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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Personal Restraint of MICHAEL E. MOCKOVAK

Petitioner.

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Division I
State of Washington

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

BRIEF OF PETITIONER

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I. INTRODUCTION

After six months of trying to persuade Mockovak to hire "Russian Mafia" hitmen to kill Bradley Klock and Joseph King, the State's informant, Daniel Kultin, finally induced Mockovak to approve the plan to kill King. Mockovak was then charged with soliciting the murder of Klock and the attempted murder of King. Mockovak's trial attorneys, Jeffrey Robinson and Colette Tvedt, presented a defense of entrapment.

The Washington Supreme Court has long recognized that the statute which defines this defense "constitutes a restatement of the subjective test of entrapment" that state and federal courts have used for years.[1] Nevertheless, Mockovak's lead counsel mistakenly believed that entrapment was governed by an objective standard – a standard that turns on the thought processes of a hypothetical reasonable person. Because he did not understand that entrapment focuses on the defendant's subjective state of mind, he failed to appreciate the importance of evidence that Mockovak's mind had been damaged by years of childhood sexual abuse.

Similarly, Mockovak's other attorney ignored the advice of Dr. John Gonsiorek, a clinical psychologist and a longtime friend of Mockovak. Gonsiorek told her that Mockovak's childhood sexual abuse was directly relevant to the crimes that he was charged with, and recommended that

[1] *State v. Lively*, 130 Wn.2d 1, 10, 921 P.2d 1035 (1996).

she find an expert witness who could explain the relationship among childhood sexual abuse, learned helplessness, and entrapment.

At trial, Mockovak's attorneys 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 has attempted to explain counsel's failure by advancing 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 the State offers no evidence to support these speculations. The failure of Mockovak's attorneys to present the available diminished capacity evidence was based on their mistaken understanding of the law, a misunderstanding that "basic legal research" would have revealed.

In support of his PRP, 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. Under the Rules of Appellate Procedure, in order to contest Mockovak's factual assertions the State was obligated to identify all factual disputes and to offer admissible evidence to counter Mockovak's evidence.

> ***The State's response must*** answer the allegations of the petition 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***.

In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992) (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 factual disputes. *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 the present case the State did not file any declarations, offered no evidence whatsoever, and ignored its obligation under RAP 16.9 to "identify in the response all material disputed issues of fact." Thus the State has conceded every fact Mockovak alleged.

In an effort to dispel the obvious conclusion that defense counsel's conduct was deficient, the State offers only legal theories which conflict with established case law. In fact, Mockovak's unrebutted evidence shows that his attorneys' failure is attributable to the simple fact that they did not know the law.

First, attorney Robinson did not understand that entrapment involves a *subjective* inquiry into the mind of the defendant. Because he did not understand this, he failed to understand the critical significance of evidence that Mockovak was profoundly damaged in a way that affects the way his brain processes information, the way he responds to fear, and the

way he responds to pressure – all in ways that made him exceptionally vulnerable to entrapment. 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 the defendant was very susceptible to the inducements of others.

Second, Tvedt and Robinson both mistakenly believed that they had to choose between presenting an entrapment defense or a diminished capacity defense. They thought that if Mockovak presented an entrapment defense he would then be precluded from presenting a diminished capacity defense. They both believed (and Robinson even stated his erroneous belief on the record) that in order to assert the defense of entrapment, a defendant had to admit commission of the crime charged.

But they were doubly wrong. First, one is allowed to assert "inconsistent" defenses at the same time. *See Mathews v. United States,* 485 U.S. 58, 62 (1988); *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007). And second, the defenses of entrapment and diminished capacity are not inconsistent. Neither attorney understood that evidence of a severe psychological impairment caused by childhood sexual abuse was completely harmonious with an entrapment defense. Although Washington courts have recognized the admissibility of evidence of learned helplessness for decades, trial counsel failed to present this

evidence. Because their failure to present the evidence of psychological and neurological impairment was based upon ignorance of the established law of the State, their conduct was both deficient and prejudicial, and Mockovak was denied his right to effective assistance of counsel.

II. STATEMENT OF FACTS

A. Although Mockovak's Counsel Presented Evidence Regarding Mockovak's Childhood Sexual Abuse To the Sentencing Judge, They Failed to Present Any Evidence of This Abuse to the Jury.

Mockovak's trial counsel were aware of the fact that Mockovak was the victim of many years of ongoing childhood sexual abuse; they specifically argued that this fact should be taken into account at sentencing. Their sentencing memorandum contained a detailed discussion of the abuse perpetrated against Michael Mockovak and against his brothers, Paul, Eric and Neil, by their maternal uncle Bruce Vikre:

> Unbeknownst to [Mockovak's mother and father], when Bruce Vikre visited the family, he would sneak into the boys['] bedroom at night and sexually assault all four brothers who shared a room. The abuse started when Michael was no older than eight and in the third grade, and it may have started before that. Michael's memory of the beginning of the abuse is not clear.
>
> The sexual abuse continued for at least ten years until he graduated from high school, and only stopped when Michael moved away to attend college. Michael remembers periods where he unsuccessfully tried physical resistance. Although the four brothers all knew the abuse was occurring, they never spoke of it, in fear of retaliation by their uncle. . . . As Paul [Mockovak] states in his letter to the court:
>
> . . . As the oldest sibling, Michael Mockovak has long felt shame and guilt for failing to stop or disclose the abuse that was occurring to him and his siblings. Michael's friend of three decades, John Gonsiorek, wrote, "Michael has never told me the full story of the abuse. I believe this is because it 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.

CP 676.[2]

By the time the uncle's abuse came to light, Michael Mockovak had already left the family home and he was attending college. Thus, he was not contacted by police to give a statement regarding the abuse perpetrated against him. CP 677. Law enforcement chose to simply charge the uncle with two counts of Criminal Sexual Conduct, one for Eric Mockovak and one for Neil Mockovak. *Second Decl. Lobsenz*, Appendices A & B.[3] Although police chose not to seek to interview Michael Mockovak, they did interview the uncle, and although the uncle minimized the extent of his sexual abuse of Michael, he did admit to it. The follow-up report of Detective Thomas Grega, dated May 10, 1977, states in part that when the uncle was interviewed at his place of employment, "Bruce [Vikre] also stated he had sexual activity with Michael Mockovak. This started when Michael was approximately 13 years old and continued until Michael was approximately 16 years old." *Second Decl. Lobsenz,* Appendix C.

While away at college, Michael Mockovak attempted to get treatment

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[2] This clerk's papers citation, and the others in this section of the brief, refer to the clerk's papers which were designated in Mockovak's direct appeal, COA No. 66924-9-I.

[3] The uncle plead guilty in 1977. CP 677 (See Appendix A, attached).

from a therapist there, but that therapist exploited his vulnerability and also sexually assaulted him. CP 677-78. Due to that additional assault, Mockovak never again sought any professional help for the effects of the years of childhood sexual abuse he had experienced.

Realizing that Mockovak's childhood sexual abuse was relevant to his culpability, Attorney Robinson did seek out and obtain the expert opinion of Jon R. Conte, Ph.D., regarding the long-term adverse effects of being a victim of childhood sexual abuse. In his sentencing memo, Robinson pointed to Conte's statement that the adverse psychological effects of childhood sexual abuse continue 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."

CP 681 (quoting "Disclosure of Dr. Conte").

In his sentencing memo, Robinson noted that "there is extensive literature on the harmful impact of childhood sexual abuse" and that "the ramifications of the abuse last well into adulthood." CP 681. He also drew the judge's attention to Dr. Gonsiorek's observation that "throughout his adult life" Mockovak "has remained gullible and susceptible to influence, especially when he is depressed, lonely, isolated or stressed." CP 680. But despite the fact that Robinson knew about Mockovak's childhood sexual abuse, and knew that such abuse has devastating long

term adverse effects which extend into adulthood, Robinson never presented any evidence of the childhood sexual abuse to Mockovak's jury.

B. Mockovak's Counsel Knew About The Childhood Sexual Abuse Right from the Start of the Case.

The State speculates that perhaps the reason trial counsel did not present evidence about the psychological impact of childhood sexual abuse 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 Dr. Gonsiorek shortly after Mockovak's arrest in November of 2009. *Decl. Gonsiorek*, ¶ 5. Gonsiorek told attorney Tvedt about Mockovak's childhood sexual abuse:

> In November and/or December of 2009, I contacted by phone Colette Tvedt, one of Michael's attorneys on at least one occasion, but more likely on two occasions.
>
> During that phone conversation ***I gave Tvedt a detailed history of Mike, including the fact that during his childhood he was sexual [sic] abused for years by an uncle, and the fact that he was later abused by the therapist from whom he sought help regarding that childhood sexual abuse.*** I also told Tvedt about Mike's recurring mood disorder, and ***his history of being easily manipulated and exploited.***

Id. at ¶¶ 4-5 (emphasis added). 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.*[4]

In addition to being a close friend of Mockovak's, Dr. Gonsiorek is a retired clinical and forensic psychologist who practiced for over thirty years and has many 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 her

> 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.

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.

C. Gonsiorek Told Mockovak's Trial Counsel That It Would Be a Good Idea to Get an Expert Witness Psychologist To Support the Entrapment Defense By Explaining That Childhood Sexual Abuse Made Mockovak More Vulnerable to Entrapment.

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

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[4] 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.

> 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 him as a fact witness, but ultimately he was never called. *Id.,* ¶¶ 10-11.

After the trial ended, Gonsiorek "met with Tvedt again to help her prepare for sentencing." He "again 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. In the defense sentencing memo, Mockovak's counsel finally informed the sentencing judge that Mockovak was a victim of long-term childhood sexual abuse, and attached a letter from Gonsiorek setting forth his view that the abuse left Mockovak "susceptible to influence" by others. CP 680.

D. <u>The Long Lasting Adverse Psychological Effects Of Childhood Sexual Abuse Include "Learned Helplessness" And Suggestibility</u>.

"In almost every case of child sexual abuse, the abuser is older, more powerful, and uses either seductive or coercive techniques to assure the

child acquiesces to the abuse and refrains from reporting the assaults." *Decl. William Foote, Ph.D.*, ¶ 4.[5] "These techniques effectively make the child helpless to avoid the abusive situation, and helpless to escape it once it starts. When this happens over and over again, the child learns to be helpless . . . ." *Id.* "This phenomenon has been termed 'learned helplessness' (Peterson & Seligman, 1983)." *Id.* [6]

"Learned helplessness" becomes part of the child's personality. *Id.*, ¶ 5. Research shows that it makes the victim significantly more prone to subsequent victimization. *Id.*, ¶ ¶ 5, 6.

> Recent research has directly measured learned helplessness in a sample of men sexually abused by clergy and men sexually abused by others [Citation]. This study used a scale designed to assess the degree of learned helplessness in adults. ***In this study, abuse survivors showed higher levels of learned helplessness than would be expected in a normal population***. This study illustrated, as has other research, that having "learned" as a child that there is no escape from sexual abuse, adult victims, who may actually have the wherewithal to escape the situation, continue to apply the lesson to other types of victimization. As one researcher stated, ***adult victims of childhood sexual abuse find it much harder to be***

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[5] Dr. Foote is an adjunct professor of psychology and an adjunct professor of law at the University of New Mexico. *Id.*, ¶1. He is board certified in forensic psychology, and is a consultant to the Albuquerque Police Department and the New Mexico Police Academy. *Id.*, ¶2. He served as the Clinical Director of a nonprofit organization dedicated to the treatment of sexually abused Inuit men in Canada, and is widely published in the field of forensic psychology. *Id.*, ¶1.

[6] That term was coined by the American psychologist Martin Seligman and grew out of his research conducted at the University of Pennsylvania in 1967. Seligman discovered that the conditioning of an animal repeatedly exposed to a painful stimulus that it cannot escape leads to the development of learned passive behavior. Eventually the animal will stop trying to avoid the painful behavior and will act as if it is utterly helpless to change the situation. When opportunities are then presented to escape the painful stimulus, this learned helplessness prevents the animal from taking any action to escape. http://en.wikipedia.org/wiki/Learned_helplessness.

> ***assertive in their relationships with other adults*** [Citation].
>
> Given this data, it is not surprising that ***the experience of trauma in childhood has been shown to make adults more susceptible to suggestion and influence by others*** . . . .

Id., ¶¶ 7-8 (emphasis added).

E. <u>An Adult Who Was Sexually Abused As A Child Is More Vulnerable To Entrapment.</u>

Under Washington law, by statute the defense of entrapment has two components: "The criminal design originated in the mind of law enforcement officials, or any person acting at their direction *and* the actor was induced to commit a crime which the actor had not otherwise intended to commit." *Decl. Foote*, ¶9, quoting RCW 9A.16.070(1). As Dr. Foote has stated, "A history of being a victim of child sexual abuse would apply to both of these elements." *Id.*

> For the first leg of the test, ***a history of child sexual abuse resulting in a pattern of learned helplessness would especially predispose a man to respond passively to someone else originating the idea of a crime***. Learned helplessness essentially produces passivity. The research done with victims of domestic violence [citations] indicates that the impact of learned helplessness is to keep a person who is being victimized in that situation, even when the situation becomes life-threatening. ***It is this very passivity that would cause a man to stay in a situation in which he is being importuned to commit a crime he might not otherwise commit.*** It is the learned helplessness which would prevent a man from leaving a situation which he found counter to his own values and desires.
>
> ***The second leg of the test, which focuses on the inducement of defendants to commit crimes they might not otherwise commit relates to the psychological process of suggestibility*** [citations]. Suspects' suggestibility has been implicated as a factor in false confessions [citation]. In the context of custodial interrogations, suspects who falsely confess not only agree to facts which they

> know[] are untrue, but may even actively enter into the process of writing falsely inculpatory statements. In the same way, ***the heightened suggestibility of child sexual abuse survivors would cause them to actively engage in criminal activity that they might not otherwise do.***

Decl. Foote, ¶ ¶ 10-11 (emphasis added).[7]

F. <u>Psychological Testing Shows That Mockovak Does Suffer from Learned Helplessness and Suggestibility</u>.

In its response to Mockovak's PRP, the State speculated 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. But the State offered no support for its speculation and again its speculation proved to be completely unfounded.

Forensic psychologist Dr. Natalie Novick-Brown examined Mockovak and found that he *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

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[7] Retired FBI Special Agent Dan Vogel has worked as an advocate for abused children for 14 years, and he confirms what Dr. Foote has stated: "***Sexually abused children do develop learned helplessness and as adults*** it is harder for them to be assertive in their relationships with other adults. ***They are*** more susceptible to the suggestions of others and their increased suggestibility does make them ***more vulnerable to entrapment by making them more likely to commit criminal acts that they were not predisposed to commit***." *Decl. Vogel*, ¶27 (emphasis added).

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).[8] On the suggestibility test that she administered, Mockovak's score was 1.5 standard deviations above the mean, showing that he is much more suggestible than the average person. *Id.,* ¶7.

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 also 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 were consistent with the types of adverse brain development that are associated with childhood abuse:

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[8] *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."

> 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 neocortex during childhood, including the anterior cingulate, the orbitofrontal and dorsolateral prefrontal cortex.

Id., ¶15 (footnotes omitted); *accord id.*, ¶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."). *See* Cohen, Early Life Stress and Morphometry of the Adult Anterior Cingulate Cortex and Caudate Nuclei, *Biology and Psychiatry*, Vol. 59, 975- 978 (2006) (studies of women who suffered childhood sexual abuse suggested that such abuse caused them to suffer long term brain alterations) (copy attached as Appendix B).

G. Dr. Novick-Brown Confirms That Mockovak's Childhood Abuse Is "Directly Relevant" to His Vulnerability to Entrapment.

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

H. Mockovak's Counsel Made No Attempt To Present Evidence of His Childhood Sexual Abuse To The Jury, Nor To Explain Why The Abuse Made Him Exceptionally Vulnerable To Entrapment.

Mockovak's attorneys were aware of the fact that Kultin pressured Mockovak to authorize Kultin to hire Russian hitmen to kill Klock and/or King. They knew about Kultin's statements to Mockovak that the Russian Mafia would "come after your family," and although they "probably won't kill us, they'll fucking, you know . . ." if he didn't go through with the plan to hire them. *Tr.* 8/11/09 at 61; *Tr.* 11/6/09 at 86. Indeed, Robinson specifically argued to the trial judge that the conduct of informant Kultin was outrageous, precisely because Kultin threatened that harm would come to Mockovak or his family if he didn't go ahead with the plan.

Mockovak's attorneys also knew that he was a victim of long-term childhood sexual abuse because Dr. Gonsiorek told them this in late 2009.

They knew that the childhood sexual abuse was relevant to entrapment

because Dr. Gonsiorek explicitly told them that "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." *Decl. Gonsiorek*, ¶9.

And finally, they also knew that a forensic psychologist could testify in support of the entrapment defense by explaining the relationship between childhood sexual abuse and learned helplessness, because Dr. Gonsiorek told Tvedt that it would be a good idea to get such a witness.

Despite the fact that defense counsel knew all of these things, they never attempted to present any of this evidence to the jury. Thus, the jurors – the people who were deciding the merits of the entrapment defense – never heard anything at all about Mockovak's childhood sexual abuse, learned helplessness, increased suggestibility, or the long-term effects of such abuse including permanent alterations of the brain.

The inevitable question thus arises: Why didn't trial counsel present such evidence to the jury?

I. Defense Counsel Mistakenly Believed That In Order To Plead Entrapment a Defendant Must Admit That He Committed The Offense, And Thus Mockovak Could Not Simultaneously Present Both A Diminished Capacity And An Entrapment Defense.

The unrebutted evidence shows that the answer to this question is twofold. First, Mockovak's attorneys mistakenly believed that it was not legally permissible to present an entrapment defense and a diminished

capacity defense at the same time. Attorney Robinson thought that in order to present an entrapment defense, the defendant must *admit* that he committed the offense. We know this because Robinson *said* this to the trial judge in the course of his argument in support of a pretrial motion:

> In the state of Washington, Dr. Mockovak has to admit to the offense before he can even plead the defense of entrapment.

RP 12/6/10, at 15, *ll.* 10-12. Similarly, Attorney Tvedt also mistakenly believed that Mockovak could not present two defenses at the same time; she explicitly told attorney Ronald Marmer that Mockovak had to choose *between* the defenses of diminished capacity and entrapment.

> [S]he told me that we had to pick between the defenses of entrapment and diminished capacity. ***She said it was an "either/or" proposition and that we could not do both***. She said that if we presented an entrapment defense, we would have to be very careful not to do anything that would make it appear that we were also making a diminished capacity argument, because under Washington law (she said) one cannot simultaneously claim that the crime did not occur and also present a defense of entrapment. ***She said if we presented a diminished capacity defense and argued that Dr. Mockovak did not have the ability to form the intent necessary to commit the charged crimes, then we would be prevented from arguing entrapment as a defense.*** She said that to assert entrapment one must admit that the crime was committed . . . .

Decl. Marmer, ¶ 14 (emphasis added).

Neither Tvedt nor Robinson said where they got the idea that Mockovak could not simultaneously present both entrapment and diminished capacity defenses. But there was a period of time when

Washington case law did appear to prohibit the assertion of an entrapment defense if the defendant was denying that he committed the crime. *See State v. Matson,* 22 Wn. App. 114, 121, 587 P.2d 540 (1978) (stating that "an instruction on entrapment is proper only where the defendant has admitted that the crime took place."). Later cases, however, such as *State v. Galisia*, 63 Wn. App. 833, 822 P.2d 303 (1992), disapproved of the sweeping language of *Matson*, and held that in order to assert the entrapment defense the defendant need only admit that he committed the *acts* which formed the basis for the criminal charge; but he need not admit that he acted with the mental state necessary to commit the crime.

> *Matson* failed to distinguish circumstances where a defendant admits that the *activity* on which a charge is based took place, from circumstances where a defendant actually admits to committing the crime as charged. In fact, earlier cases refer not to the "crime" charged but to the "act" charged. The distinction between denying that an event occurred and denying that the event resulted in criminal liability is critical . . . . *Matson* and *Draper*[[9]] thus do not require a defendant to admit either the crime itself or all the elements of the crime before being entitled to an entrapment instruction.

Galisia, at 836-37. *Accord Mathews v. United States*, 485 U.S. 58, 62 (1988) ("We hold that even if the defendant denies one or more of the elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find

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[9] *State v. Draper*, 10 Wn. App. 802, 521 P.2d 53, *rev. denied*, 84 Wn.2d 1002 (1974).

entrapment."); *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007).

Thus, under Washington law (and under federal law) it is permissible to assert the entrapment defense *without* admitting that the defendant committed the crime charged. A defendant *may* simultaneously assert *both* that he had a mental illness or defect which affected his ability to form the mental state necessary to commit the offense, and the defense of entrapment. Trial counsel's belief that they were not allowed to argue both entrapment and diminished capacity is clearly wrong, and thus any so-called strategic decision predicated upon such a belief is objectively unreasonable and constitutes deficient conduct.

J. Attorney Robinson Did Not Understand That Entrapment Was A Subjective Inquiry.

In addition, Robinson was also operating under a second erroneous belief. Robinson believed that the entrapment defense was governed by an objective standard; Attorney Tvedt knew better and she correctly understood that entrapment was a subjective inquiry.

These two conflicting beliefs were manifested in two conversations with Attorney Ronald Marmer. In the first conversation, held prior to trial, Attorney Marmer spoke with Attorney Tvedt:

> During one of our face to face meetings when Ms. Tvedt was discussing the entrapment defense with me, I asked her if entrapment was a subjective or an objective inquiry. ***She told me that it was a subjective inquiry.*** She said that while some states used an objective test, Washington State used a subjective test.

Decl. Marmer, ¶ 15 (emphasis added).

After the trial ended, Marmer had a conversation with both attorneys:

> Much later, after the jury had returned its verdicts, I had a meeting with Mr. Robinson and Ms. Tvedt to discuss sentencing issues. I believe this meeting was in February of 2011. During this meeting I referred to the "subjective test" for entrapment. ***Mr. Robinson interjected that he did not know where I got the idea that the test was subjective, and that use of the word "reasonable" in the standard jury instruction on entrapment plainly reflected an objective standard.*** There was a brief pause and I waited to see whether Ms. Tvedt would either disagree with Mr. Robinson or else acknowledge that she had previously advised me that the test was a subjective test. However, she did not say anything at all . . . .

Decl. Marmer, ¶ 16.

Ms. Tvedt was correct. In Washington the test for entrapment is a subjective test. "The statute [RCW 9A.16.070] thus constitutes a restatement of the subjective test of entrapment as applied by both the federal and Washington state courts." *Lively*, 130 Wn.2d at 10. "The subjective test focuses on the issue of whether *the defendant* was predisposed to commit the crime." *Id.*, at 10 n.2 (emphasis added). It is *not* a test of whether a reasonable person would have been entrapped, as Attorney Robinson mistakenly believed.

III. ARGUMENT

A. Deficient Conduct.

1. Ignorance of a Point of Law Fundamental to the Defense Case is a Quintessential Example of Deficient Performance.

A defendant making a claim of ineffective assistance of counsel must

establish two things. "First, the defendant must show that his counsel's performance was deficient." *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *State v. Thomas,* 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Second, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694; *Thomas,* at 226.

An attorney's conduct is deficient when it is shown "that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, at 226; *Strickland*, at 688. Deficient conduct is established when it is shown that the attorney's failure to do basic legal research caused him to remain ignorant of the legal principles that governed the defense that he was presenting at trial. Both the Washington Supreme Court and the U.S. Supreme Court have recently reaffirmed this point that failure to know the applicable law constitutes deficient conduct:

> Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*"

In re Tsai, ___ P.3d ___ (May 7, 2015) at ¶19, quoting *Hinton v.*

Alabama, 571 U.S. __, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014).[10]

2. 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 has argued 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 simply not true.

The State ignores the unrebutted 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 Robinson stated that one "has to admit to the offense before he can

[10] There are many other examples of this type of deficient conduct. For example, in *State v. Kyllo*, 166 Wn.2d 856, 868-69, 215 P.3d 177 (2009) trial counsel failed to understand the legal principles governing the voluntary intoxication defense that he was presenting. "[W]ith proper research [trial] counsel should have discovered" that the WPIC jury instruction was flawed and misstated the law. *Id.* "Failing to research or apply relevant law was deficient performance" in *Kyllo* "because familiarity with the case law would have revealed that the trial court's jury instruction on self-defense misstated the law. *Id.* Similarly, in *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999), the Court found "deficient performance where reasonably adequate research would have prevented the possibility of conviction based on acts predating the relevant statute's effective date." *In re Tsai*, at ¶19. *Accord State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) ("Mr. Adamy's counsel was deficient for failing to recognize and cite the appropriate case law").

even plead the defense of entrapment." RP VIII-A at 15, *ll.* 10-12.[11] Robinson's statement is fully consistent with what Tvedt told Marmer about Washington law.

But both defense attorneys were wrong. As noted in the cases cited above,[12] 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. *See, e.g.,*

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[11] See Appendix C for an index to the many volumes of the report of proceedings.

[12] *State v. Galisia*, 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).

State v. Shuck, 953 S.W.2d 662 (Tenn. 1997), discussed *infra* at pp. 35-40.

3. Even Though Washington Courts Had Been Using A Subjective Test for Entrapment for Over Forty Years, Attorney Robinson Did Not Know This When He Tried the Case.

The State also ignores the fact that Robinson did not understand that the test for entrapment under Washington law is subjective. In his initial PRP 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.*

The State attempts to argue that Mockovak is engaging in "pure speculation" as to what Robinson thought. But there is no speculation about this point: Marmer attests to the fact that Robinson *explicitly told him* that entrapment is governed by an objective test. *Decl. Marmer*, ¶16. This is actual evidence of what Robinson thought.[13]

Again, basic legal research would have alerted Robinson to the fact that in Washington entrapment is governed by a subjective test. This point was well established long before Mockovak's trial was held. In 1996 the

[13] 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).

Supreme Court acknowledged that Washington courts, like the federal courts, used a subjective test for entrapment: "The statute [RCW 9A.16.070] thus constitutes a restatement of the subjective test of entrapment as applied by both the federal and Washington State courts." *State v. Lively*, 130 Wn.2d 1, 10, 921 P.2d 1035 (1996). Two decades before that, in *State v. Anderson*, 16 Wn. App. 553, 558 P.2d 307 (1976), the appeals court noted that "the trial court did give an instruction which stated *the subjective test* of entrapment. This approach to entrapment, which focuses upon the intent of the defendant to commit the crime, . . . has been approved by the United States Supreme Court, [citation], and followed in Washington," citing to *State v. Swain*, 10 Wn. App. 885, 520 P.2d 950 (1974).[14] Indeed, if Robinson had read any case on entrapment he would have known that Washington uses a subjective test. But clearly he did not do any research and did not know this, because when Marmer, at a post-trial meeting, "referred to the subjective test of entrapment, Mr. Robinson interjected that he did not know where [Marmer] got the idea that the test was subjective . . . ." *Decl. Marmer*, ¶ 16.

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[14] The *Swain* Court pointed out that Washington had been employing a subjective test for entrapment for years before that: "In *State v. Emerson*, 10 Wn. App. 235, 517 P.2d 245 (1973), we discussed the subjective and objective tests. We pointed out that ***the subjective test was recently reaffirmed*** in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), ***and that test is followed in Washington. The Washington cases have applied this test.*** *State v. Waggoner*, 80 Wash.2d 7, 10, 490 P.2d 1308 (1971); *Seattle v. Evans,* 75 Wash.2d 225, 229, 450 P.2d 176 (1969); *State v. Gray*, 69 Wash.2d 432, 434, 418 P.2d 725 (1966)." *Swain*, 10 Wn. App. at 888 (emphasis added).

4. 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 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" decision 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.*[15]

In this case trial counsel's so-called "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

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[15] *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 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.").

elements of the entrapment defense. Because Mockovak had been sexually abused for years as a child, he 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.

The State simply fails to acknowledge and respond to the unrebutted evidence that Mockovak's counsel did not know the law of entrapment. Here, as in *Thomas*, *Tsai*, *Kyllo,* and *Aho*, trial counsel did not know the law. In fact, their understanding of the law of entrapment was the exact opposite of what it really was. Contrary to their belief, they *could* present diminished capacity and entrapment defenses at the same time. And contrary to Attorney Robinson's belief, the test for entrapment was subjective. If Robinson had known (1) that RCW 9A.16.070 "constitutes a restatement of the subjective test of entrapment,"[16] and that "the predisposition of the defendant is the focal element of the defense";[17] and (2) that he could present psychological evidence of the defendant's learned helplessness stemming from childhood sexual abuse to show Mockovak's exceptional vulnerability to entrapment; then Robinson would have

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[16] *Lively*, 130 Wn.2d at 10.

[17] *Id.* at 13.

realized that there was no conceivable tactical reason not to present such evidence. But he did not know these basic legal principles. This failure to know the law, and to present such evidence, was deficient conduct.

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

In its PRP Response the State suggested that perhaps Mockovak's attorneys could not present such psychological evidence because no expert witness would testify that Mockovak's childhood sexual abuse caused him to suffer from learned helplessness. But we know this to be untrue, because Dr. Novick-Brown has confirmed, through her objective testing, that Mockovak does suffer from learned helplessness. Mokovak's test scores indicate that his brain was permanently altered by the childhood sexual abuse, and that there is a neurological reason why he is more vulnerable to manipulation and entrapment than the average person.

As Drs. Foote and Novick-Brown have both explained, the childhood experience of being unable to prevent the perpetration of sexual abuse teaches the child that it is futile to resist the demands of an adult who is pressuring the child to comply with his demands. *Decl. Foote*, ¶¶4-8. The parts of the brain that normally regulate the ability to figure out strategies for resisting such manipulation do not develop normally and the pattern of learned helplessness endures in adulthood. *Decl. Novick-Brown*, ¶15.

Entrapment occurs when the idea for a crime originates with a law

enforcement agent who induces 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 adult who then persuades, pressures, or intimidates the child into engaging in sexual conduct that the child was not predisposed to engage in. When abuse is repeatedly perpetrated, the child "learns" that resistance is futile and it becomes 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. *Decl. Foote,* ¶¶ 5-8. Indeed, the physiology of the brain itself is altered. *Decl. Novick-Brown,* ¶¶9, 15. Thus, there is a clear relationship between childhood sexual abuse and vulnerability to entrapment later in life, and several witnesses could have testified to this relationship. *Foote,* ¶¶9-11; *Novick-Brown*, ¶17; *Gonsiorek*, ¶¶6-9; *Vogel*, ¶27.[18]

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

The State also speculated that perhaps trial counsel did not present

[18] Similarly, 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.

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 offered no support for that speculation and it is also incorrect. *See Second Decl. Michael Mockovak*, ¶¶4-6.

In sum, there is overwhelming evidence of deficient conduct.

B. <u>Prejudice</u>

As noted in both *Strickland* and *Thomas*, in order to establish prejudice the defendant "need *not* show that counsel's deficient conduct more likely than not altered the outcome of the case." 466 U.S. at 693; 109 Wn.2d at 226.[19] Mockovak need only show that the probability of a different result is sufficient to undermine confidence in the outcome of the case. *Strickland,* 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

1. In a recorded conversation Kultin, the government's informant, admitted that the idea to hire Russian hit men originated with him, not with the defendant.

"The defense of entrapment requires proof of two elements." *State v. Smith*, 101 Wn.2d 36, 46, 677 P.2d 100 (1984). The first element requires proof that "(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction." *Smith*, at 46, quoting RCW 9A.16.070(1)(a). In this case, Kultin admitted on

[19] *Accord Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) ("[*Strickland*] specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered").

tape that the idea to hire hit men to kill people originated with him. The tape of the conversation of August 11, 2009 shows that when Mockovak asked Kultin why Kultin felt comfortable coming to Mockovak with a proposal that Mockovak should hire some hit men to kill Bradley Klock, Kultin did not deny that he was the one who first came up with that idea:

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."[20] *Id.* at 62-63 (emphasis added).

After suggesting that Mockovak hire someone to kill Klock, Kultin suggested that after Klock was killed, Mockovak should then hire the Russians to kill Dr. King. He told Mockovak that after Klock was murdered, "then, once the practice is free, we can talk about Joe." *Id.* at

[20] Kultin acknowledged that "let's make him go away meant let's kill him. RP X, 34.

69-70. So far as the transcripts disclose, this was the first time that anyone mentioned the possibility of murdering Dr. King.

Since the origination element of entrapment was admitted, only the second element of entrapment – the predisposition element – was at issue in the trial. That element requires proof that "The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit." RCW 9A.16.070(1)(b). When analyzing whether Mockovak has satisfied the prejudice prong of *Strickland*, the question is simply this:

> If Mockovak's trial counsel had offered expert psychological testimony about childhood sexual abuse, learned helplessness, and a diminished capacity to resist entrapment, is there a reasonable probability that the jury would have found that Kultin induced Mockovak to commit a crime that he had not otherwise intended to commit?

Because the record contains strong proof of the inducement element, the only possible answer to this question is yes.

2. The State's speculation that the trial judge would not have allowed the defense to present such evidence flies in the face of decades of Washington case law that expressly recognizes the admissibility of expert testimony regarding learned helplessness.

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").[21]

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."

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

[21] *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 433 (2010) (expert testified defendant "developed 'learned helplessness'"). *See also State v. Dejarlais,* 88 Wn. App. 297, 303, 944 P.2d 1110 (1997) (recognizing that battered women "are vulnerable and in a condition of 'learned helplessness'").

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.[22]

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*.

3. In a remarkably similar case, the Tennessee Supreme Court reversed a conviction for solicitation of murder because the trial court abused its discretion when it excluded diminished capacity evidence in support of the defendant's entrapment defense.

In *State v. Shuck*, 953 S.W.2d 662 (Tenn. 1997) – a remarkably similar case involving a conviction for solicitation of first degree murder, a phony hitman, and an undercover FBI informant wearing a wire and recording conversations with the defendant – the Tennessee Supreme Court held that it was reversible error to exclude the testimony of a

[22] As Dr. Novick-Brown notes, the relationship between learned helplessness and abuse has been well accepted for decades: "Learned helplessness has been the subject of multidisciplinary study since the mid-1960s. . . . [T]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.

defense expert about the defendant's susceptibility to entrapment due to cognitive deficits. The *Shuck* case vividly demonstrates what Mockovak's trial attorneys should have done.

Shuck was a practicing veterinarian who employed a woman named Waters. When Shuck made statements which could be construed as threats against Waters, another employee named McDaniel agreed to cooperate with the FBI and to wear a wire when she went to work so that the FBI could monitor Shuck's conversations with McDaniel. *Id.* at 664. Over a period of five weeks McDaniel had several conversations with Shuck, many of which were recorded and some of which were not.

Just like informant Kultin, informant McDaniel claimed that in an unrecorded conversation Shuck asked her to help him find a way to kill Waters and Waters' husband. *Id.* at 665. And just like Kultin, informant McDaniel falsely told Shuck that she could put him in touch with a hit man who could perform the murders. *Id.* In recorded conversations Shuck voiced some hesitation and reluctance to go ahead with the plan. He said he "may need" the hit man, but he was unsure when. *Id.* In another conversation Shuck said he might not want to go ahead with the plan. *Id.* In still another conversation Shuck said he wanted the hit man to kill a third person named Lawrence Myers. *Id.* Eventually, McDaniel introduced Shuck to the hit man – who was in fact an undercover FBI

agent – and Shuck made a payment of $500 to the hit man to kill Myers. *Id.* Shuck was arrested right after meeting with the phony hit man. He was charged with one count of solicitation of first degree murder and two counts of solicitation of aggravated kidnapping.

As in this case, "the theory of defense throughout the trial was entrapment." *Id.* But unlike Mockovak's counsel, Shuck's attorneys tried to present the supporting testimony of an expert witness, a neurologist.

> In order to support this theory [of entrapment], the defense sought to introduce expert testimony from Dr. Eric Engum, a neuropsychologist, that the defendant suffered from a cognitive decline, and the significant deterioration of the defendant's cognitive abilities rendered him more susceptible to the persuasion of others to commit a crime, and particularly susceptible to persuasion of a trusted employee and confidante.

Id. at 665. "The trial judge ruled that the expert's testimony was not admissible because it would invade the province of the jury." *Id.* The trial judge did rule that Shuck had raised a viable entrapment defense, and the jury was instructed on that defense, but Shuck was convicted. *Id.*

The Tennessee Supreme Court noted that "Tennessee applies the subjective test of entrapment" which requires the jury to focus on the defendant's predisposition to commit the crime charged. *Id.* at 666. "Establishing susceptibility to inducement and persuasion was the purpose for which the defendant sought to introduce the expert psychological testimony . . . ." *Id.* The Court rejected the trial judge's basis for excluding the evidence and held that the fact that the evidence bore on the

ultimate issue for jury determination (entrapment) "was not a valid basis" for excluding it. *Id.* at 667.[23]

In the course of its decision, the Tennessee Supreme Court noted that "several federal and state courts have addressed the issue and [have] concluded that the admissibility of such proof is subject to the applicable rules of evidence which generally govern the admission of expert testimony." *Id.* For example, in *United States v. Hill*, 655 F.2d 512 (3rd Cir. 1981), the Court reversed a district court's ruling that the testimony of a clinical psychologist was inadmissible to prove that the defendant's psychological profile, subnormal intelligence, and susceptibility to persuasion made him uniquely susceptible to inducement. The court held:

> Testimony by an expert concerning a defendant's susceptibility to influence may be relevant to an entrapment defense. An expert's opinion, based on observation, psychological profiles, intelligence tests, and other assorted data, may aid the jury in its determination of the crucial issues of inducement and predisposition. A jury may not be able to properly evaluate the effect of appellant's subnormal intelligence and psychological characteristics on the existence of

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[23] "[T]he trial court abused its discretion by excluding the expert psychological testimony proffered by the defendant. As the defendant contends, the trial court excluded the proffered expert testimony on the sole basis that it embraced an ultimate issue of fact to be decided by the jury. From our review of the offer of proof, Dr. Engum did not seek to offer opinion testimony on the ultimate issue of whether the defendant was entrapped. Instead, if permitted to do so, Dr. Engum would have offered opinion testimony, based upon observation, intelligence tests, and other assorted data, that the defendant had suffered a cognitive decline and significant deterioration of his cognitive abilities which rendered him more susceptible to inducement and persuasion than the average person. Even assuming that Dr. Engum had sought to offer opinion testimony on the ultimate issue of entrapment, such testimony is not objectionable if otherwise admissible. *Id.* at 669.

> inducement or predisposition without the considered opinion of an expert.
>
> Accordingly, if the expert can reach a conclusion, based on an adequate factual foundation, that the appellant, because of his alleged subnormal intelligence and psychological profile, is more susceptible and easily influenced by the urgings and inducements of other persons, ***such testimony must be admitted as relevant to the issues of inducement and predisposition***.

Hill, 655 F.2d at 516 (emphasis added).[24]

In *Shuck* the expert testimony regarding the defendant's unusual vulnerability to entrapment was excluded because of an erroneous evidentiary ruling by the trial judge. In the present case such evidence was not presented because Mockovak's trial attorneys did not understand that such diminished capacity evidence could be offered together with an entrapment defense, and because lead counsel did not understand that since entrapment was governed by a subjective test, Mockovak's own learned helplessness and the abnormal development of his brain were highly relevant to the entrapment defense. As the *Hill* case shows, as early as 1981 competent defense attorneys have been offering exactly this kind of psychological evidence in support of an entrapment defense. If the conduct of Mockovak's attorneys had not been deficient – if they had offered the evidence of learned helplessness produced by years of

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[24] *See. also United States v. Newman*, 849 F.2d 156, 165 (5th Cir. 1988) (when entrapment is raised, expert psychiatric testimony is admissible to demonstrate that a mental disease or defect makes a defendant peculiarly susceptible to inducement if the expert demonstrates a proper factual foundation for the testimony, either through personal interviews with or psychological testing of the defendant.).

childhood sexual abuse – *Shuck* shows that it would have been admitted.

4. Dan Vogel, a Retired FBI Special Agent with Decades of Experience Managing Confidential Informants, Found Abundant Evidence That Kultin Entrapped Mockovak.

As retired Special Agent Dan Vogel noted after reading the transcripts of Kultin's recorded conversations with Mockovak: "In this case there is clear evidence that Kultin was committing acts of entrapment." *Decl. Vogel*, ¶9. After reading the transcript of the very first recorded conversation of August 11, 2009, Vogel states:

> [P]redisposition by Mockovak to commit a crime is not present in this meeting and there are intimidation, manipulation, and entrapment attempts by Kultin to influence Mockovak to continue in the fantasy Russian Mafia hit of Klock.

Vogel, ¶19. Vogel cites to seven specific statements that show that Mockovak was reluctant to proceed and that Kultin was trying to frighten him into agreeing to go forward. *Id.*, ¶20. Vogel concluded that Kultin was "obviously out of control at this point in the investigation." *Id.*

5. The prosecution's chief law enforcement witness conceded that for months he thought Mockovak was just blowing smoke, and that when Mockovak failed to mention any criminal plan the FBI directed the informant to try to "spark some kind of conversation" to see if Mockovak really intended to harm anyone.

From the very beginning, law enforcement was unsure of what Mockovak's true intentions were toward Bradley Klock. Even Kultin, who claimed that Mockovak (in an unrecorded conversation) had asked "in a joke way" whether there was some way to take care of Klock, said

that he was not sure if Mockovak was serious. RP VII, 118-19, 121.

Kultin first 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. When Kultin first told him his story in May, agent Carr "was not all that concerned," and 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 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 D).

Since there was no evidence that Mockovak was predisposed to do anything, the FBI deliberately decided to see if they could "spark" him into doing something. Ignoring his own previous instructions to Kultin

never to bring up the subject on his own, FBI Agent Carr directed 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 testified that 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.*

6. The very first recorded conversation of August 11, 2009 provides strong evidence that Mockovak was *not* predisposed to hire Kultin's hitmen friends. When Kultin offered to hire hitmen to kill Klock, Mockovak unambiguously replied: "No, no, no, no."

The very first recorded conversation took place on August 11, 2009. The transcript of that conversation reveals that Mockovak told Kultin that he did *not* want Kultin 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 so killing him would be unnecessary.

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 as much as $700,000 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; instead, he emphatically stated before he made any decision about what to do, "I want to see what the outcome of [Klock's] deposition is first," because if the deposition went well Klock's lawsuit "may just go away at that point," and that would make it unnecessary to hire anyone to kill Klock. *Tr.* 8/11/09 at 44. (Trans. excerpt attached as Appendix E).

7. Kultin sought to scare Mockovak into approving the plan by suggesting that if he didn't hire the hitmen they'd be angry and would come after him and his family and harm them.

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. *Trans. 8/11/09* at 46-47. (Transcript excerpt attached as Appendix F).

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 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 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.

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

8. The jurors expressed amazement at how much Kultin pressured and manipulated Mockovak. They *acquitted* Mockovak of the charge of soliciting Klock's murder, and reported that their decision to convict on the attempted murder of King charge was a very close call that could easily have gone the other way.

We know from the comments the jurors themselves made that many of them found the case very difficult to decide; they found the conduct of Kultin, the government's agent, to be very troubling; and they explicitly

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 G).

> 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.

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

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

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

> 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 G).

9. The fact that Kultin was finally able to induce Mockovak to approve a plan to kill King after six months does not show that Mockovak was initially predisposed to commit this crime. In fact, it shows the exact opposite. If *eventually* agreeing to commit a crime necessarily showed a predisposition to commit that crime then no defendant would ever be able to prove entrapment and the statutory defense would be rendered meaningless.

The State claims that there is no reasonable probability that expert testimony about learned helplessness, increased vulnerability to entrapment, and the long-term impact on the brain development of adult

survivors of childhood sexual abuse, would have made any difference to the outcome of this case. *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 friends to kill anyone, 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. Since Mockovak ultimately agreed to go along with Kultin's criminal plan, the State argues that this shows he was predisposed to commit this crime.

But this kind of "logic" conflicts with the very definition of "predisposition." The Supreme Court has held that the appropriate time to measure a defendant's predisposition is *before* he is contacted by an agent:

> [T]he prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act ***prior to first being approached by Government agents***.

Jacobson v. United States, 503 U.S. 540, 549 (1992) (emphasis added). Thus, proof that a defendant became comfortable with the idea of committing a crime *after* a Government agent urged it upon him is irrelevant; a "predisposition" towards crime, by definition, only exists if it existed "pre" contact by the Government agent.

The fact that the defendant *eventually* succumbed to law enforcement

encouragement to commit a crime is a fact 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.[25] So the State's approach to this case, if accepted, would essentially eliminate entrapment as a defense altogether.

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

If Mockovak's lawyers had understood the law governing entrapment, they would have heeded Dr. Gonsiorek's advice and they would have sought an expert like Dr. Novick-Brown to test and diagnose Mockovak. Had they done that, they could have presented her testimony to show that Mockovak has a diminished capacity to resist repeated pressure from others 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.*** . . .
>
> 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

[25] As the Court said in *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 100 (1984), "Entrapment occurs when . . . the accused is lured or induced *into committing* a crime he had no intention of committing." (Italics added).

> 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).

The question 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 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 attempting to kill Dr. King. The jurors ***acquitted*** Mockovak of soliciting the murder of Klock, and said that the State's case on the charge of attempting to kill Dr. King was "not clear cut at all" and could have "swung the other way." CP 789-90.

In addition, the fact that (1) for months Agent Carr was not concerned about any danger to anyone; (2) that later Carr still thought Mockovak was just "blowing smoke"; and (3) 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

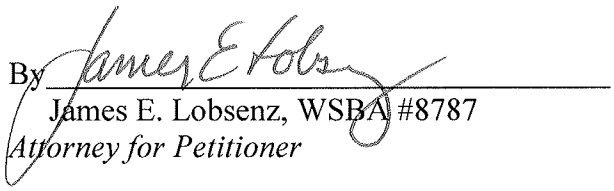
reasonable probability that if trial counsel's conduct had not been deficient (in so many ways), the jury would have acquitted Mockovak of all the charges. *Strickland's* prejudice prong is easily met here.

IV. CONCLUSION

Mockovak's trial counsel failed to provide effective representation of counsel. Dr. Gonsiorek, an experienced clinical psychologist, told them that Mockovak's childhood sexual abuse was an important fact that bore directly on his defense of entrapment. He told them to get an expert witness to explain this to the jury. They failed to do so. Though they chose to present an entrapment defense, they did not know the law governing this defense. For the reasons stated above, Petitioner asks this Court to vacate his convictions and to order a new trial.

Respectfully submitted this 22nd day of June, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA #8787
Attorney for Petitioner

CERTIFICATE OF SERVICE

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

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

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

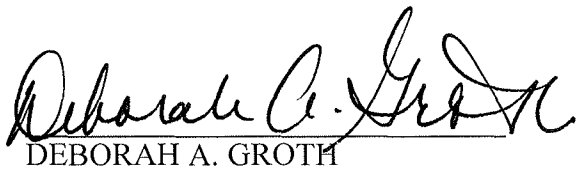
3. On June 22, 2015, I caused to be served *VIA EMAIL and US MAIL* one copy of the following document on:

Attorney for Respondent:
James M. Whisman
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue, W554
Seattle, WA 98104

Entitled exactly:

BRIEF OF PETITIONER

DATED: June 22, 2015.



DEBORAH A. GROTH
Legal Assistant to James E. Lobsenz

APPENDIX A

HC 3312
9/67

Court No. A-68,153

STATE OF MINNESOTA
County of Hennepin

STATE OF MINNESOTA
Plaintiff

— vs —

BRUCE MORTON VIKRE
Defendant.

FILED
1985 DEC -9 PM 3:56
BY A. Allen DEPUTY
HENN. CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

REPORT OF PROBATION OFFICER
AND ORDER TERMINATING
PROBATION SUPERVISION

To the Honorable ALLEN OLEISKY, *one of the Judges of the above-entitled Court: On the* 11th *day of* July, *19*77, BRUCE MORTON VIKRE *the above-named defendant* pleaded guilty to *the crime of* CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE *upon* COMPLAINT FILED BY COUNTY ATTORNEY *of Hennepin County, Minnesota, on the* 16th *day of* May, *19*77; *and thereafter on the* 11th *day of* July, *19*77, imposition of sentence was stayed to July 10, 1987; *And thereafter on* July 11, *19*77, *the* imposition *of sentence was duly stayed by said Court until the* 10th *day of* July, *19*87, *and defendant was placed on* probation *under the supervision of the Probation Office during said stay;*

And I further report that defendant has successfully complied with terms of probation.

I therefore report the above facts, and respectfully recommend that active probation supervision be terminated as of August 19, 1985 *with the stay of* imposition *of sentence to remain in effect until* July 10, 1987 *or until further order of this Court.*

DATED: November 19, 1985

APPROVED BY: David N. Gair
DAVID N. GAIR, COURT SERVICES SUPERVISOR
ADULT DIVISION

Mara Widseth
MARA WIDSETH (x8904), *Probation Officer*

Upon the foregoing report IT IS HEREBY ORDERED that active probation supervision be terminated as of August 19, 1985 *with the stay of* imposition *of sentence to remain in effect until* July 10, 1987 *or until further order of this Court.*

DATED: ~~November~~ Dec 9, 1985

By The Court:
Allen Oleisky
ALLEN OLEISKY *Judge.*

APPENDIX B

Early Life Stress and Morphometry of the Adult Anterior Cingulate Cortex and Caudate Nuclei

Ronald A. Cohen, Stuart Grieve, Karin F. Hoth, Robert H. Paul, Lawrence Sweet, David Tate, John Gunstad, Laura Stroud, Jeanne McCaffery, Brian Hitsman, Raymond Niaura, C. Richard Clark, Alexander MacFarlane, Richard Bryant, Evian Gordon, and Leanne M. Williams

Background: *Early life stress (ELS) is linked to adult psychopathology and may contribute to long-term brain alterations, as suggested by studies of women who suffered childhood sexual abuse. We examine whether reported adverse ELS defined as stressful and/or traumatic adverse childhood events (ACEs) is associated with smaller limbic and basal ganglia volumes.*

Method: *265 healthy Australian men and women without psychopathology or brain disorders were studied. ACEs were assessed by the ELSQ and current emotional state by the DASS. Anterior cingulate cortex (ACC), hippocampus, amygdala, and caudate nucleus volumes were measured from T1-weighted MRI. Analyses examined ROI volumetric associations with reported ACEs and DASS scores.*

Results: *Participants with greater than two ACEs had smaller ACC and caudate nuclei than those without ACEs. A significant association between total ACEs and ROI volumes for these structures was observed. Regression analysis also revealed that ELS was more strongly associated than current emotional state (DASS) with these ROI volumes.*

Conclusions: *Reported ELS is associated with smaller ACC and caudate volumes, but not the hippocampal or amygdala volumes. The reasons for these brain effects are not entirely clear, but may reflect the influence of early stress and traumatic events on the developing brain.*

Key Words: Early life stress, adverse childhood events, brain morphometry, anterior cingulate cortex, caudate nucleus, amygdala, hippocampus, MRI

A large body of literature links early life stress (ELS) and a wide range of adult psychopathology (Fergusson et al 2000; Friedman et al 2002; Gearon et al 2003; Harrison et al 1997; Heim et al 2002; Infrasca 2003; McBeth et al 2001; Parker et al 2000; Speranza et al 2003; van Zelst et al 2003; Zlotnick et al 2004) Recent studies document the frequent co-occurrence of multiple types of neglect and abuse (Anda et al 2002; Briere and Elliott 2003; Cicchetti 2004; Dong et al 2004; Dube et al 2002; Edwards et al 2003) These studies have shown a high prevalence of co-occurring adverse childhood events (ACEs) and increased risk for substance abuse (Anda et al 1999; Clark et al 1997; Dube et al 2001), criminal activity and psychopathology (Anda et al 2002; Baud 2005; Beautrais 2000; Bebbington et al 2004; Bonanno 2004; Briere and Elliott 2003; Dube et al 2002; Edwards et al 2003; Fergusson et al 2000; Friedman et al 2002; Gearon et al 2003; Harrison et al 1997; Infrasca 2003; Krueger 1983; Massie and Szajnberg 2002; O'Sullivan 2004; Pagano et al 2004; Parker et al 2000; Speranza et al 2003; van Zelst et al 2003), and health problems in adulthood (Dube et al 2003; McBeth et al 2001; Patterson et al 1992; Tam et al 2003).

Accordingly, there has been increased emphasis on elucidating pathways between ACEs and adult emotional experience. Traumatic life experiences, including ELS, are associated with alterations in specific brain systems implicated in adult psychopathology, including alterations in the hypothalamic-pituitary axis and mesolimbic dopamine pathways (Ansorge et al 2004; Arborelius et al 2004; Carpenter et al 2004; Charmandari et al 2005; De Bellis 2001; Heim et al 2002; Infrasca 2003; Maslova et al 2002; Pryce et al 2004; Shea et al 2005; Whittington et al 2004) Studies of post-traumatic stress suggests that that in addition to its functional impact, exposure to severe emotional trauma may cause alterations in brain structure (Bremner 1999; Bremner 2002b; Bremner et al 1995; Gilboa et al 2004; Gurvits et al 1996; Kimble and Kaufman 2004; Liberzon and Phan 2003; Lindauer et al 2004; McEwen and Magarinos 1997; Nutt and Malizia 2004; Pederson et al 2004; Pitman 2001; Vermetten and Bremner 2002; Villarreal et al 2002a, 2002b; Villarreal and King 2001; Wignall et al 2004; Winter and Irle 2004; Yamasue et al 2003) For example, there is evidence of smaller hippocampal volume and other morphometric differences among adults who had been exposed to severe childhood stress (Bremner 2002a; Bremner 2003; Bremner and Narayan 1998; Bremner et al 1997).

Few studies have focused on morphometric differences in other brain regions associated with PTSD, though there are some reports of smaller anterior cingulate cortex (ACC) volume (Araki et al 2005; Rauch et al 2003; Yamasue et al 2003). Functional imaging and electrophysiological studies have also suggested alterations involving response of the ACC (Araki et al 2005; Corrigan 2004; De Bellis et al 2001; Hamner et al 1999; Lanius et al 2001; Shin et al 2001; Yamasue et al 2003) Despite this increased knowledge about neural structures associated with PTSD, little is known about whether exposure to early life stress affects brain structure in people without symptoms of PTSD or adult psychopathology.

In the present study, we examined the relationship between reported ELS and brain morphology in a large sample of adults with no history of psychopathology or brain disorder, and also whether cumulative exposure to ACEs is associated with volumetric differences of the hippocampus, amygdala, anterior cingulate cortex, and caudate nuclei, brain systems that are implicated in PTSD and other emotional behavior. In particular, we hypothesized that the ACC, caudate nuclei, and hippocampus

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would be smaller among people with prior ACEs, with those having the greatest aggregate number of ACEs showing the smallest volumes.

Methods and Materials

Data pertaining to frequency and age of onset of ELS and specific ACEs was collected as part of the Brain Research International Database (BRID) (Gordon 2003) The goal of the BRID was to develop an international database of cognitive, emotional, behavioral, electrophysiological, and neuroimaging data to establish normative information on these measures across the lifespan.

Study Population

Participants were healthy volunteers between the ages of 18 and 70, recruited in Adelaide and Sydney, Australia. Participants were recruited by advertisement and were reimbursed the equivalent of $150 to complete all assessments. Potential participants were excluded if they met criteria for major affective or anxiety disorders, schizophrenia, substance abuse, neurological disease, or major medical conditions that could affect cognition (e.g., stroke, heart disease, cancer) currently or in the past. Human subjects IRB approval for the study was obtained at each site. Prior to enrollment, participants were informed of the nature, benefits, and risks of all procedures, and consented to participate.

The sample consisted of 1045 adults, approximately equally divided between men (519) and women (526). Of this sample, 250 people also had brain magnetic resonance imaging (MRI) within two weeks of their behavioral assessment. The mean age of participants in the sample was 39.9 ± 17.2. There were no differences in age between men and women (Men: 39.4 ± 18.3; Women: 40.4 ± 16.8). By design, participants ranged in education (12.5 ± 4.4 years).

Measures

Brain MRI Acquisition. Images were acquired at 1.5 Tesla using standard Siemens Sonata or Vision systems at 2 different sites (The Brain Dynamics Centre, Westmead Hospital, University of Sydney, Australia; Perrett Imaging, Flinders University, Australia). Isotropic T1-weighted images were acquired in a saggital orientation using an magnetization prepared rapid gradient echo (MPRAGE) sequence (repetition time [TR]: 9.7 msec; time-to-echo [TE]: 4 msec; Echo train: 7; Flip Angle: 12°; inversion time [TI]: 200 msec; NEX = 1). One hundred eighty contiguous 1 mm slices were acquired with an in-plane matrix of 256 × 256 at a resolution of 1 mm × 1 mm.

Magnetic Resonance Image Analyses. MR image post processing and analysis was conducted using SPM2 running on MATLAB 6.5 (MathWorks, Natick, Massachusetts). Images were first normalized to a Brain Resource International Database-specific T1-weighted template, which was made using 255 subject images that had previously been normalized to the International Consortium for Brain Mapping (ICBM) 152 template (Montreal Neurological Institute). This procedure facilitated data averaging by normalizing brains to standardized stereotactic space. Standard T1 templates of segmented images provided by SPM were used to create customized template images. Based on a cluster analysis method that separates pixels based on the distribution of intensities and a priori knowledge of spatial tissue distribution patterns in normal subjects (Friston et al 1996), images were segmented into gray matter (GM), white matter (WM), cerebrospinal fluid (CSF), and nonbrain tissues. A correction was made to preserve quantitative tissue volumes following the normalization procedure (Ashburner et al 1998, 2000; Ashburner and Friston 2000; Salmond et al 2002) These voxel-based morphometry procedures are based on established techniques, presented in greater detail elsewhere (Ashburner and Friston 2000; Good et al 2001). Validation was conducted by correlating ROI volumes by separate analytic methods using the automated anatomical labeling (AAL) and a semi-automated method. Data from the two methods was highly consistent (r = .93–.98), providing evidence for the validity of the region of interest (ROI) measures.

ROI Volumetric Methods. Volumes for the four ROIs were determined based on Automated Anatomical Labeling (AAL) anatomic atlas that is defined in MNI space (Tzourio-Mazoyer et al 2002) – the frame of reference upon which the brains are "normalized." Global volumes were obtained by summing the segmented volumes from GM, WM and CSF segmented images. Total brain volume was obtained by summing these three components.

ROI Dependent Measures. Based on the methods described above, ROI volumes were determined for each participant for the ACC, the hippocampus, the amygdala and the caudate nucleus, bilaterally. Right and left volumes were obtained for each ROI, in mL (cm^3). The specific boundaries used to determining each ROI have been described in detail previously (Tzourio-Mazoyer et al 2002).

The anatomic boundaries of the amygdala, hippocampus, and caudate nuclei are anatomically well defined across brain measurement systems, whereas the ACC is somewhat more variable. The ACC measurements in this study were identical to those described by Tzourio-Mazoyer et al (2002). Boundaries for cingulate cortex were based on a limit starting from the paracingulate sulcus on the left and cingulate on right. After these two sulci ended their parallel course, the cingulate sulcus provided this boundary. The caudal limit was set by the subparietal sulcus. The anterior cingulate region was split relative to the medial cingulate region using the intersection with the corpus callosum. The ACC was limited by the paracingulate sulcus rostrally and the white matter of the corpus callosum, caudally.

SPHERE. Participants completed the Somatic and Psychological Health Report (SPHERE) (Hickie et al 2001a, 2001b) prior to being enrolled to assess for current past history of psychiatric illness. The SPHERE was previously developed as screening measure of mental disorders for use in international studies, and has been shown to be reliable and a valid measure of psychopathology in three large cohorts of patients in general medical practice (n = 48,500) and in one cohort of patients in a specialty psychiatric clinic.(Hickie et al 2001a, 2001b) Performance on the SPHERE was compared in these studies to DSM-III-R and DSM-IV diagnosis, Brief Disability Questionnaire findings, and general practitioner ratings of patients' mental health, and was shown to have strong reliability and validity with respect to the detection of both psychological and somatic symptoms, and also with respect to prediction of functional disability. In this study, the SPHERE was used to screen for psychopathology for purposes of satisfying the exclusion criteria.

Early Life Stress Questionnaire. The occurrence of potential ACEs was measured on the Early Life Stress Questionnaire (ELSQ), a self-report questionnaire. The ELSQ was developed for use in an international cohort (McFarlane et al 2005; Paul et al 2005), and is based on the Child Abuse and Trauma Scale, which has been shown to have strong internal consistency, test-retest reliability, and validity, as it correlates with adult outcome and psychopathology (Sanders 1995)and is based on the Child Abuse

Table 1. Prevalence and Co-occurrence of Adverse Childhood Events (ACE)

ACE	% Of Total	ACEs (Total)	%
Divorce	22.2	0	31.8
Severe Family Conflict	20.3	1	22.3
Separated from Family	16.1	2	15.3
Premature Birth	15.6	3	9.2
Major Illness in Family	14.9	4	5.1
Bullied	17.4	5	4.0
Death in Family	11.3	6	2.8
Emotional Abuse	12.3	7	2.2
Domestic Violence	11.8	8 or more	2.0
Hospitalization/Surgery	9.4		
Natural Disaster	7.6		
Major Illness (Self)	7.4		
Physical Abuse	5.2		
Sexual Abuse	4.6		
War	4.1		
Poverty/Neglect	3.7		
Fire Destroyed Home	1.5		
Adoption	1.2		

ACEs-Total excludes premature birth.

and Trauma Scale (Sanders 1995); which has strong internal consistency, test-retest reliability, and validity, as it correlates with adult outcome and psychopathology. The ELSQ consists of 19 ACEs shown to be either traumatic or extremely stressful in past studies (De Bellis 2001; Harrison et al 1997; McGee et al 1995; Sanders and Becker-Lausen 1995) Participants endorsed whether specific ACEs had occurred during their childhood (0-12 years) and if so, at what age. These self-reported ACEs have been strongly correlated with agency estimates of childhood trauma (McGee et al 1995), including sexual and physical abuse, traumatizing accidents, natural disasters and sustained domestic conflict. Specific content areas covered by items on this questionnaire are summarized in Table 1.

Depression, Anxiety, and Stress Scale (DASS). This scale was developed to assess symptoms of depression, anxiety and stress (Lovibond and Lovibond 1995), and has strong reliability and validity (coefficient alpha = .92). The DASS asks participants to endorse the severity and frequency specific symptoms associated with depression, anxiety, and stress reactivity on a four-point Likert scale, with indices derived to reflect symptom severity for these three domains. Index scores correlate highly with scores on other standardized measures of depression and anxiety, and level of stress (Lovibond and Lovibond 1995).

Statistical Analyses. Frequency distributions were generated for each ELSQ item. Descriptive statistics were also obtained for the DASS index scores. Cross-tabulations with Chi Square comparisons were used to test for differences in rates and ages of onset of particular ACEs. Data from one ELSQ item that queried whether the participant had been born prematurely was removed from subsequent analyses, as premature birth could bear on brain development. Accordingly, subsequent analyses were based on the remaining 18 ELSQ items.

Participants were dichotomized based on number of ACEs that they reported into two groups (ACE-None, ACE-High). Participants reporting no ACEs were included in the ACE-None group, whereas participants with two or more ACEs were included in the ACE-High group. Those with one ACE were excluded from group comparisons. The rationale was to create distinct groups with respect prior to ACE exposure, with those with no ACEs serving as a control group. Within-subject multivariate analyses of variance (MANOVA) procedures were performed, with brain hemisphere the within-subject contrast and ACE group (ACE-High vs. ACE-None) the between-subject contrast, and the four ROIs volumes serving as dependent variables.

Univariate between-group comparisons for each ACE were conducted to determine whether differences in ACC and caudate volumes occurred as a function of eight specific ACEs (divorce, death of a parent/primary family member, sustained family conflict, sexual abuse, physical abuse, emotional abuse, witnessed domestic violence, bullied as a child) considered to have particular significance for emotional development. Participants in the ACE-None served as controls for each of these contrasts to minimize the influence of other ACEs on the effect of interest. Regression was also conducted in which all dichotomous ACEs were entered as independent variables, and ACC and caudate volumes were treated as dependent variables to determine which of these seven ACEs were most strongly associated with them.

Stepwise regression analyses were used to characterize the relationship among ELS severity (defined as total number of ACEs), current emotional distress on the DASS, and volumes of the brain ROIs.

Results

Characteristics of Early Life Stress

The most commonly reported ACEs across the entire sample were sustained major family conflict (20.3%), divorce of parents (22.2%), and separation from other family members during childhood (15.1%)(see Table 1). The majority of participants endorsed at least one ACE (69.7%), even after excluding premature birth. While almost one third of the participants reported no ACE exposure, almost a third of the sample reported three or more ACEs. On average, participants reported 1.71 (2.06) ACEs.

A surprising proportion of people in the sample reported that they had exposure to natural disaster (7.6%) or war (4.1%) as a child. A smaller proportion had lost their homes to fire during childhood (1.5%). Examination of the nature of these experiences revealed that most of the natural disasters had been the result of severe storms/hurricanes, earthquakes, or flooding. With respect to war, most participants endorsing this item had not personally experienced war as children, but reported being affected by the fact that parents or other significant family members had been in battle during their childhood.

Chi-square analyses were conducted to determine if the age of onset of specific ACEs varied. Participants were stratified into four groups based on the age at which each ACE had occurred (0-2, 2-4, 4-8, 8-12 years). There were not significant differences in the frequency of occurrence by age for any of the ACEs.

Brain Morphometry and Early Life Stress

Comparison of the ACE-High and ACE-None groups revealed that two groups differed with respect to brain volumes across all ROIs ($F(4,246) = 2.12$, $p = .05$, one tailed), with smaller volumes in the ACE-High group (see Table 2). Univariate comparisons indicated significant overall between-group differences for the ACC (F (1,249) = 5.47, p = .02) and the caudate nuclei ($F(1,236) = 5.07$, $p = .03$), but no other ROIs.

When right and left hemispheres for each ROI were considered separately, significant between group differences were

Table 2. Volume of Brain Structures as a Function of Early Life Stress

Brain Structure	ACE-None	ACE-High
ACC		
Right	3.667 ± .537	3.518 ± .571
Left	4.744 ± .702	4.602 ± .734
Amygdala		
Right	1.27 ± 1.40	1.26 ± 1.43
Left	1.16 ± 1.28	1.15 ± 1.36
Caudate Nucleus		
Right	2.773 ± .309	2.681 ± .310
Left	2.941 ± .348	2.875 ± .351
Hippocampus		
Right	3.166 ± .390	3.079 ± .400
Left	3.380 ± .400	3.279 ± .406

Measurements in mm^3 for each structure bilaterally. Bold indicates between-group differences ($p < .05$). ACE, adverse childhood event; ACC, anterior cirgulate cortex.

found for both the right ACC ($F(1,249) = 6.55$, $p = .01$) and left ACC ($F(1,249) = 4.58$, $p = .03$). The ACE-High group exhibited smaller right (4.1%) and left ACC (3.1%) volumes. Similarly, the ACE-High group showed smaller volume of the right (3.2%; $F(1, 249) = 6.29$, $p = .01$) and left (3.0%; $F(1, 249) = 3.66$, $p = .03$, one-tailed) caudate nuclei. Groups approached significant differences for the right hippocampus ($F(1, 249) = 2.51$, $p = .06$, one-tailed) and the left hippocampus ($F(1, 249) = 2.222$ $p = .07$, one-tailed). Groups did not differ significantly on right or left amygdala volume.

Multiple regression analysis revealed a relationship between ROI volumes and ELSQ total ($R = .27$, $F(6, 185) = 2.45$, $p = .03$). The right ACC ($\beta = .74$, $p = .02$) and the left ACC ($\beta = .68$, $p = .03$) accounted for most of the variance in ELSQ-Total, while the right caudate nucleus was also associated with ELSQ-Total ($\beta = .34$, $p = .03$, one-tailed), though it accounted for only a small proportion of the variance.

ELS and Global Brain Volume

In order to examine the context of the observed associations between ELS and the ROIs examined, global tissue volumes were compared between ACE-high and ACE-none groups. Global gray matter (GM) was greater in the ACE-none group (699.5 mL ± 81.1 mL versus 672.1 mL ± 77.0 mL; $p = .021$), while no significant differences existed between the groups for global white matter volume (WM), CSF volume, or total brain volume. The relationships between ELS and regional GM no longer achieved statistical significance after regional volumes were normalized for global GM volume prior to analysis.

To further examine this relationship, the eight primary ROIs associated with ACC, caudate, hippocampal, and amygdala volumes were entered into a hierachical regression analysis along with the four global volume measures (GM, WM, CSF, TBV), and also age. Again a significant association was found ($R = .276$, $p = .04$), between ELS-Total Score and brain volume. Only right ACC ($\beta = 2.25$) and left ACC ($\beta = 1.64$) were retained as contributing significantly to the variance in ELS.

Influence of Specific ACEs

Univariate comparisons of the effects of the eight ACEs considered to have primary significance for emotional development revealed several significant ROI differences. Participants who had lost a parent or primary family member ($F(1,106) = 11.09$, $p = .001$), witnessed domestic violence in their homes ($F(1,118) = 8.46$, $p = .001$), experienced sexual abuse ($F(1,115) = 4.62$, $p < .03$), and been bullied as children ($F(1,138) = 3.24$, $p = .03$) had smaller ACC volumes than controls without any prior ACE exposure. Differences in ACC volume were not found for other ACEs (divorce, family conflict, physical abuse, emotional abuse).

Participants who had lost a parent or primary family member ($F(1,106) = 7.29$, $p < .01$), witnessed domestic violence in their homes ($F(1, 118) = 9.34$, $p = .005$), and experienced sexual abuse ($F(1,115) = 3.73$, $p = .05$) also had smaller caudate nuclei than controls without any prior ACE exposure. Significant differences in caudate volume were not evident for the other ACEs.

Stepwise regression analyses examined the relationships between these eight ACEs and volumes of the ACC and caudate nuclei, with each ACE entered as a dichotomous independent predictor into the regression equation. A significant relationship was observed between the ACEs and ACC volume ($R = .22$, $F(2, 248) = 4.78$, $p = .01$), with Death of parent/primary family member and witnessing domestic violence retained in the model. A significant relationship also emerged for caudate volume ($R = .23$, $F(4, 246) = 3.36$, $p = .01$), with four ACEs retained in the regression, including Death of parent /primary family member, Witnessed Domestic Violence, Sustained Family Conflict, and Sexual Abuse.

ELS, Current Emotional Distress and Brain Morphometry

Overall, participants reported lower DASS scores (Depression = 1.55 ± 2.19; Anxiety = .85 ± 1.19; Stress = 1.55 ± 2.19) than published norms for healthy community samples in Australia (Crawford 2003). ELSQ-total score was correlated with the three DASS measures (Depression: $r = 23$, $p = .001$; Anxiety: $r = .20$, $p = .001$; Stress: $r = .28$, $p = .001$). Stepwise regression analysis revealed that ELSQ total score was significantly associated with overall DASS severity ($R = .27$, $p < .03$), though DASS-Stress was the only variable retained.

Stepwise regression analysis also revealed a significant association between scores on the DASS and ACC volume ($R = .22$, $p < .03$), with the strong correlation between DASS-Stress and right ACC volume ($r = -.13$, $p < .05$) accounting for much of this effect. DASS-Depression and DASS-Anxiety were not associated with any of the four brain ROIs. When all three DASS indices were entered into the regression along with ELSQ-Total to examine their relationship to ACC volume, ELSQ-Total found to be the strongest correlate ($r = -.15$, $p = .02$), whereas the DSS scores did not correlate significantly with ACC volume.

Discussion

The current findings indicate that people who have experienced significant ELS show differences in brain structure compared to people who have experienced minimal ELS. ACC and caudate nucleus volumes were 2-5% smaller among people who reportedly had experienced two or more ACEs compared to people who reported none. These differences approximate the amount of hippocampal and cortical reduction typically observed over a decade among healthy elderly people (Grieve et al 2005).

These findings are noteworthy as the ACC and caudate nucleus were examined relative to two other limbic structures that have been implicated in PTSD (Bremner 1999; Bremner 2002b; Bremner et al 1995; Gilboa et al 2004; Gurvits et al 1996; Kimble and Kaufman 2004; Liberzon and Phan 2003; Lindauer et al 2004; McEwen and Magarinos 1997; Nutt and Malizia 2004; Pederson et al 2004; Pitman 2001; Vermetten and Bremner 2002; Villarreal et al 2002a, 2002b; Villarreal and King 2001; Wignall et

al 2004; Winter and Irle 2004; Yamasue et al 2003) The fact that ACC and caudate volumes were more strongly related to the ELS in the current study suggests that the hippocampus and amygdala are not uniquely vulnerable to the effects of traumatic stress, and may be even more vulnerable.

These observations reinforce a growing body of research that implicates both the ACC and caudate nucleus in neuropsychiatric disorders and emotional regulation (Adamec 1997; Davidson et al 1999; Davidson and Irwin 1999). Both structures are also part of the brain dopamine system (Ansorge et al 2004; Arborelius et al 2004; Carpenter et al 2004; Charmandari et al 2005; De Bellis 2001; Heim et al 2002; Infrasca 2003; Maslova et al 2002; Pryce et al 2004; Shea et al 2005; Whittington et al 2004), which also includes other limbic structures and orbital frontal cortex (Alexander et al 1990; Alexander et al 1986; Cohen et al 2000; Cohen et al 2005; Devinsky et al 1995) The ACC seems to be a particularly important brain region for the attention and intentional control, with ACC lesions producing decrements in spontaneous behavior (Cohen et al 1994, 1999a, 1999b) Furthermore, the ACC mediates stress response, as is evident by reductions of stress report following cingulotomy, and lesions of the ACC leads to a reduction in ruminative thinking (Cohen et al 1994, 1999a, 1999b) Evidence of a functional relationship between the ACC and other limbic structures in the context of PTSD has been suggested by recent research by this group (Bryant et al 2005; Williams et al 2005a, 2005b; Williams et al, in press), and other laboratories (Bush et al 2002; Shin et al 2001; Vogt et al 2005; Williams et al 2004).

That a significant relationship between ELS and brain morphometry was observed among people without clinically significant past or current psychopathology is important. Most morphometric studies of brain effects of stress have focused on specific psychopathologies, such as PTSD, in which it is assumed brain changes occur secondary to neuropathological processes associated with the particular disorder, such as hypothalamic-pituitary axis dysfunction. Current emotional distress can not easily explain the observed effects, as the DASS scores of participants in the sample were low relative to normative data, and even the most elevated DASS scores fell below levels observed in clinical populations. These findings suggest that brain alterations may occur in response to even moderate levels of childhood trauma and stress.

ACC volume was retained as the significant correlate of ELS-Total Score when entered along with GM, WM, and other global brain volume measures. This finding suggests that the ELS effects were not attributable to the overall cortical or white matter volume. Yet, it should be noted that participants in the ACE-High had GM volumes that were almost 4% less than the control subjects, with a trend towards a significant effect. Therefore, it is possible that ELS may actually affect cortical regions beyond the ACC.

Conclusions regarding the relationship between ELS and the brain must be tempered by several considerations and limitations of the current study. Given that ELS was associated with current emotional experience, it is possible that brain differences were associated with current emotional state. Yet, this seems unlikely given that participants had no overt psychopathology and showed mild levels of emotional distress on the DASS. Furthermore, ELS-total score emerged as a stronger correlate of ACC and caudate volumes than the DASS indices, suggesting that early experience contributed more to brain morphometry findings than current emotional state. The fact that early life stress experience was determined by retrospective self-report poses a potential confound because of a documented association between current emotional state and inaccurate recollection of past trauma (Southwick et al 1997).

Perhaps the most difficult issues to resolve stems from the fact that probably not all ACEs are equal in their functional significance. To address this, we examined differences in brain volume associated with ACEs, such as domestic violence and abuse, known to have detrimental impact on emotional development (Cicchetti 2004; Dong et al 2004; Anda et al 1999). This provided evidence that the loss of parent or primary family member, domestic violence, sexual abuse, and other ACEs are associated with smaller ACC and caudate volumes. However, the relative importance of specific ACEs to these effects can not be fully determined from the current study, as the experimental design was not developed with the sole purpose of examining the effects of specific ACEs, while controlling for others. The results ultimately suggest a more complex scenario, as brain volume effects appear to occur as a function of the total number of stressors that have been experienced during childhood. A majority of participants had experienced at least one ACE during childhood, and a significant proportion had multiple ACEs. It seems likely that ELS effects on the brain occur as result of a complex interaction based on the severity of specific ACEs and the total quantity of ELS experienced during childhood.

Furthermore, brain response to ELS is ultimately not only a function of the traumatic event, but also the person's physiological and psychological reaction to the event. In this study it was not possible to directly examine response to stress response, given that the stressors being studied had occurred many years earlier. It is also possible that differences in brain morphometry are due to genetic influences that simultaneously shape the way people respond to stress and their brain structure and function (Gilbertson et al 2002) Unraveling these interactions and the mechanisms by which reaction to ELS results in brain changes requires additional investigation.

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APPENDIX C

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 D

~~State's~~ Defendant's ex. # 60
09-1-07237-6 SEA
State v. Michael Mockovak

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 Kultin

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 Kultin

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

06626 MEM

APPENDIX E

MOCKOVAK: It's not like...I mean, do I like Brad? No.

Source: Yeah.

MOCKOVAK: Do you like Brad?

Source: But yeah, but look at it...look at it, but he...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.

APPENDIX F

MOCKOVAK: No, no, no, okay. Well, listen, you better be very clear then, 'cause...because...you know, because of our last conversation, let's not make them think that okay, this is absolutely gonna happen.

Source: Okay.

MOCKOVAK: 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.

Source: Okay.

MOCKOVAK: Okay?

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 gonna quibble about that.

Source: Okay.

MOCKOVAK: I mean, I understand. This is not like signing a contract with, uh...this isn't like a lasik purchase where...

Source: I know.

MOCKOVAK: ...we give you a price guarantee.

Source: I know.

MOCKOVAK: Yeah, okay.

Source: But, um, I know they've done it before many, many times.

MOCKOVAK: Yeah.

Source: Um, I've supplied these people with information in the past.

MOCKOVAK: Really?

Source: Yeah.

MOCKOVAK: So what kind of information do you give 'em, just like where he'll be at a particular time, and they take it from there?

Source: That's what we're gonna have to kinda figure out too. Um...

MOCKOVAK: 'Cause we don't really...

APPENDIX G

- [*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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