14).

6. Opinions expressed in this report are held to a reasonable degree of psychological certainty.
7. Test results in the current evaluation indicated the following:
 - Effort: Scores on three validity scales in the BRIEF-A (i.e., Negativity, Inconsistency, Infrequency) fell in the acceptable range; there were no Atypical scores on the RCFT-R; and he was able to recognize all 50 images on the initial and retention trials of the TOMM (i.e., a perfect score). MMPI-2 validity scales during testing in his first interview also fell in the normal range. Results on the SIRS-2 were consistent with genuine responding.
 - Intelligence: He obtained a full-scale IQ score of 144 (almost 3 standard deviations above the mean) on the WAIS-IV with no intra-index scatter. This score establishes his "baseline" performance (i.e., other test results should fall in or near this high range).
 - Memory: On the HVLTR, a test of verbal memory/learning, he obtained a Total Recall T-score of 41 (.85 standard deviations *below* the mean) and a Delayed Recall T-score of 51 (0.12 standard deviations above the mean). On the RCFT, a test of visual-spatial memory/learning, his score on the Immediate Recall scale (T-score = 78) fell 2.75 standard deviations above the mean; his score on the Delayed Recall scale (T-score = 70) fell 2 standard deviations above the mean; and his score on the Recognition Total Correct scale (T-score = 65) fell 1.5 standard deviations above the mean.
 - Executive Functioning: On the BRIEF-A, scores on two subscales fell in the clinically elevated range: Initiate (T-score = 66; 1.6 standard deviations above the mean), which indicates inability to begin activities by independently generating problem-solving strategies, and Task Monitor (T-score = 65; 1.5 standard deviations above the mean), which indicates inability to keep track of one's own problem-solving success or failure. On the TOGRA, he obtained a standard score of 134 (2.3 standard deviations above the mean).

Suggestibility: On the GSS, he obtained a suggestibility score of 20, which is 1.5 standard deviations above the mean.

Personality testing on the MMPI-2 during the initial interview indicated clinical elevations on the Depression (T-score = 70; 2 standard deviations above the mean) and Paranoia (T-score = 83; ~3.3 standard deviations above the mean) scales. The computer-generated interpretation (which was consistent with my interpretation) indicated that Dr. Mockovak sees himself as quite vulnerable to being hurt by others. He reported great difficulty with relationships in the past. His profile indicated a high degree of personal distress and included numerous symptoms of depression (e.g., subjective depression, dysphoria, physical malfunctioning, brooding, lassitude-malaise) and anxiety. His Naiveté subscale score fell close to the clinical range (T-score = 60); his Lack of Ego Mastery/Defective Inhibition subscale (T-score = 67) and Schizotypal Characteristics subscale (T-score = 67) were clinically elevated. His low mood is accompanied by strong feelings of inadequacy and uncertainty about the future.

On a Learned Helplessness questionnaire, he endorsed a number of items indicating helplessness (i.e., I cannot find solutions to difficult problems, I place myself in situations in which I cannot get out of, when I perform poorly it is because I don't have the ability to perform better, I do not accept a task that I do not think I will succeed in, I am unable to reach my goals in life, and when I don't succeed at a task I find myself blaming my own stupidity for my failure).

On a Mastery scale, he endorsed the following items: no way can I solve some of the problems I have, sometimes I feel that I am being pushed around in life, I often feel helpless in dealing with the problems of life, I cannot do some things I really set my mind to, and there is little I can do to change many of the important things in my life.

On a Locus of Control scale, his score (13/29) indicated an external locus of control.

On a Social Support scale, his responses indicated that he perceives he has a low level of support from others, including his family.

On a Coping Competence scale, his responses indicated limited coping capacity.

8. In my initial report, I cited research indicating that childhood maltreatment leads to structural and functional changes in brain development. As noted in that report, Dr. Mockovak suffered extreme childhood maltreatment over much of his childhood (i.e., ten years of sexual abuse by an uncle, frequent physical and emotional abuse by his alcoholic father, and neglect by his mother). Dr. Mockovak's objective test results and questionnaire responses were consistent with the valid MMPI results he obtained in his initial evaluation. Together, testing revealed an external locus of control, deficient ego mastery, defective inhibition, suggestibility, and learned helplessness. His comments as events spiraled out of control in 2009 were consistent with these test results.
9. Objective cognitive testing found significant difficulty in verbal memory, which indicated temporal lobe dysfunction, and a high level of suggestibility, which indicated dysfunction in the prefrontal cortex. These results were in stark contrast to Dr. Mockovak's extremely high IQ. Testing also found significant difficulties in independently generating problem-solving strategies and keeping keep track of the results of those problem-solving strategies. Both skills are executive functions controlled by the prefrontal cortex. Personality testing with the MMPI-2 found a lack of ego mastery and defective inhibition and indicated that his low mood and Post-traumatic Stress Disorder (PTSD) were accompanied by strong feelings of inadequacy and uncertainty about the future in the context of a perception that he had no source of social support. Responses on questionnaires were consistent with MMPI results and indicated that Mr. Mockovak had an external locus of control. The latter means he typically perceives external events to be beyond his personal control and consequently gives up easily (i.e., learned helplessness). These constructs are directly relevant to his offense conduct.
10. During his interview, Dr. Mockovak told me about the many stressful circumstances he encountered as the year 2009 progressed, including a lawsuit brought against his company by former employee Bradley Klock, the possibility of a dissolution of his medical business with his business partner Dr. Joseph King, conflict with his ex-wife Heather regarding his parental access to their daughter, health problems, and conflict

with his father. He told me the history of his conversations and interactions with Daniel Kultin, the IT director of his medical clinic, and how Kultin pressured him over a period of many months to let Kultin hire Russian hit-men to kill Dr. Mockovak's business partner. Dr. Mockovak explained why he finally succumbed to Kultin's pressure and authorized him to act. He delivered a money payment to Kultin in early November of 2009.

11. On November 16, 2009, Dr. Mockovak was arrested and charged with two counts of Solicitation of Murder in the First Degree. The counts involved Dr. Joseph King and Brad Klock. The case was tried before a jury in early 2011. On February 3, 2011, the jury acquitted Dr. Mockovak of soliciting the murder of Brad Klock but convicted him on four counts involving the planned murder of Dr. King and theft of his life insurance proceeds. Dr. Mockovak was eventually sentenced to 20 years in prison.
12. At the time of his offense Dr. Mockovak was suffering from PTSD, which was described in my initial report. In addition, at the time of his offense his persistent depressive disorder or dysthymia had deepened to Major Depressive Disorder, Severe, With Psychotic Features. Symptoms at least from the summer of 2009 to the point of his arrest in 2009 included a persistent low mood, markedly diminished interest in or pleasure from daily activities, chronic insomnia and low energy, feelings of worthlessness, and diminished ability to concentrate and make decisions. In addition, immediately prior to his telling Kultin he would go forward with the "hit," symptoms involved a psychotic episode (i.e., visual hallucination) and a brief dissociative experience. Throughout much of 2009, Mr. Mockovak's combined PTSD and depression caused clinically significant distress and impairment in his daily functioning. Moreover, physical illness throughout that period decreased his already-low resiliency. His PTSD and Major Depressive Disorder are mental defects. As DSM-5 notes, adverse childhood experiences, especially when there are multiple experiences of diverse types, "constitute a set of potent risk factors for major depressive disorder," and stressful life events are "well recognized as precipitants of major depressive disorder" (DSM-5, p. 166). PTSD is associated with aggressive

behavior, heightened sensitivity to potential threats, and over-reaction, which may lead to reckless or self-destructive behavior (DSM-5, p. 275-76).

13. Summarizing the above, due to his mental defects and illness, Dr. Mockovak's psychiatric functioning changed dramatically over the course of 2009 as events and illness cumulatively increased his stress and led to clinical depression. His mental defects involved cognitive deficits and traits associated that he'd developed in response to his childhood trauma, which included an external locus of control, lack of ego mastery, suggestibility, and learned helplessness.
14. According to the literature, an external locus of control is associated with lack of ego mastery.¹ As reflected in his MMPI results, Mr. Mockovak's lack of ego mastery also was associated with deficient inhibition (i.e., impulse control). His comments reflected hopelessness and his perception that he had no control over the events that were spiraling out of control in the days and months leading up to November 6. Suggestibility (an executive function controlled in the prefrontal cortex) indicates that Dr. Mockovak was highly inclined to acquiesce to Kultin just as he had acquiesced to his uncle in childhood. The tendency to acquiesce was an ingrained aspect of his personality ("my personality is to avoid confrontation at all costs") that had been reinforced in him over his ten-year history of repeated sexual abuse. These dynamics plus the deficient inhibition identified in his MMPI explain why his mental defects rendered him unable to keep resisting Kultin's repetitive suggestion.
15. Learned helplessness has been the subject of multidisciplinary study since the mid-1960s. Originally developed to explain why exposure to aversive stimuli in a classical conditioning context would produce failure to learn how to escape, the construct has been the subject of extensive neurological study in recent years to the point where there now is a great deal of information regarding permanent neurochemical changes produced by uncontrollable stressors (e.g., long-term childhood sexual abuse). A primary finding in this research is that the net effect of

¹ Zimmerman, B.J., & Cleary, T.J. (2006). Adolescents' development of personal agency: The role of self-efficacy beliefs and self-regulatory skill (pp. 45-69). In F. Pajares & T. Udan (Eds.), *Self-efficacy beliefs of adolescents*. Charlotte, NC: Information Age Publishing.

chronic depletion of norepinephrine in response to uncontrollable stressors is augmentation of noradrenergic activity in this population of neurons.² The first application of learned helplessness in psychopathology was in the area of depression. Later, the process was extended to explain behavior in posttraumatic stress disorder.³ Dr. Mockovak's test results, particularly findings indicating dysfunction in the prefrontal cortex, are consistent with neuroimaging research that finds links between childhood maltreatment and attenuated structural and functional development of the neocortex⁴ during childhood, including the anterior cingulate⁵, the orbitofrontal⁶ and the dorsolateral prefrontal cortex.⁷ As noted in my previous report, childhood maltreatment appears to weaken ventral prefrontal-subcortical circuitry between the prefrontal cortex and amygdala, which is important in the automatic fear-regulatory circuit, which in turn predicts the development of internalizing symptoms (e.g., depression, anxiety and PTSD). Childhood maltreatment also weakens connectivity between the prefrontal cortex and hippocampus, which plays an important role in the regulation of fear via neural connections in both the amygdala and prefrontal cortex. As a result, adults with histories of childhood maltreatment exhibit *impaired fear-network connectivity* that affects executive functioning (e.g., decision making and impulse control) and affect modulation, which not only places these individuals at risk for PTSD and mood disorders but also increases risk of aberrant over-reaction.⁸ In fact, studies of adults with PTSD have found disrupted communication in fear-

² Weiss, J. M., & Simson, P. G. (1988). Neurochemical mechanisms underlying stress-induced depression. In T. Field, I., McCabe, & N. Schneiderman (Eds.), *Stress and coping* (pp. 93-116). Hillsdale, NJ: Erlbaum.

³ Mindeka, S., & Zinbarg, R. (1996). Conditioning and ethological models of anxiety disorders: Stress-in-dynamic-context anxiety models. In D. Hope (Ed.), *Nebraska Symposium on Motivation: Perspectives on anxiety, panic, and fear* (pp. 135-211). Lincoln: University of Nebraska Press.

⁴ Ito, Y., Teicher, M.H., Glod, C.A., & Ackerman, E. (1998). Preliminary evidence for aberrant cortical development in abused children: a quantitative EEG study. *J Neuropsychiatry & Clinical Neuroscience*, 10, 298-307.

⁵ Cohen, R.A., Grieve, S., Hoth, K.F., Paul, R.H., Sweet, L., Tate, D., Gunstad, J., Stroud, L., McCaffery, J., Hitsman, B., Niaura, R., Clark, C.R., McFarlane, A., Bryant, R., Gordon, E., & Williams, L.M. (2006). Early life stress and morphometry of the adult anterior cingulate cortex and caudate nuclei. *Biology & Psychiatry*, 59, 975-982.

⁶ Hanson, J.L., Chung, M.K., Avants, B.B., Shirtcliff, E.A., Gee, J.C., Davidson, R.J., & Pollak, S.D. (2010). Early stress is associated with alterations in the orbitofrontal cortex: a tensor-based morphometry investigation of brain structure and behavioral risk. *Journal of Neuroscience*, 30, 7466-7472.

⁷ Tomoda, A., Suzuki, H., Rabi, K., Sheu, Y.S., Polcari, A., & Teicher, M.H. (2009). Reduced prefrontal cortical gray matter volume in young adults exposed to harsh corporal punishment. *Neuroimage*, 47(suppl 2), T66-T71.

⁸ Evans, J.R., & Park, N-S (1997). Quantitative EEG findings among men convicted of murder. *Journal of Neurotherapy*, 2, 31-39.

network connectivity leads to exaggerated and generalized fear responses.^{9, 10, 11, 12, 13}

Dr. Mockovak's reactions to Kultin over the six months in question are consistent with this research.

16. Dr. Mockovak's ability to resist the suggestion that he resort to criminal activity – in this case hiring people to kill his business partner – was substantially impaired by the cognitive deficits associated with the PTSD caused 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. While a normal person would have the ego strength to resist such pressure, Dr. Mockovak was not (and is not) a normal person because he was subjected to years of sexual abuse as a child. Because of this experience, he developed psychological impairments that made him particularly vulnerable to manipulation by others.
17. Entrapment is a specific form of manipulation where a government agent suggests the commission of a criminal act to another person who is *not* predisposed to commit the crime at issue and then manipulates that person into committing the offense. Compared to normally-constituted persons, Dr. 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. From that experience, he "learned" he was helpless, and this learned helplessness continues to afflict him as an adult. Consequently, as an adult his ability to reject suggestions of criminal activity put to him by others is substantially diminished.

⁹ Pitman, R.K., Rasmusson, A.M., Koenen, K.C., Shin, L.M., Orr, S.P., Gilbertson, M.W., Milad, M.R., & Liberzon, I. (2012). Biological studies of post-traumatic stress disorder. *Nature Reviews Neuroscience*, 13(11), 769–787.

¹⁰ Maren, Pha, & Liberzon, op. cit.

¹¹ Maren, S., Phan, K.L., & Liberzon, I. (2013). The contextual brain: implications for fear conditioning, extinction and psychopathology. *Nature Reviews Neuroscience*, 14(6), 417–428.

¹² Imperatori, C., Farina, B., Quintiliani, M.I., Onofri, A., Gattinara, P.C., Lepore, M., Gnoni, V., Mazzucchi, E., Contardi, A., & Della Marca, G. (2014). Aberrant EEG functional connectivity and EEG power spectra in resting state post-traumatic stress disorder: A sLORETA study. *Biological Psychology*, 102, 10-17.

¹³ Milad, M.R., & Quirk, G.J. (2012). Fear extinction as a model for translational neuroscience: Ten years of progress. *Annual Review of Psychology*, 63, 129–1251.

Dated this 7th day of January, 2015, in Seattle, Washington.

A handwritten signature in black ink, appearing to read "Natalie Novick Brown". The signature is written in a cursive style with a long horizontal flourish at the end.

Natalie Novick Brown, PhD

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of
MICHAEL E. MOCKOVAK
Petitioner

NO. 69390-5-I

FOURTH DECLARATION
OF JAMES E. LOBSENZ RE
CLERK'S PAPERS

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2015 FEB -6 PM 2:23

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 am counsel for Petitioner Mockovak in this PRP. I also was counsel for Mockovak in his direct appeal. I have personal knowledge of the facts set forth here.

2. Recently, in an order dated January 12, 2015, this Court stated that the clerk's papers from Mockovak's direct appeal were previously destroyed, thus making it impossible for this court to transfer those clerk's papers from the direct appeal case file to the PRP case file.

3. In the briefing that Petitioner Mockovak has filed in the PRP case, he has occasionally cited to, and quoted from, some of the clerk's papers from the prior direct appeal. Since the clerk's papers have been destroyed, at present this Court has no way of examining the cited clerk's papers.

4. There were roughly 1,000 pages of clerk's papers in the direct appeal. Rather than copy and file a complete set of all of those

pages, I have *only* made copies of those specific pages that Mockovak has cited in his PRP briefing. Copies of those specific pages are attached to this declaration.

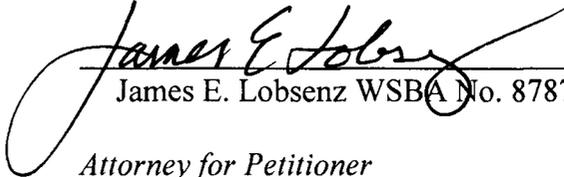
5. For this Court's convenience, I have grouped the copied pages into five Appendices according to the particular document that the pages are excerpted from. Therefore, there are five attached Appendices as follows:

Appendix A	CP 172, 183, 189 & 192, taken from <i>Defendant's Motion to Dismiss</i> (Superior Court Docket No. 44)
Appendix B	CP 626, taken from <i>Order Denying Motion for Release</i> (Superior Court Docket No. 98)
Appendix C	CP 676, 677-78, 681, 684, 703, taken from <i>Defendant's Sentencing Memo</i> (Superior Court Docket No. 104)
Appendix D	CP 731, taken from <i>Presentence Statement of King County Prosecuting Attorney</i> (Superior Court Docket No. 107)
Appendix E	CP 788, 789-90, 787-791, taken from <i>Supplemental Materials in Support of Defendant's Sentencing Memo</i> , (Superior Court Docket No. 108)

6. By attaching only the specific pages that Mockovak cited, I have avoided providing the Court with many unnecessary pages. For example, the 4 cited pages attached as Appendix A are taken from a pleading that is 88 pages long. I did not think the Court would want copies of the 84 pages that Petitioner Mockovak has *not* cited. However, if the Court does want to see the complete document from which the cited pages have been taken, I can and will provide copies of those pages, or of

any other portion of the direct appeal clerk's papers that the Court wishes to have.

DATED this 5th day of February, 2015.


James E. Lobsenz WSBA No. 8787
Attorney for Petitioner

APPENDIX A

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2. The case number and name of the prosecutions in which the cooperating witness utilized in this case has previously been utilized as a cooperating witness;
3. The case names and numbers of any trials or evidentiary hearings at which the cooperating witness has testified concerning his own prior criminal activity, payments or rewards provided him by the government, efforts made to induce others to participate in criminal activity, or other purported law enforcement-related matter;
4. Any ledger, sheet, or other document which details the sums paid the cooperating witness or his family in this and other cases in which the cooperating witness assisted the government and the purpose of each such payment;
5. Any information, whether or not memorialized in a memorandum, agent's report or other writing, regarding promises of immunity, leniency, preferential treatment or other inducements made to the cooperating witness or any family member, friend, or associate of the cooperating witness in exchange for the cooperating witness's cooperation, including the dismissal or reduction of charges, assisting in matters of sentencing or deportation, assisting in helping the witness obtain Naturalization, any contacts with INS on behalf of the cooperating witness, promises or expectancies regarding payments for expenses or testimony or eligibility for any award or reward; in addition to information regarding payments, promises of immunity, leniency, preferential treatment or other inducements made to the government witnesses, any records or information regarding payments, promises of immunity, leniency, preferential treatment

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With respect to Daniel Kultin, we have provided in discovery all of the documentation we have received. We know that Daniel Kultin was paid by the FBI for his time working with the FBI and SPD in connection with this case. We do not know the amount or details of payments. According to the case investigators, Daniel Kultin was not directly or indirectly given any promises of immunity, lenience, preferential treatment, or other inducements, favors, or rewards for his assistance in this case. We have no reason to think that Mr. Kultin worked with law enforcement on any other investigation. Mr. Kultin was apparently the subject to an INS investigation, which was quickly resolved. The FBI has denied our requests for further information.

We have no reason to believe that any potential State witness has any prior convictions.

We have identified a number of civil actions in which your client is a party. We do not intend to provide any discovery with respect to those matters. All of that material is available through the County Clerk's Office.

We do not at present have any additional discoverable material.

During our last telephone conversation, you agreed to provide the State with copies of records you receive or have received pursuant to subpoena. Please provide those records as soon as possible. To our knowledge, you have issued two subpoenas to AT&T for telephone records pertaining to Dr. Joseph King, and one subpoena to Sprint for telephone records of Daniel Kultin's cell phone.

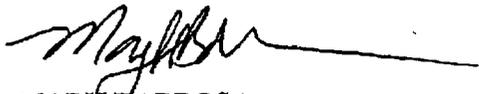
Finally, we see in the Bar News that you were recently made a shareholder of your firm. Congratulations.

Cordially,

For DANIEL T. SATTERBERG, King County Prosecuting Attorney



SUSAN K. STOREY
Senior Deputy Prosecuting Attorney



MARY BARBOSA
Senior Deputy Prosecuting Attorney

**SCHROETER
GOLDMARK
& BENDER**

Email: tvedt@sgb-law.com
campagna@sgb-law.com

August 24, 2010

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Since 1969

Bruce Bennett, Supervisory Special Agent
Associate Division Counsel
Federal Bureau of Investigation
1110 Third Avenue
Seattle, Washington 98101

Re: ***Our Client Michael Mockovak***
FBI File Number 166C-SE-95743

Dear Mr. Bennett:

In connection with the matter of *State of Washington v. Michael Mockovak*, and pursuant to 28 C.F.R. 16.22 *et seq.*, (commonly known as a *Touhy* request), we request copies of the following materials:

1. Any records relating to conversations between Daniel Kultin and Michael Mockovak that occurred between the dates of August 12, 2009 and October 19, 2009, including but not limited to (a) any notes, memos, or recordings of such conversations, (b) any records relating to the creation or destruction of any notes, memos or recordings of such conversations, and (c) any logs or recording the dates and times audio or video recording equipment was provided to Daniel Kultin for the purpose of recording conversations with Michael Mockovak.

2. Any records relating to compensation or benefits offered or given to Daniel Kultin in return for participating in the investigation of Michael Mockovak, including but not limited to any offers or payments of money, or any offers of or discussion about assistance with Daniel Kultin's immigration status.



U.S. Department of Justice

United States Attorney
Western District of Washington

Please reply to:
PHIL LYNCH
Assistant United States Attorney
Chief, Civil Division

700 Stewart Street, Suite 5220 Tel: (206) 553-7970
Seattle, Washington 98101-1271 Fax: (206) 553-4073

September 7, 2010

VIA FACSIMILE AT (206) 682-2305

Joseph Campagna
Schroeter Goldmark and Bender
810 Third Avenue
Seattle, WA 98104

Re: *State of Washington v. Michael Emeric Mockovak*
No. 09-1-07237-6 SEA, King County Superior Court

Dear Mr. Campagna:

I am in receipt of a copy of your letter dated August 24, 2010, requesting documents and materials from the FBI in connection with the above-referenced action. Pursuant to 28 C.F.R. 16.21 *et seq.*, I have conferred with the FBI, and both the FBI and this office consent to this request to the extent set forth below.

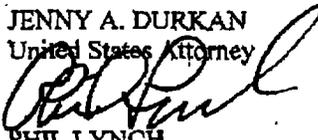
This consent extends to the production of a portion of the documents and materials you requested. The FBI is authorized to produce records (FD-302s) relating to recordings of Mr. Mockovak that occurred between the dates of August 12, 2009, and October 19, 2009, including recordings and logs of when the recording device was provided. However, as a matter of policy, the FBI does not provide notes. With respect to compensation paid to Daniel Kulin, the FBI is authorized to provide a summary of the dates, times, and amounts paid, but the FBI is not authorized, as a matter of policy, to release copies of internal documents regarding confidential human sources.

This letter only authorizes the FBI to produce portions of their file as outlined above. Please arrange receipt of these documents and materials with Special Agent Bruce Bennett.

If you have any questions, please do not hesitate to contact me.

Sincerely,

JENNY A. DURKAN
United States Attorney


PHIL LYNCH
Assistant United States Attorney
Chief, Civil Division

cc: Bruce Bennett, FBI

APPENDIX B

FILED
KING COUNTY, WASHINGTON

FEB 23 2011

SUPERIOR COURT
ANGIE VILLALOVOS
DEPUTY



Superior Court of Washington
County of King

STATE OF WASHINGTON
Plaintiff
vs

NO: 09-1-07237-6 SEA

Michael McKenry Defendant

ORDER ON CRIMINAL MOTION

The above-entitled, having heard a motion for release pending sentencing

IT IS HEREBY ORDERED that defendant's motion to reconsider release pending sentencing is denied.

Date: February 23 2010

Palmer Robinson
Judge **PALMER ROBINSON**

[Signature]
Deputy Prosecuting Attorney

[Signature]
Attorney for the Defendant (11950)



APPENDIX C

1 Bruce Vikre visited the family, he would sneak into the boys bedroom at night and sexually
2 assault all four brothers who shared a room. The abuse started when Michael was no older
3 than eight and in the third grade, and it may have started before that. Michael's memory of
4 the beginning of the abuse is not clear.

5 The sexual abuse continued for at least ten years until he graduated from high school,
6 and only stopped when Michael Mockovak moved away to attend college. Michael
7 remembers periods where he unsuccessfully tried physical resistance. Although the four
8 brothers all knew the abuse was occurring, they never spoke of it, in fear of retaliation by
9 their uncle. As Paul states in his letter to the court:

10 My Uncle Bruce, on my mother's side of the family began to abuse the boys
11 when we were living in Madison, WI and I was 7 or 8 years old. I don't have
12 many memories as a child and I have often felt that the abuse may have begun
13 before that. The sexual abuse of me went on for 10 years until I was 16 and
14 affected my life in many ways. There were well over 100 incidences just with
15 me. This combined with the fact that my father was also very angry and took
16 out his rage on the children. There was always the threat of being yelled at or
17 hit. None of us kids ever knew what it was going to be like when we got
18 home from school. We were all living in a constant state of fear and never
19 really fit in or felt safe growing up. Denial of what was happening and
20 shutting out the feeling was the only mechanism that I had at the time. It is
21 what we all did as children in order to survive, because it truly felt as though it
22 was a constant life and death situation.

23 Id.

24 As the oldest sibling, Michael Mockovak has long felt shame and guilt for failing to
25 stop or disclose the abuse that was occurring to him and his siblings. Michael's friend of
26 three decades, John Gonsiorek, wrote "Michael has never told me the full story of the abuse;
I believe this is because it has always remained a source of serious discomfort for him. I do
know from his report that he was the first to be abused, and that he sometimes has blamed
himself, feeling that if he had come forward, perhaps his other siblings would not have been
abused." Letter of John Gonsiorek, Exhibit B.

1 When Paul Mockovak was 17 years old, he finally got the courage to disclose the
2 abuse to his parents. Initially, they did not report the abuse to the authorities, instead, they
3 sent him to a family therapist. Eventually, a social worker reported Bruce Vikre to law
4 enforcement and he was arrested and charged with Criminal Sexual Conduct in the 1st
5 degree.² (See court file documents from State of Minnesota vs. Bruce Vikre, Case No. A-68,
6 153, Exhibit C.) Mr. Vikre plead guilty in 1977.

7 At the time Paul Mockovak reported the abuse and Bruce Vikre's was arrested,
8 Michael Mockovak had already left the family home and was a college student. He was not
9 contacted by police to give his version of the abuse. Suffice it to say that Mr. Vikre
10 minimized both the nature of his abuse of Michael and the time period it covered. The
11 abusive acts Mr. Vikre admitted to performing against Michael's brothers were the same
12 kinds of abuse suffered by Michael.

13 Mr. Vikre's arrest proved to be a very difficult time for Michael as the memories of
14 abuse resurfaced. Initially, his family made every effort to ensure that the abuse would not
15 be made public—a typical and frequent reaction for families of victims of abuse, especially
16 34 years ago. The fact that Michael was not interviewed let him avoid directly confronting
17 his abuse, but the memories and trauma continued. The repeated sexual assaults, the alcohol-
18 driven abusive behavior of his father and his mother's inability to be engaged left serious
19 scars on Michael as he entered adulthood.

20 Michael understood that he needed help to deal with the anger, rage, guilt and other
21 emotions that resulted from the years of abuse he suffered. He had never spoken to his
22 siblings or his parents about the years of abuse. Instead, he sought out counseling from a
23 prominent psychotherapist at Oberlin College. Michael confided in this professional and the

24 _____
25 ² Criminal Sexual Conduct in the 1st degree requires proof of sexual penetration and one or more of
26 the following elements: Victim is under 13 and defendant is over 3 years older; Victim is 13-15 and
defendant is 4 years older, defendant is in a position of authority and uses that position so victim will
submit; Victim is under 16 and defendant has a significant relationship to the victim and uses force or
coercion; causes victim reasonable fear of imminent bodily harm; there were multiple sexual acts
committed over an extended time.

1 counselor abused his position of power and exploited Michael's vulnerability by sexually
2 assaulting him. Michael Mockovak was devastated by this betrayal and from that point on
3 never sought out professional help.

4 Studies have shown the harmful impact of re-victimization and sexual exploitation by
5 health care professionals on a victim of childhood sexual abuse. The effects of sexual
6 exploitation by psychotherapists include client guilt, shame, grief, anger, depression, loss of
7 self esteem, ambivalence, confusion, fear, and distrust. See The State Task Force on Sexual
8 Exploitation by Counselors and Therapists, It's Never OK (1985 Minnesota Legislative
9 Report); Luepker & Retsch-Bogart, Group Treatment for Clients who have been Sexually
10 Involved with their Psychotherapists, in Minn. Task Force, It's Never OK, supra note 1, at
11 35; Pope, 39, 40-45 (G. Gabbard ed. 1989); Jorgenson, Randles, Strasburger: The Furor Over
12 Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem, William and
13 Mary Law Review, Volume 32, Issue 3 (1991).³ The Code of Ethics adopted by the
14 American Psychiatric Association states emphatically that "sexual contact with the patient is
15 unethical." American Psychiatric Ass'n, The Principles of Medical Ethics with Annotations
16 Especially Applicable to Psychiatry § 2, at 4 (1985). In the psychological community, this is
17 considered one of the most egregious breaches of trust and professional ethics. Therapists
18 who engage in sexual activity with their patients breach established boundaries and cause
19 lasting damage to patients. Michael Mockovak reached out to this counselor for help
20 resolving long standing issues related to the years of abuse. The counselor responded by
21 sexually exploiting him. As a result of this violation, Michael Mockovak did not seek out
22 further counseling. This is a common reaction by survivors of childhood abuse who are
23 subsequently abused by their counselors. See A. Stone, Commentary, Sexual Misconduct by
24 Psychiatrists: The Ethical and Clinical Dilemma of Confidentiality, 140 Am. J. Psychiatry
25 195, 196 (1983).

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³ Where the source is not provided as an exhibit to this memorandum, a copy will be provided by
defense counsel upon request.

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be the cumulative effects of chronic betrayal, disempowerment, feelings of guilt and helplessness, and low self-esteem.

Lucy Berliner, Sexual Abuse of Children, in The APSAC Handbook on Child Maltreatment 55, 62 (John E. B. Myers et al. eds., 2d ed. 2002).

There is extensive literature on the harmful impact of childhood sexual abuse. As illustrated in the letter from Jon R. Conte, Ph.D., the ramifications of the abuse last well into adulthood. "Taken as a corpus of research and other evidence, there is simply no question that sexual assault can be a profoundly negative experience for the victim with significant immediate and long term impact on virtually every aspect of life." Disclosure of Dr. Conte, Exhibit D. Many of the characteristics described in Dr. Conte's disclosure are present in Dr. Mockovak. Fear, depression, anxiety, poor self esteem, and social adjustment, difficulties in inter-personal relationships and insomnia are just some of the symptoms associated with sexually abused persons.

At the March 9, 2011, Norm Maleng, Advocate for Youth, 4th Annual Award Breakfast, there was a recognition of the harmful and long-lasting impacts of early childhood sexual abuse. Each of the speakers spoke eloquently about the tremendous need for additional funding for programs and services for children who have been sexually, physically and psychologically abused. Comprehensive services such as: counseling for traumatic stress; trauma recovery support; youth support groups; mentoring programs; medical care; and life skills counseling for youth who have been abused. Michael Mockovak did not have that support and when he finally reached out for help, he was further abused and exploited.

Thankfully, since December 2009, Michael Mockovak has been under the care of a psychiatrist, Dr. Seth Cohen and perhaps for the first time, he is addressing many of the issues that have plagued him throughout his life. Dr. Mockovak has finally found a counselor he trusts and feels comfortable confiding in about his past. Many aspects of Dr. Mockovak's behavior-his anger, mood swings, paranoia, and willingness to believe that

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1 The Ninth Circuit has approved downward departures in cases where the defendant
2 was the victim of childhood sexual abuse. In *United States v. Walter*, 256 F.3d 891 (9th Cir.
3 2001) the defendant was convicted of threatening the president and a District Court
4 downward departure was approved where the departure was based on a combination of brutal
5 beatings by defendant's father, the introduction to drugs and alcohol by his mother, and, most
6 seriously, the sexual abuse defendant faced at the hands of his cousin, constituted the type of
7 extraordinary circumstances justifying consideration of the psychological effects of
8 childhood abuse. In *United States v. Roe*, 976 F.2d 1216 (9th Cir. 1992) the Ninth Circuit
9 held that the trial court clearly erred in holding it did not have discretion to depart downward
10 where defendant's suffered extraordinary sexual abuse as a child.

11 Michael Mockovak was sexually abused by his uncle. It happened numerous times
12 over many years. He was not able to protect himself from these assaults, and he was unable
13 to protect his brothers, who were abused in the same room during the same abusive
14 encounters. When he finally found the courage to ask for help he was again betrayed and
15 abused by his therapist. The results of the years of abuse had a major impact on Dr.
16 Mockovak's emotions and thoughts as he dealt with Daniel Kultin. How could it possibly
17 have been otherwise?

18 C. EDUCATION AND PROFESSIONAL CAREER

19 Despite his unstable and abusive childhood Dr. Mockovak always excelled in school.
20 He was an A student in high school and was accepted into Oberlin College in Ohio. After
21 graduating from college, Michael Mockovak spent a few years working as a waiter at various
22 restaurants and travelling while trying to figure out what career path to pursue. He took a job
23 as a nurse's aide in a detoxification center in Minnesota. It was during this job that Michael
24 Mockovak realized he wanted to be a doctor. He saved his money from waiting tables and
25 working odd jobs so that he could study fulltime for his medical entrance exams (MCAT's).
26 He did well on his exams and was accepted into Yale Medical School. After graduating from

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1 than three decades of adult life. While this view provides simplicity, it avoids the complex
2 reality that is the truth. When all of the facts of this case are taken into account, the standard
3 range sentence is excessive and significantly more than necessary to promote the legitimate
4 goals of sentencing. That sentence should be reduced in the following manner:

- 5 • Michael Mockovak suffered significant childhood sexual abuse and family
6 dysfunction based primarily on the impact of the sexual abuse on Michael, his three
7 brothers, and his entire family, in addition to his father's alcohol fueled verbal abuse.
8 The consequences of childhood sexual abuse and family dysfunction have been
9 clearly described by evidence presented in the defense sentencing memorandum.
10 These issues had a major impact on Michael Mockovak developing feelings of anger,
11 distrust, paranoia, and suspicion of others, and these feelings had a major impact on
12 Dr. Mockovak's dealings with Daniel Kultin. These factors justify a reduction of the
13 standard range sentence by a total of **3 years or 36 months**.
- 14 • Michael Mockovak's dealing with Daniel Kultin occurred during a time when he was
15 clinically depressed and taking antidepressant medication. The consequences and
16 symptoms of this depression and the medication taken to combat it have been clearly
17 described by evidence presented in the defense sentencing memorandum. These
18 circumstances had an impact on Dr. Mockovak's dealings with Daniel Kultin, and
19 they justify a reduction of the standard range sentence by a total of **2 years or 24**
20 **months**.
- 21 • Dr. Mockovak presented substantial evidence on the issue of entrapment. While the
22 jury convicted in spite of that defense, the evidence revealed that Daniel Kultin,
23 acting at the direction of FBI agents, used numerous methods to induce Dr.
24 Mockovak to become involved in criminal activity. Jurors have made it clear that
25 their votes for conviction included acknowledgment that the defense presented a
26 substantial amount of evidence supporting the entrapment defense and that at least
two of the governments witnesses, Daniel Kultin and Brad Klock, suffered from
serious credibility problems. The evidence in this regard justifies a departure from
the standard range by a total of **4 years or 48 months**.
- Dr. Mockovak proved the existence of other mitigating factors, including his
complete lack of any prior convictions, jail time or contacts with law enforcement;
the fact that he behaved perfectly while on pretrial release for 14 months; the fact that
he is an excellent parent; the fact that his first conviction occurred when he was 52
years old; and, the fact that state and federal authorities made strategic decisions
designed to advantage the prosecution and disadvantage the defense and significant
ways, including the allocation of the burden of proof on the issue of entrapment, the
attempt to use federal law to avoid or delay discovery in a state court proceeding, and
an explicitly stated desire to take advantage of sentencing differences in state and
federal court. The combination of all of these factors justifies an additional departure
from a guideline sentence range of **2.5 years or 30 months**.

APPENDIX D

**APPENDIX B TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)**

Defendant: **MICHAEL E MOCKOVAK** FBI No.: **322490FD0** State ID No.: **WA25402754**
DOC No.:

This criminal history compiled on: **November 17, 2009**

- | |
|---|
| <input type="checkbox"/> None known. Recommendations and standard range assumes no prior felony convictions. |
| <input type="checkbox"/> Criminal history not known and not received at this time. WASIS/NCIC last received on 11/17/2009 |

Adult Felonies - None Known

Adult Misdemeanors - None Known

Juvenile Felonies - None Known

Juvenile Misdemeanors - None Known

Comments

APPENDIX E

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Honorable Palmer Robinson

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

THE STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL MOCKOVAK,

Defendant.

No. 09-1-07237-6 SEA

DECLARATION OF
DAVID SNYDER

I, DAVID SNYDER, hereby declare and state as follows:

1. I am a Washington state private investigator, license number 2945.
2. I am CEO and Agency Principal at "David Snyder PI & Associates, Inc.", located at 601 Union Street, Suite 4200, Seattle, WA 98101.
3. I graduated *Magna Cum Laude* from the University of Washington with a B.A in social science. I completed a yearlong certificate program in forensics at the University of Washington. I am a graduate of the Reid School of Interview and Interrogation Techniques. I am a member of the Washington Association of Legal Investigators and the Washington Association of Criminal Defense Lawyers, and regularly attend continuing legal education seminars.
4. I was hired by Schroeter, Goldmark and Bender to do investigation for the defense in the above entitled cause. As part of that investigation I attempted to conduct interviews with all of the jurors after the verdict was returned. At present, I have

DECLARATION OF
DAVID SNYDER - 1

SCHROETER GOLDMARK & BENDER

500 Central Building • 810 Third Avenue • Seattle, WA 98104
Phone: 206-622-8000 • Fax: 206-682-2305

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1 completed interviews with nine out of fourteen jurors.¹ Based on these interviews, I
2 make the following representations based on the comments made to me by the jurors.

3 5. All of the jurors said they were confident that they returned the correct verdict based
4 on the evidence and the instructions they were given. All indicated that they obeyed
5 the court's instructions and did not consider any information that was not introduced
6 at trial and admitted by the court. They also indicated that there was no outside
7 influence on the jurors as they deliberated.

8 6. The jurors said that they had serious doubts about the credibility of Daniel Kultin.
9 Some of the comments included the following:

10 • "I thought I could probably trust him as far as I could throw him." "He was very
11 secretive." "There was a whole lot more going on than he was willing to share."
12 (Juror No. 10)

13 • "The informant was a rather shady character and that was uncomfortable no
14 matter how you slice it." "You listen to that Kultin guy and he sounds sleazy, and
15 he doesn't sound reliable."
16 (Juror No. 3)

17 • "Daniel Kultin seemed to have a lot of holes in his testimony."
18 (Juror No. 4)

19 • "Carr and Kultin, I wouldn't trust them any further than I could throw a piano."
20 (Juror No. 12)

21 • "I thought he was a bit questionable." "Kultin forgot a lot of things. No
22 explanation for why he had so many calls and text messages over the summer"
23 (Juror No. 1)

24 • "He did not seem very reliable. There were times he didn't seem very bright,
25 because we had just talked about one thing, and a half hour later he couldn't
26 remember it. So whether or not it was just nerve racking sitting up there, or he
27 was just being very evasive on purpose, I'm not sure.
28 (Juror No. 2)

29 • "I think Daniel Kultin is some of the lowest scum of the earth. And I think the
30 FBI made a terrible mistake believing that this person, Daniel Kultin, had
31 anything of value to add to their case."
32 (Juror No. 6)

¹ Juror No. 9 spoke to me in detail but after consideration asked that his comments not be included. I have not included them for that reason. The jurors are referenced by number. If the court requests their names, the defense will supply them.

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- [question] Did you trust Daniel Kultin? [reply] "No. He's certainly somebody I would not want to have as a friend."

(Juror No. 8)

7. The jurors also indicated that the defense presented significant evidence of entrapment, and came very close to proving that Dr. Mockovak had been entrapped. The comments included the following:

- "Kultin seemed to be encouraging Mockovak. With reaching out as a friend. And it did strike me as weird that all the meetings were...social meetings. They were at restaurants. It felt to me like Mockovak was in a delicate place. And was reaching out for friendship. And was vulnerable. And that Kultin really capitalized on that. And that was an uncomfortable fact."

(Juror No. 10)

- "I don't think that someone should be able to go as far as the informant in this case did."

(Juror No. 3)

- "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, were really like, 'Oh my God, are you serious, you can really do that?'...The kind of friendship building, and the camaraderie that went on in the process. We all have watched cop shows on TV and the movies, and what they can get away with, and what Jack Bower gets away with and what Daniel Kultin gets away with are entirely different. But it surprised us that he could have that much relationship building, and bonding activity, while wearing a wire. We were all, or many of us were quite amazed that he could say and do so many of the things that he did. It was really hard to determine, whether he was leading Dr. Mockovak, or whether he was just playing the role."

(Juror No. 4)

- "Daniel, he is the one that is doing the pushing, and the FBI instructed him to push. And FBI contradicted themselves. On one side, you have Carr testifying that he told Daniel not to push, but then we see that Carr was having Daniel open many doors, and push Dr. Mockovak closer and closer, and then through."

(Juror No. 12)

- "I think Mockovak did actually seem hesitant at times. And I felt that at those moments, Kultin was reeling." [question] Reeling Mockovak in? [reply] "Right."

(Juror No. 1)

- "Well, it was not clear cut at all. Very difficult. So for the last two, or for the luring and inducing, and for reasonable persuasion. That was not clear cut. And it

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came down to our judgment. If it had just been on those two things, it may have swung the other way.”

(Juror No. 2)

- “I was one of the hold-ups for getting a decision made sooner, because I strongly felt that Kultin played such a critical role in coercing Mockovak to do something that he wouldn’t have otherwise done. It was Kultin pushing him to do it.”

(Juror No. 6)

- “I had a feeling that if it weren’t for [Kultin], this whole deal would have just evaporated. While he may not have been bringing it up, he was enabling it.”

(Juror No. 8)

8. After speaking to jurors about the facts, I attempted to re-contact them to ask their opinion on sentencing. I was able to re-contact eight of the nine jurors I previously spoke to. I told them that Dr. Mockovak did not have a prior criminal record. I did not give them any additional information about Dr. Mockovak. All eight of these jurors expressed, in varying degrees, a belief that Dr. Mockovak deserves leniency at sentencing. Their comments included the following:

- “Well, I don’t see him as a threat to society. And I’m guessing that once he gets out, they’ll be some action on taking away his medical license. And he’ll be suffering for the rest of his days whether he’s in jail or not. So, I hate to take a father away from a child. But on the other hand, as a mother, this is sort of coming at me from the family point of view, I’d hate to see a child think that your dad can plot to kill somebody, and that is okay. But certainly, if he was remorseful, maybe five years and some community service, I could go for that. With his talents, and education, I mean there’s no doubt that he’s a gifted surgeon, and he probably still has something useful to give to society. And I don’t feel like he’s a threat to the average person. And putting him away in jail is probably not a good use of our tax payer dollars.”

(Juror No. 10)

- “I’m not taking sides with Dr. Mockovak.” “I have to look at Dr. King and his family, and consider what they’ve been through, and their anxiety.” “But I would certainly feel comfortable if Judge Robinson erred on the side of leniency. I don’t see Dr. Mockovak as being a vicious person that is a danger to society. I think Dr. Mockovak just got caught up in a world of personal hurt.”

(Juror No. 4)

- “I would be comfortable with house arrest, or probation. I hope Judge Robinson will take my views into consideration. I hope she will be lenient in handing out the sentence. Dr. Mockovak’s professional career and life is already ruined by this dumb mistake he made. And he should be given a second chance instead of a long jail sentence.”

(Juror No. 12)

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- Kind of what I expected, and I'm not a law professional, and I have no background, but in my head, I was thinking somewhere between seven and ten years." "As close as the defense came with the entrapment, to me, in my opinion, seven to ten just seems like a fair term." "With his talents and his education, it seems like he would be in a position to give back to the community in a way that perhaps the average person couldn't."

(Juror No. 1)

- "Well, my gut tells me that I don't feel he's a danger to society. So if he was my next door neighbor, I wouldn't be in any fear at all. His career is already ruined, so he can't practice medicine. And that was pretty much his life. So his life is completely ruined. And from a tax payer's perspective, if someone is not a danger to society, why would we want to pay to keep him locked up. So I would lean more towards the lighter side."

(Juror No. 2)

- "Mockovak seems fairly harmless, though rather childish. I don't think a long prison sentence is going to help anybody." "I don't think he is a threat to society at all. Even if he was let out tomorrow. I wish the state could, instead of sentencing him to jail time, I wish they could just sentence him to give back to the community that he has hurt. But I don't think that him doing ten or even five years of jail time is going to do anybody any good."

(Juror No. 6)

- "First, I did not get the feeling that Dr. Mockovak was an evil person in any way. More like he was caught up in events. Second, I am willing to defer to the judge on sentencing. On an aside though, I think everybody deserves a second chance. If Judge Robinson handed down a sentence on the lighter side, I would be comfortable with that. I certainly don't feel he poses any danger to society."

(Juror No. 8)

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

DECLARATION OF
DAVID SNYDER - 5

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David Snyder

3/14/11 - Seattle, WA

David Snyder

Date and Place Signed

Respectfully submitted this 14th day of March, 2011.

Presented by:

SCHROETER, GOLDMARK & BENDER

Colette Tvedt

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Counsel for Defendant Mockovak

DECLARATION OF
DAVID SNYDER - 6

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Attorneys for Respondent

James M. Whisman
King County Prosecutor's Office
516 Third Avenue Room W554
Seattle WA 98104
Jim.whisman@kingcounty.gov

- Legal messenger service, for delivery on _____, to the following:
- Overnight mail service, for delivery on _____, to the following:
- Other _____.

DATED this _____ day of February, 2015.

, Legal Assistant