

NO. 69390-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of
MICHAEL MOCKOVAK,
Petitioner.

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State of Washington

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

Mr. Michael Mockovak is restrained pursuant to the Judgment and Sentence entered under King County Superior Court cause number 09-1-07237-6 SEA. Appendix A.

B. INTRODUCTION

The arguments in Mockovak's petition fall into four general categories. He argues that: 1) state investigators recorded conversations in violation of the Privacy Act resulting in a variety of state and federal constitutional violations; 2) trial counsel were ineffective because they misunderstood the law of entrapment; 3) trial counsel ineffectively impeached witnesses Klock and Kultin; and 4) counsel should have presented evidence that Mockovak was a child abuse survivor and was thus more susceptible to suggestion from an informant. None of these arguments establishes constitutional error resulting in actual prejudice, or non-constitutional error resulting in a complete miscarriage of justice.

Mockovak's many attacks on the recorded conversations between Kultin and Mockovak rest on the flawed premise that the recordings were

illegal.¹ The premise is flawed because the Washington Privacy Act did not require judicial authorization for the one-party consent recordings in this case. A plot to murder contemplates bodily harm against the planned victim and, thus, falls under an express exception in the Privacy Act which Mockovak wholly fails to discuss. Thus, recordings made without judicial authorization did not violate state law. Approximately three-quarters of Mockovak's petition must be rejected for this simple reason. Mockovak's Privacy Act arguments fail for other reasons, too, as detailed below.

The claim that trial counsel did not understand the law of entrapment was properly rejected on direct appeal. Mockovak's argument for a change in entrapment law is at best novel, and trial counsel is not ineffective for failing to anticipate novel legal arguments. More fundamentally, Mockovak's arguments are also legally incorrect. An entrapment defense contains both subjective and objective components, so it is proper to tell the jury that a normal amount of persuasion by an informant does not constitute entrapment. Thus, the pattern instruction is a correct statement of the law.

¹ The following arguments fail based on Mockovak's flawed premise: PRP, §F.1, at 52-71 (ineffective assistance of counsel for failure to move to suppress recordings); PRP, §F.3, at 82-86 (state officers violate due process when they deliberately commit a crime in the course of their investigation); §F.4, pp. 86-95 (state law enforcement officers' involvement in illegal activity violates the Washington constitution); §F.5, 96-97 (investigation violated the Tenth Amendment). See also Supplemental PRP at 20-34.

Mockovak's claim that trial counsel should have impeached Kultin or Klock regarding an incident of harassment that occurred in 2005 is baseless. The prior event was neither impeaching, nor admissible. Even if admissible, the strategy would have failed, so counsel reasonably refrained from pursuing that strategy.

Finally, as for Mockovak's claim that trial counsel should have presented evidence of prior sexual abuse, Mockovak has not established that trial counsel knew before or during trial about such abuse, or that trial counsel did not make a tactical decision to withhold such evidence. In fact, it is obvious from the record that there were sound tactical reasons to avoid this defense. No evidence suggests that Mockovak was susceptible to coercion. To the contrary, a plethora of objective evidence shows that he was high-functioning, well-educated, and highly aggressive in business and personal matters. To suggest that Mockovak was "helpless" would have opened the door to damaging information about his business and personal dealings, all of which showed that, far from being passive, Mockovak was downright pugilistic. A "learned helplessness" defense would have undercut the credibility of trial counsel's very effective strategy.

Mockovak has failed to carry his burden and his personal restraint petition should be dismissed.

C. ISSUES PRESENTED

1) Whether Mockovak's recorded conversations with Daniel Kultin fall under the threats of bodily harm exception to the Privacy Act (RCW 9.73.090(2)(b)) such that prior judicial authorization was not required to record the conversations.

2) Whether the avowedly strategic decision by trial counsel Jeffrey Robinson and Colette Tvedt to forgo a suppression motion was a reasonable tactical choice that did not prejudice Mockovak where Mockovak insisted on a quick trial and where the benefits of restarting the case in federal court did not outweigh other tactical considerations.

3) Whether Mockovak has failed to show a Due Process violation premised on bad faith where law enforcement officers recorded conversations plotting a murder and where the Federal Bureau of Investigation (FBI) agent directing the investigation and the state officer assisting in the investigation reasonably believed the case was going to be prosecuted in federal court, and thus complied with federal law in obtaining the recordings, but then obtained judicial authorization under state law for the remaining conversations when they learned that it might not be possible to prosecute in federal court?

4) Whether Mockovak has failed to show that recording conversations according to federal law instead of state law violates the

state constitution where the Washington Supreme Court has repeatedly held that failure to comply with the Privacy Act is a statutory, not a constitutional, violation.

5) Whether Mockovak has failed to show a Tenth Amendment violation—federal officials forcing state courts to accept federal law—where three recordings of conversations obtained pursuant to federal law were presented in evidence as a tactical decision by trial counsel?

6) Whether this court should refuse to consider Mockovak's slightly restyled challenge to the entrapment instruction where that challenge was rejected on direct appeal?

7) Whether trial counsel reasonably chose to ask for the pattern jury instruction on entrapment where that instruction, in accordance with Washington law, contains both subjective and objective components.

8) Whether Mockovak has failed to show that trial counsel was ineffective in failing to confront witnesses Klock and Kultin with an incident that had occurred three years before the solicitations to commit murder at issue in this case, where that prior incident would have no impeachment value, whatsoever.

9) Whether Mockovak has failed to support a claim that trial counsel was ineffective for failing to present evidence that Mockovak had been sexually assaulted as a teenager where there is no showing that trial

counsel knew that fact before trial, there is no showing that a “learned helplessness” defense applied to Mockovak, there is no showing such a defense would have been admissible, and where the objective evidence shows that Mockovak was highly aggressive, not passive, in all his interpersonal and business dealings.

D. FACTS

The facts as recited in this Court’s unpublished opinion are reproduced here and suffice as background facts for this petition. State v. Mockovak, No. 66924-9-I, slip op. (COA, Nov. 30, 2013). Additional facts appear in the relevant argument sections where needed. The State will by separate motion make arrangements to have the recorded conversations available in the event this Court desires to hear any portion of those exhibits. See Exhibit 53 (Packet of Discs of Wire Recordings); Exhibit 54 (Transcript of Recordings).

Mockovak and King began practicing together in 2002. The two doctors were the co-owners of Clearly Lasik, a business providing refractive eye surgery. By 2009, the company had grown to operate several surgical centers in both the United States and Canada.

In early 2009, Kultin, the director of information technologies at Clearly Lasik, began to suspect that Mockovak was planning the murder

of the company's former chief executive officer, Brad Klock. Klock, who had been fired from Clearly Lasik in 2006, had filed suit for wrongful termination, seeking damages in the amount of \$750,000. On several occasions, Mockovak asked Kultin, a Russian immigrant, whether he had friends in Russia who could do something that would put an end to Klock's civil case. Kultin first interpreted these comments as jokes.²

Then, in March or April of 2009, as the two men sat alone in the Clearly Lasik lunchroom, Mockovak told Kultin that Klock would be traveling to Europe. In a quiet voice, Mockovak suggested that this would be a good opportunity for something to "happen" to Klock. Based upon Mockovak's demeanor, Kultin began to realize that Mockovak was serious about having Klock killed. After discussing the situation with his father, Kultin contacted the FBI.

In June 2009, Kultin was contacted by Special Agent Lawrence Carr to discuss Mockovak's comments. Agent Carr, who did not initially believe that Mockovak was serious about killing Klock, instructed Kultin that he must not bring up the subject of murder with Mockovak. Instead, Agent Carr told Kultin to tell Mockovak that Kultin was planning to visit a friend whom he believed to be a member of the Russian mafia. Agent Carr hoped that this fictional story would spark a conversation that would

² Mockovak had on several occasions jokingly told Kultin that he believed Kultin was associated with Russian criminal activity.

enable the FBI to understand "what Dr. Mockovak was thinking."

However, when Kultin told this story to Mockovak, it did not prompt Mockovak to further discuss his thoughts regarding Klock. Instead, Mockovak merely commented that Kultin's story was interesting and that he would like to someday meet this person.

Then, on August 3, 2009, Mockovak telephoned Kultin and said that he would like to discuss "that thing that we talked about before." Kultin understood this to mean that Mockovak wanted to further discuss his thoughts regarding Klock. Kultin promptly relayed this information to Agent Carr, who told Kultin that if Mockovak were to raise the subject of harming Klock, Kultin should tell Mockovak that he knew people and would "make some calls."

Kultin met with Mockovak on August 5, 2009 at the Clearly Lasik office. The two men talked in the parking lot. Mockovak expressed his frustration with Klock, and Kultin understood that it was Mockovak's desire that Klock be murdered. Mockovak then raised the subject of his growing frustration with his business partner, King. King was seeking additional compensation for surgeries that he had been performing at Clearly Lasik's surgery centers in Canada. Mockovak told Kultin that King was a "greedy snake" who wanted to split up the business. He said that there was a large insurance policy on King's life that would be paid to

Mockovak if King were to die. Mockovak told Kultin that "maybe we can look after Joe later."³ As he had been instructed by Agent Carr, Kultin told Mockovak that he would make some calls.

Kultin next met with Mockovak on August 11, 2009. Agent Carr arranged for Kultin to wear a recording device.⁴ At the meeting, Kultin told Mockovak that he had been in contact with persons regarding the murder of Klock. He told Mockovak that "they can do it," to which Mockovak responded, "Oh, good, good, good." Kultin then described the persons who would do the killing and explained that such murders are usually disguised as street robberies. Kultin told Mockovak that the men would make sure that the victim was dead.

Mockovak then asked how much the killing would cost. Kultin replied that it was "twenty grand," with \$10,000 to be paid in advance and \$10,000 to be paid after completion of the murder. Mockovak inquired what Kultin would receive, and Kultin told him that he would receive a portion of the money from the killers. Mockovak told Kultin, "Okay, you need to."

Mockovak then told Kultin that he did not want the murder to be done immediately. Rather, Mockovak explained, he wanted to wait until

³ Both Mockovak and Kultin often referred to King by his nickname, Joe.

⁴ The recordings were admitted into evidence at trial. A transcript of the recordings was also admitted.

after the depositions in Klock's lawsuit were completed. If it appeared that Klock would drop his suit, then the murder, which Mockovak described as a purely "financial thing," would be unnecessary. Mockovak told Kultin that he must make this clear to the persons with whom he was discussing the murder-for-hire.

The two men then briefly discussed the possibility of having King killed for the proceeds of the insurance policy. Mockovak told Kultin that the insurance money would be distributed only in the event that King's death occurred before the business was split up. Mockovak then reiterated that no further action should be taken until after the depositions in Klock's lawsuit were completed.⁵

In the months following this meeting, Mockovak's frustration with King grew. On September 30, 2009, King sent Mockovak a letter stating that if the business was not split up by October 31, King would cease to perform surgeries at Clearly Lasik's surgery center in Alberta, Canada. Mockovak considered this an ultimatum and was extremely upset. Shortly after King reiterated his demand in a second letter on October 13, Mockovak began to search for information regarding King's vacation travel plans to Sydney, Australia.

⁵ On September 16, the FBI paid Kultin \$1,200 for the first two meetings he had with Mockovak. Kultin was not promised any specific future payment.

Kultin next met with Mockovak on October 20, 2009. Kultin again wore a wire. Mockovak first reported that the depositions in Klock's lawsuit had been "outstanding." Mockovak told Kultin that there was nothing urgent about Klock, whom he described as nothing more than a "fly on the wall," but that the situation with King was different. Mockovak speculated that King was attempting to force him out of the business completely.

Mockovak told Kultin that King would be travelling to Australia in November and showed Kultin the flight information he had discovered during his investigation the previous week. Kultin told Mockovak that the cost of a murder might be less expensive in Australia, which Kultin described as "a wild place." Mockovak replied, "Oh that's good" and "That's what I'm thinking." Kultin said that he would ask his friend whether the murder could be accomplished in Australia. Mockovak told Kultin that he had secreted enough cash to pay for the hit.

On October 21, 2009, Mockovak called his insurance company and requested a copy of the policy on King's life. The policy, which insured King's life for \$4 million, named Mockovak as the beneficiary.

Kultin and Mockovak met again on October 22, 2009. In this conversation, which was also recorded by the FBI, Kultin told Mockovak that he had spoken to his friend and that "Australia is actually very easy."

He told Mockovak that King could be killed "as a robbery" or "as an accident." Mockovak remarked that Australia was far away and that any investigation of King's death would never "come back here ever." Kultin asked whether King's wife, Holly, was also to be killed, and Mockovak told him "no." Mockovak told Kultin that he had been gathering cash and had by that time set aside \$11,000. The two men then discussed when the post-murder payment would be required.

The tension between Mockovak and King intensified during the ensuing weeks. Both doctors threatened to fire a scheduler in the Renton office because she could not follow the conflicting directives that they imposed for scheduling surgeries. One employee at Clearly Lasik would later describe Mockovak as more angry than she had ever seen him.

Mockovak and Kultin next met to discuss the details of the plan on November 6, 2009. Mockovak described his attempts to discover additional details of King's travel plans. Mockovak told Kultin that he was trying to sell one of the Canadian surgical centers in anticipation of King's death. He said that he was excited about running the business without interference from King.

Kultin asked Mockovak how he would like the murder to be accomplished. Mockovak proposed that King could be killed while he ran on the beach. When Kultin inquired whether Mockovak would like

King's body to be found, Mockovak replied that having the body discovered would be better for purposes of collecting the proceeds of the insurance policy. Mockovak told Kultin that he did not care whether the killers delivered any message to King before murdering him. Instead, Mockovak explained, "I just want him the fuck out of my way."

Kultin then asked Mockovak whether he had "thought this through," and Mockovak replied that he was a "little uneasy." Kultin asked him whether he was going to "freak out" if the murder occurred, and Mockovak told him that he would not. Mockovak explained that although part of him was uneasy, he did not want to put himself at the mercy of an arbitrator or a judge. He told Kultin that King really "ha[d] this coming." Killing King, Mockovak explained to Kultin, was "the only sure way."

Mockovak and Kultin then discussed how to launder the post-murder payment. Mockovak was concerned that his bank account activity would look suspicious if he were to withdraw a large sum of money shortly before King's death. The two men determined that Mockovak would purchase an expensive (but fake) watch from a jeweler associated with the same criminal organization for which the hit-men were working. Kultin emphasized that the second payment must be made or that both Mockovak and he would be in danger. Mockovak told Kultin

that he understood and that he had no desire to get "serious people like this upset."

The two men then discussed what Kultin would receive for his part in the plot. Mockovak told Kultin that he would be hired as the director of marketing at Clearly Lasik. They agreed that no change in Kultin's position within the company should occur until at least six months after the completion of the murder. Mockovak then told Kultin that most of the insurance money would be used to pay Clearly Lasik's obligations and to purchase King's half of the business from King's wife, who would be a co-owner after King's death. Mockovak explained that although this would be expensive, he hoped that "at the end of it all there's like a hundred grand for you."

Near the end of the conversation Mockovak told Kultin that he had often considered going to the garage of Clearly Lasik and killing King himself. Kultin replied, "don't do that." He told Mockovak that it was a "good thing you came to me because otherwise you would have done it the wrong way."

Mockovak and Kultin agreed to meet the following day near Sea-Tac International Airport in order for Mockovak to deliver the first payment. The conversation concluded with Mockovak reiterating that the choice of Australia for the murder was "almost too good to be true."

On November 7, 2009, Mockovak and Kultin spoke by telephone. Mockovak told Kultin that he had successfully stolen a portrait of King and his family from the Clearly Lasik office in Vancouver, Washington. He told Kultin that he was pleased that they had met on the previous night because it had given him 24 hours to contemplate the murder plan. Mockovak said, "It's absolutely the right thing to do."

That night, Mockovak and Kultin met at a soccer park near the airport. The meeting was recorded by the FBI. The men went into a restroom where, as they had planned, Mockovak gave Kultin \$10,000 in cash. Mockovak "wanted to make sure" that he would get his money back in the event that the hit was unsuccessful. Kultin replied that Mockovak would not lose his money.

Mockovak then gave Kultin the photograph of King and his family. He explained that King now had three children and that the children were slightly older than they appeared in the picture. Kultin assured Mockovak that the picture of King's wife would be sufficient for the killers to identify King. Mockovak also gave Kultin a piece of paper on which he had handwritten King's flight information. He told Kultin, "we're ready."

On November 11, 2009, at the direction of the FBI, Kultin called Mockovak and told him that everything was in place for the murder. He

explained that the killers had located King in Australia and that they were now watching him. Kultin told Mockovak that he was expecting to hear news of the murder within several days. Mockovak responded, "That sounds good."

Mockovak was arrested on November 12, 2009. He was charged with solicitation to commit murder in the first degree of Dr. Joseph King, attempted murder in the first degree of Dr. Joseph King, conspiracy to commit theft in the first degree, attempted theft in the first degree, and solicitation to commit murder in the first degree of Brad Klock. A jury found Mockovak guilty as charged of the first four charges but acquitted him of solicitation to murder Brad Klock.

E. ARGUMENT

1. STANDARDS OF REVIEW.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or non-constitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner bears the burden of showing prejudicial error. State v. Brune,

45 Wn. App. 354, 363, 725 P.2d 454 (1986). A petitioner who asserts a constitutional error as grounds for relief must establish by a preponderance of the evidence that he was actually and substantially prejudiced by the claimed error. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992).

To establish ineffective assistance of counsel, Mockovak must show both that defense counsel's representation was deficient, i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. In judging the performance of trial counsel, courts begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. The Strickland standard must be applied

with “scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity” of the adversary process. Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689-90). Counsel’s representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 131 S. Ct. at 788.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. The petitioner must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. “The likelihood of a different result must be substantial, not just conceivable.” Richter, 131 S. Ct. at 792. Speculation that a different result might have followed is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Mockovak’s ineffectiveness claim fails, even if the representation was

deficient. See In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992).

2. MOCKOVAK'S ARGUMENTS PREMISED ON A VIOLATION OF THE PRIVACY ACT MUST ALL BE REJECTED; THE ONE-PARTY CONSENT RECORDINGS IN THIS CASE WERE LEGAL.

Mockovak claims that trial counsel should have sought suppression of evidence because a suppression motion would certainly have been granted, the state prosecution would have crumbled, and the case would then have moved to the more defendant-friendly federal forum. He also argues that a state and federal investigation that depends on recordings made in violation of state law also violate the federal and state constitutions in several different ways. These claims are baseless and must be rejected.

There was no violation of the Privacy Act because the conversations between Mockovak and Kultin concerned efforts to kill two people. Prior judicial authorization to record a conversation is not needed when one party consents and the conversation concerns the solicitation and planning of a murder. If the Privacy Act was not violated, then neither state nor federal investigators did anything illegal, and about three-quarters of Mockovak's claims melt away.

Even if the Privacy Act applied, a motion to suppress would have failed as to the recordings that were authorized pursuant to the Privacy Act, and those recordings were sufficient evidence upon which the State could proceed in state court. Moreover, even if the motion to suppress might have been partially granted, there were sound tactical reasons at that point to keep the case in state court, not the least of which was the fact that Mockovak wanted a quick trial and refused to allow his lawyers to negotiate a plea to any sentence more than five years.

a. Relevant Facts.

Daniel Kultin had a total of ten conversations with Mockovak in 2009 regarding the solicitation to murder Klock and King. They can be summarized as follows:

<u>Date</u>	<u>Location</u>	<u>Recording</u>
Mid-March	Lunchroom Meeting	None
August 5	Parking Lot Meeting	None
August 11	Teriyaki Lunch Meeting	FBI / no state order
August/Sept.	Clearly Lasik Office	None
October 20	Clearly Lasik Office	FBI / no state order
October 22	Bellevue Athletic Club	FBI / no state order
November 6	Maggianos' Dinner	Privacy Act
November 7	Phone Call	Privacy Act
November 7	Starfire Soccer Fields	Privacy Act
November 11	Phone Call	Privacy Act

As is evident from this summary, seven of those conversations were recorded, three were not. Of the seven that were recorded, the first three were obtained pursuant to federal law, and last four were recorded after obtaining authorization under the Privacy Act.

The change in approach was dictated by unforeseen circumstances. Investigators were told after eight months of investigation (March – October) that the United States Attorney believed there might be an insufficient federal nexus for federal charges. PRP, Appendix E (Carr memo). Thus, as is evident from the above summary, just one week before Dr. King’s trip to Australia and one week before the “hit” was supposed to occur, investigators had to shift their investigation in an effort to meet requirements under Washington State law. They promptly sought an authorization under the Privacy Act to record the conversations between Kultin and Mockovak. Id.

- b. The Recordings In This Case Were All Permissible Without Judicial Authorization Because Mockovak’s Communications With Kultin Conveyed Threats To Cause Bodily Harm; Such Communications Fall Under An Exception To The Privacy Act.

It is permissible under both the state and federal constitutions to record a private conversation if one party to the conversation consents to the recording. State v. O’Neil, 103 Wn.2d 853, 865, 700 P.2d 711 (1985);

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992); State v. Clark, 129 Wn.2d 211, 221-22, 916 P.2d 384 (1996). However, the Washington Privacy Act provides greater protection against electronic monitoring, and generally requires judicial authorization before a conversation may be intercepted or recorded, even if one party consents. RCW 9.73.030.

There have always been exceptions to this general rule. See Former RCW 9.73.030(2)(b). In 1977, the Legislature amended the Privacy Act to clarify and expand the exceptions. See Laws of 1977, 1st Ex. Sess., ch. 363, § 3.⁶ One change was to add a new exception that allowed the recording of communications or conversations regarding bodily harm.

Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) *which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands*, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation

⁶ These amendments came in the wake of the Washington Supreme Court's decision in State v. Wanrow, 88 Wn.2d 221, 233, 559 P.2d 548 (1977), which held that a telephone conversation with a police operator was a 'private communication' within RCW 9.73.030(1) and could not be recorded. Part of the amendment was designed to abrogate the interpretation announced in Wanrow, whereas other parts were meant to broaden the exception in ways unrelated to Wanrow. See Lewis v. Dep't of Licensing, 157 Wn.2d 446, 464, 139 P.3d 1078, 1086 (2006) (recognizing abrogation of Wanrow); Kearney v. Kearney, 95 Wn. App. 405, 413, 974 P.2d 872 (1999) ("it is apparent that the Legislature amended RCW 9.73 in 1977 partially in response to Wanrow's narrow interpretation of RCW 9.73...").

ensues, may be recorded with the consent of one party to the conversation.

RCW 9.73.030(2) (*italics added*). This exception has consistently been held to apply to recordings of conversations where suspects plot or conspire to commit murder, meaning that judicial authorization is not required to record communications in murder-for-hire schemes.

The first case to present this issue came to the Washington Supreme Court three years after the threats of bodily harm exception was created. In State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980), several defendants were conspiring to commit a variety of crimes. Ronald Williams, Richard Caliguri, and Robert Valentine were the subjects of a federal investigation into alleged racketeering and attempts to control businesses in Pierce County. Williams, 94 Wn.2d at 534-35. Valentine was arrested for attempting to kill a State Liquor Control Agent and, pursuant to a plea agreement, he became an informant in the investigation. Id.⁷ An undercover agent for the Federal Bureau of Investigation (FBI) assisted. Id. Numerous conversations were recorded at the direction of federal agents, without the consent of Williams or Caliguri, and without compliance with the Privacy Act. Id. The conversations included discussion about various crimes, including racketeering, a plan to bomb

⁷ The briefing submitted in Williams presents a fuller picture of the facts. See Appendix B (Brief of Appellant in State v. Williams, No. 46795 (on file in the King County Law Library)).

the Night Moves Tavern, and a plot to kill Frank Colacurcio by blowing up his automobile. Id. at 535; Appendix B at 2-3.

Williams and Caliguri were subsequently charged in Pierce County Superior Court with aggravated attempted murder for the shooting of the state liquor control agent, attempted murder for the plan to blow up the Night Moves Tavern with knowledge it would be occupied, first degree arson related to the plan to destroy the Night Moves Tavern, conspiracy to commit murder for the plan to kill Colacurcio in his vehicle, and conspiracy to commit first degree arson related to that plan. Id.

After pretrial hearings, the trial court in the Williams case suppressed many recordings concerning general crimes and racketeering, because federal authorities had not complied with the Privacy Act. “The trial court ruled admissible, however, those parts of the conversations which related to threats of extortion, blackmail, bodily harm, or other unlawful requests or demands.” Id. at 536; Appendix B at 4-5.

A different trial court in the Caliguri case ruled that all conversations, even those involving threats or plans for bodily harm, must be suppressed. Id. The supreme court granted the parties’ joint request for interlocutory review in the two cases. Id. at 549.

The court ultimately held that the plot to kill and harm others fell under the exception found in subsection (2) of the Act.

Recordings and police participant testimony concerning any parts of conversations relating to threats of extortion, blackmail, bodily harm, or unlawful requests or demands of a similar nature were properly ruled admissible in the Williams case.

Id. at 534. It rejected the defense argument that the exception applied only to emergencies. Id. at 548-49.⁸ The cases were remanded to the superior court for trial.

After the Washington Supreme Court's decision in Williams, the trial court in Caliguri reconsidered its original rulings and admitted the recorded conversations showing that Caliguri had participated in plans to burn down the Night Moves Tavern. See State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983). As to the arson planned for the Night Moves Tavern, the facts established that a participant in the scheme offered a bonus if somebody in the building was killed. Although there "was general recognition by all of the men of the possibility that someone might die," there was no clear agreement by either Williams or Caliguri that they would kill. Caliguri, at 504. Caliguri recognized that "the janitor's gonna go for sure" and "a few people are gonna take a fall." Id. Virtually all of

⁸ The court rejected several arguments by the State: that the Privacy Act did not apply to federal authorities; that the Act was preempted by federal law; that testimony was admissible even if recordings were not; and that the defendants did not have standing to object to a recording of a codefendant where he did not participate in the conversation. Williams, at 536-46.

the tapes were admitted against Caliguri under the bodily harm exception to the Privacy Act. Caliguri was convicted.

The case then returned to the Washington Supreme Court. On appeal, Caliguri renewed his argument that the recordings should not be admitted under RCW 9.73.030(2)(b), claiming that the trial court had interpreted the threats of bodily harm exception too broadly. The Washington Supreme Court rejected that argument.

The conspiracy in the present case, as do most, if not all, conspiracies, was initiated by one coconspirator's request. Since the conspiracy and underlying request were to commit murder, a crime involving great bodily harm, any conversation 'convey[ing]' the request is squarely within the scope of RCW 9.73.030(2)(b) as construed in Williams.

Id. at 507. Thus, the exception applies to any conversation wherein a threat to commit bodily harm is conveyed.

Caliguri also argued that because the actual request was conveyed in only the second conversation, and the rest of the conversations dealt with implementation of the plan, only the second conversation should be admitted under the threats of bodily harm exception. The court rejected that argument because "the word 'convey' is broadly defined as "to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance." Id. The court held that

Planning among coconspirators to implement an earlier request is behavior indirectly reaffirming and detailing the underlying request. Thus, coconspirator planning to carry out a conspiracy is within the scope of RCW 9.73.030(2)(b) whenever the underlying conspiracy and request is; i.e. whenever the conspiracy began with a request to commit extortion or blackmail or to cause bodily harm.

Id. at 508.

These holdings make plain that all conversations concerning a solicitation to commit murder and the subsequent plans to carry out that murder fall under the threats of bodily harm exception of the Privacy Act, so law enforcement need not obtain judicial approval before obtaining such recordings.

This holding has been followed by other Washington appellate courts. The bodily harm exception was at issue in State v. Robinson, 38 Wn. App. 871, 691 P.2d 213 (1985), and the court reached the same result as had the court in Williams. Robinson was agitated with his wife over a contentious divorce. He left a message on his brother-in-law's voice mail with an implied threat to "go into my drastic act and whoever has to suffer the consequences—whoever wants to have to suffer for it are the ones I can find like you, her sister, and anybody else that is related to her." Robinson, 38 Wn. App. at 873. In the ensuing days, Robinson shot and wounded the brother-in-law and then killed his wife's divorce lawyer. He argued that the recorded voice mail message violated the Privacy Act

because it did not contain an express threat. The court rejected that argument as inconsistent with the Supreme Court's interpretation of the statute.

The word "convey" as used in RCW 9.73.030(2)(b) recently has been defined by the Supreme Court as: to impart or communicate either directly by clear statement or *indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.* ...

We hold the message at the very least implies that Mr. Robinson will inflict bodily harm on Mr. Pruitt and his relatives if he does not see his children. Thus, the message is admissible under RCW 9.73.030(2)(b) without proof of Mr. Robinson's consent to the recording.

Id. at 885 (italics in original).

More recently, this Court reaffirmed this interpretation of the "bodily harm" exception in State v. Babcock, 168 Wn. App. 598, 279 P.3d 890 (2012). Babcock was a prison inmate who tried to persuade an undercover officer to murder the father of Babcock's child molestation victim. He argued that the recordings did not fall within the bodily harm exception because he never expressly threatened bodily harm. The Court of Appeals rejected his argument in light of the statutory exception.

...[T]he conversations between Babcock and Agent Floyd fell within the purview of the exception. Agent Floyd testified that at the first meeting, Babcock said, "[H]e wanted to have a couple of people killed" and named the targets. ... The second meeting was the planning stage of the conspiracy. Agent Floyd wrote, "I found Harley T. Are you sure you want him done?" ... Babcock responded,

“10-4,” which Agent Floyd understood as an affirmative response. ... Agent Floyd also wrote, “When I leave here, we have a deal. Harley’s f* * *ing dead.” ... Although Babcock did not agree to the deal that day, he later sent a letter confirming it. These conversations conveyed threats of bodily harm, which fall within the scope of the statutory exception under RCW 9.73.030(2)(b).

Babcock distinguishes his case from Caliguri, where the recordings capture the defendant explicitly recognizing the possibility of bodily harm in committing the underlying arson, by arguing that the recording must contain the defendant expressly making a threat of bodily harm. But the Caliguri court did not draw that distinction. Rather, it broadly construed “convey” to include all stages of the agreement and planning that contain threats of bodily harm. Caliguri, 99 Wn.2d at 507-08. Additionally, as the State points out, the statute states that all conversations conveying a threat of bodily harm may be recorded, thereby demonstrating that the legislature did not intend to limit the threat exclusion to conversations where the defendant expressly states the threat of bodily harm. See RCW 9.73.030(2).

Babcock, 168 Wn. App. at 608-09.

It is clear that the Washington Legislature agrees with this interpretation of the statute. The legislature’s “failure to amend a statute following a judicial decision interpreting that statute ... indicate[s] legislative acquiescence in that decision.” City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). In the three decades since Williams was decided the legislature has never amended the language of the bodily harm exception to narrow the exception. It reads the same now as it did in 1980. Had the Legislature disagreed with the judicial

interpretation of the exception, it certainly could have amended the statute, as it did following Wanrow. Thus, it is clear that plots to murder may be recorded with one-party consent and that judicial authorization pursuant to the Privacy Act is not required.

Mockovak's solicitations and planning to murder Klock and (later) Dr. King are indistinguishable from Williams, Caliguri, Robinson, and Babcock. The recordings of these conversations with the consent of Daniel Kultin were perfectly legal under Washington law, even without prior judicial authorization. Mockovak's Privacy Act arguments—and a great deal of the material in the declarations attached to his personal restraint petition—are simply inapposite. The arguments all turn on the flawed premise that the recordings violated the Privacy Act. The arguments must be rejected.

Mockovak may claim that those portions of the recordings which concerned conversations to kill Klock or Dr. King fall under the exception but that conversations unrelated to the murders should not have been recorded. This argument fails for two reasons.

First, as the Washington Supreme court plainly held in Caliguri, all planning associated with the conversations is admissible under the bodily harm exception. Caliguri, at 607-08. This is sensible. A rule that required judicial authorization for casual conversation interwoven into the

planning of the murder would be impossible to implement. Any normal human conversation covers a spectrum of topics. Given the normal ebb and flow of human conversation, it would be impossible to know beforehand which portions of a conversation could be recorded. Investigators would have to always seek authorization, effectively nullifying the exception.

Secondly, a ruling suppressing only the plans to kill Klock and Dr. King would be of no use to Mockovak in this case because, as trial counsel astutely argued at great length, the entrapment defense required that the jury hear the complete recordings. 11RP 151 (“Your Honor I’m going to object. If these recordings are going to be played, they should be played in their entirety.”). The matter was discussed at length outside the presence of the jury.

ROBINSON: Under the rule of completeness, if part of a statement is admitted, the entire statement should be admitted in order to clarify and put that statement into context. The relationship between Dr. Mockovak and Brad Kultin is the key issue in this case. Daniel Kultin, excuse me, is the key issue in this case, and pages 1 through 28 quite frankly have all kinds of detail about the nature of that relationship, and I don’t think that the State should be allowed to pick and choose which parts of these tapes are played. If the recording is going to be admitted, we’re asking that the entire recording be played, or quite frankly, I just want to put people on notice we are going to be here a lot longer because we will be moving to play that entire tape in its entirety from beginning to end on cross-examination. It is critical to us to have the jury hear the

entirety of these conversations. One of the things that was just glossed over is Mr. Kultin accusing Joe King of taking the key and running it down the side of Dr. Mockovak's car. We believe that there are literally dozens of small comments like that where Mr. Kultin is deliberately pouring fuel on the fire of Dr. King's dislike, distrust, or the fact that he's upset or Dr. Mockovak being upset with Joe King. That's just one example. There is another example at the very beginning of this tape on page 3 where Mr. Kultin indicates that it will be a failure if Dr. Mockovak changes his mind and goes away.

11RP 154-55. The entrapment strategy depended on the jury hearing *everything* that Kultin was saying or doing in Mockovak's presence.

11RP 158-59. The strategy was designed to show Kultin's persistence.

ROBINSON: Entrapment doesn't happen in a second. It happens over a period of time, and one of the things that Daniel Kultin did was to insert himself as a friend with Dr. Mockovak, as somebody that Dr. Mockovak could trust. That building of that trust relationship is critical to our presentation of the entrapment defense because our view is that Mr. Kultin manipulated Dr. Mockovak from the very beginning, from the very beginning, and so the conversations about girlfriends, breast implants, and those things, they're not something that anybody is proud about, but they are clearly establishing this personal relationship of friendship and trust because part of the theme that runs through this is come on, Mikey, it's you and me together, it's you and me, we're in this together in terms of killing Dr. King, having a contract to kill Dr. King or a contract to kill Brad Klock, and all of this you and me together is critical.

12RP 6. This was an intelligent trial strategy that could not have been achieved if counsel had obtained a piecemeal suppression ruling.

Mockovak may also claim that the State is estopped from raising this argument because it sought judicial authorizations under the Act. Any such argument should be rejected. Whether plans to kill fall under the Privacy Act's exception is a purely legal question, and no court would be bound by an erroneous concession on a legal issue. See State v. Knighten, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988); State v. Lewis, 62 Wn. App. 350, 351, 814 P.2d 232 (1991).

Moreover, in the Privacy Act context, the State may seek judicial authorization in an abundance of caution, but the extra effort of law enforcement does not create an obligation to obtain authorization where there is no statutory obligation. In State v. Clark, for example, the State obtained judicial authorization to record scores of conversations with the consent of an informant. State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996). The Washington Supreme Court ultimately held that these conversations were not subject to the Privacy Act because they were not private. Clark, 129 Wn.2d at 227-28. There was no suggestion, whatsoever, that by seeking permission to record the State created an obligation to seek permission.

For these reasons, Mockovak's myriad arguments based on alleged Privacy Act violations must be rejected. This includes approximately 75% (by volume) of his PRP. If this Court decides that the recordings fall

under the exception to the Privacy Act, it need not reach Mockovak's myriad of claims based on a failure to pursue suppression of the recordings.

c. A Suppression Motion Would Have Been Denied.

Based on the foregoing, it is clear that counsel's failure to pursue a suppression motion cannot be ineffective assistance of counsel because the motion would have been fruitless. See United States v. Molina, 934 F.2d 1440 (9th Cir. 1991) (no prejudice from failing to pursue suppression of evidence); United States v. Lawhorn 735 F.3d 817 (8th Cir. 2013); Ray v. United States, 721 F.3d 758 (6th Cir. 2013); Kellog v. Scurr, 741 F.2d 1099 (8th Cir. 1984) (failure to seek suppression of gun would have been futile). Mockovak cannot establish prejudice from the failure to pursue such a fruitless motion.

3. EVEN IF THIS COURT CONCLUDES THAT THE RECORDINGS HERE WERE SUBJECT TO THE PRIVACY ACT, TRIAL COUNSEL MADE A REASONABLE TACTICAL DECISION NOT TO SEEK SUPPRESSION OF EVIDENCE AND THERE IS NO PREJUDICE.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "Inquiry

into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." Strickland, at 691.

Because strategic decisions can depend on the exercise of professional judgment and a myriad of tangible and intangible factors, the Washington Supreme Court continues to stress the importance of presuming that trial counsel's strategic decisions are reasonable. In State v. Breitung, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011), the defendant was charged with assault in the second degree based on use of a deadly weapon. His trial lawyer's theory of the case was that there was no assault at all, so the lawyer did not seek a lesser offense instruction, choosing to force the jury to either accept his theory and acquit, or to convict. Breitung, 173 Wn.2d at 398-99. On appeal, Breitung claimed that his lawyer was constitutionally ineffective for choosing this strategy. The Court of Appeals agreed with Breitung, but the Supreme Court reversed the Court of Appeals, holding that the lower appellate court had abandoned the presumption that counsel's strategic choice was reasonable.

Washington follows the Strickland standard to determine whether a defendant had constitutionally sufficient representation. In finding ineffective assistance in this case, the Court of Appeals applied the three-pronged analysis from its opinion in Grier, which we rejected on review as distorting the Strickland standard. Grier, 171 Wn.2d at 38, 246 P.3d 1260. The result in this case is largely controlled by our Grier opinion. There, we reaffirmed our strict adherence to the Strickland standard

and established that to demonstrate ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's performance was reasonable. When counsel's conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient. Grier, 171 Wn.2d at 33.

Id. In the absence of any evidence on the subject, courts should presume counsel discussed trial strategy with his client. Id. at 399-401.

In this case, trial counsel told the court that a pretrial CrR 3.6 hearing was not necessary. 1RP 99. Mr. Robinson makes it clear in his declaration that his client wanted a speedy trial and that nothing longer than a five year sentence would be acceptable to him. PRP, Decl. of Robinson at 5-6. Mockovak had given his lawyers some clear directives.

Dr. Mockovak made it clear that he was not interested in pursuing strategies based on a lower sentence – he was adamant that he was innocent and, for example, would not consider allowing us to ask for a sentence as low as five years in attempts to resolve the case. He wanted a trial as quickly as possible, as long as we were prepared to deal with the witnesses and evidence. ...

Weighing all of the above mentioned factors, I concluded that we would be better off in state court. Accordingly, I made the strategic decision not to make any motions for suppression of any of the recorded conversations which took place between Daniel Kultin and Dr. Mockovak.

PRP, Decl. of Robinson, at 5-6. This passage is, standing alone, sufficient to reject Mockovak's argument. Trial counsel is responsible for making strategic decisions even over the client's objections. Taylor v. Illinois,

484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001); State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967); ABA Standards for Criminal Justice: Prosecution Function and Defense Function Std. 4-5.2 (3d ed.1993). It was Robinson's responsibility to achieve Mockovak's goals in the manner Robinson deemed most effective. Mockovak would not have had a quick trial if the state prosecution were dismissed and then restarted in federal court. And, as discussed below he would have faced a long sentence no matter where he was tried.

Mockovak's PRP consistently understates some factors in the strategic equation, and overstates others. For instance, he acknowledges that if he went to trial in federal court, *all* the recordings would be admissible, but then he fails to acknowledge how this affects the state versus federal court calculus.

Additionally, federal entrapment law is not as clearly beneficial to Mockovak as he pretends. Although it is true that the government must disprove entrapment in federal court, that burden applies only after the defendant has made a sufficient showing that he is entitled to the defense. United States v. Spentz, 653 F.3d 815, 818 (9th Cir. 2011) (undercover agent's presentment of plan to rob drug house did not constitute inducement required to establish entrapment defense); United States v.

Skarie, 971 F.2d 317, 320 (9th Cir. 1992) (defendant must present “undisputed evidence making it patently clear that an otherwise innocent person was induced to commit the illegal act”).

There are five factors a court must evaluate to determine whether a defendant was inappropriately induced. United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) (“[T]he character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government. ...). “Although none of these factors is controlling, the defendant’s reluctance to engage in criminal activity is the most important.” United States v. Busby, 780 F.2d 804, 807 (9th Cir. 1986) (citation omitted). See also Ninth Circuit Criminal Jury Instruction 6.2.

Mockovak would have had significant difficulty meeting this test. He had a highly aggressive and combative character, he proposed the scheme to murder Dr. King, he sought to profit from the plan, and, far from showing reluctance, he demonstrated enthusiasm, determination, and the financial commitment of \$10,000 in cash to see it through, and was

uncharacteristically jovial on the eve of the murder. Based on these facts, it is possible that a federal court could have refused Mockovak an entrapment instruction. Had an instruction been refused, Mockovak would certainly have been convicted in federal court.

As to the issue of sentencing in federal court, Mockovak never provides any analysis for his repeated assertions that a federal sentence for his crimes would be several times shorter than the state sentence. This assertion seems to be a serious overstatement.

The sentence Mockovak faced in federal court would depend, of course, on the precise charges that were filed. If Mockovak had been charged with conspiring to violate the federal murder statute (18 U.S.C. §§ 1111, 1117), attempting to commit murder (18 U.S.C. §§ 1111, 1113) or with soliciting a murder (18 U.S.C. §§ 373, 1111), the sentencing exposure would be very similar to what he would have faced in state court. The sentencing range for a federal conspiracy is 0 to 5 years (18 U.S.C. § 371), and the range for attempted murder and solicitation of a crime of violence (e.g., murder) is 0 to 20 years. 18 U.S.C. §§ 373, 1111, 1113. The sentencing range for conspiracy to commit murder is 0 to life. 18 U.S.C. § 1117. The Guidelines range applicable to a federal murder conspiracy would be 33 (U.S.S.G. § 2A1.5(a)), and there would be a 4-level upward adjustment based on the fact that he paid Kultin \$10,000 to

ensure the hit. U.S.S.G. § 2A1.5(b). That's a total offense level of 37, and assuming there were no other applicable adjustments, the Guidelines range for a defendant with no criminal history who went to trial would be 210 to 262 months. As this Court is aware, Mockovak received a 240 month sentence in state court.

If there was concern about a federal nexus for the conspiracy to murder charge, the case could had been charged more conservatively as Using Interstate Commerce Facilities in the Commission of a Murder for Hire. 18 U.S.C. § 1958. The statutory punishment for conspiracy is the same as the completed crime: 0 to 10 years if no one is injured. The applicable Guideline under this scenario is U.S.S.G. § 2E1.4(a), which requires a minimum base offense level of 32. Assuming this base offense level applied, and there were no other enhancements applicable, a defendant with no criminal history who went to trial would face an advisory Guideline range of 121 to 151 months. But since the statutory maximum is 120 months, that would be the Guidelines range. U.S.S.G. § 5G1.1(a).

In either scenario, Mockovak would have faced between ten and twenty years in prison, at least twice the 5 years postulated in his PRP

briefing and twice the confinement time he was willing to endure.⁹ This does not even factor in the attempted theft conviction. Thus, it is apparent that the claimed benefit of being sentenced in federal court is illusory, or at least not as clear as Mockovak pretends.

This fact substantially alters the calculus as to whether Mockovak has shown deficient performance and prejudice. If trial counsel won a suppression motion and forced the case into federal court, he certainly would have faced seven recordings instead of potentially only four, he would have run the risk that the trial judge would not permit an entrapment instruction, and he would have faced a sentence of at least ten years, twice what Mockovak was apparently willing to accept.

Moreover, Mockovak has not established prejudice because there are a number of reasons to believe a suppression motion would have failed, even if the Privacy Act applies. As discussed above, “[t]he likelihood of a different result must be substantial, not just conceivable.” Richter, 131 S. Ct. at 792.

First, it is simply not true that a suppression motion would have prevailed as to all the recordings. Assuming, *arguendo*, that the trial court excluded the first three federally-approved recordings, there was still

⁹ For purposes of showing the relative punishment, this analysis considers sentencing on a single count. Of course, Mockovak could not know before trial that he would be acquitted on one count.

sufficient evidence upon which to authorize the last four state-approved recordings because there was sufficient information available from unrecorded conversations to establish probable cause.¹⁰

Probable cause exists where there are facts sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause, and an issuing magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. State v. Emery, 161 Wn. App. 172, 201, 253 P.3d 413 (2011); State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

An authorizing judge would have been provided with any information not obtained through the federal recordings. That would have included all the background information about the acrimonious business dealings among Mockovak, Klock, and Dr. King. The judge would have heard that in March 2009, Mockovak showed interest in having Kultin arrange a hit with the assistance of Kultin's Russian contacts. The court would have learned about the on-going relationship between Kultin and

¹⁰ “[T]he Legislature intended for the analysis of the probable cause issue in a Privacy Act matter to be governed by the terms of the statute itself, not by constitutional probable cause principles. State v. D.J.W., 76 Wn. App. 135, 144, 882 P.2d 1199 (1994), affirmed, State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

Mockovak. The court would have known that Mockovak followed up on his earlier request in a conversation in the parking lot of Clearly Lasik with Kultin on August 5, 2009. In that conversation, Mockovak attempted to assess Kultin's loyalties, he talked about wanting to make Klock disappear in a more old-fashioned or illegal way like they did things in Russia. He expressed great displeasure with Dr. King and noted that there was a \$4 million insurance policy on King and that maybe they could look to King later. They agreed that Kultin would follow-up with his contacts in Los Angeles regarding how to make Klock disappear, and then they would meet again. 11RP 103; PRP, Appendix C (Application for Authority to Intercept, at 7-9). At the end of August or the beginning of September, Mockovak told Kultin in a brief conversation that he had started to stash aside some cash. 12RP 37.

This information would have been sufficient to establish probable cause to believe that Mockovak would discuss the commission of the crime of murder in a subsequent conversation with Kultin. Thus, even without the federally-recorded conversations, there would have been sufficient information to record the four conversations that were recorded between November 6th and November 11th. These conversations contain some of the most damning evidence against Mockovak. And, the testimony of many other witnesses—like those who testified that

Mockovak was jovial on the day assigned for Dr. King's murder—would have been unaffected by any suppression ruling. Thus, even if the federal recordings were suppressed, it does not follow that all recordings would be suppressed, or that the state prosecution would have ended. For these reasons, Mockovak has failed to demonstrate a probability that the result of this trial would have been different if trial counsel had brought a motion to suppress.

4. THE INVESTIGATION INTO MOCKOVAK'S PLAN TO HIRE A HIT MAN WAS NOT CONDUCTED IN BAD FAITH, DID NOT VIOLATE DUE PROCESS, DID NOT VIOLATE THE STATE CONSTITUTION, AND DID NOT VIOLATE THE TENTH AMENDMENT.

Mockovak's arguments under the Due Process Clause, the Washington State Constitution, and the Tenth Amendment depend critically on the premise that state officers violated the Privacy Act. PRP at 82-96; Supp. PRP at 20-27. However, as argued above, state officers did not violate the Act because the Privacy. It follows that Mockovak's arguments based on the Due Process Clause, the State Constitution, and the Tenth Amendment must be rejected.

Even if the state investigator violated the Privacy Act when he participated in the making of the initial three federal recordings, Mockovak's arguments fail for the reasons set forth below.

a. Investigators Did Not Act In Bad Faith So There Was No Due Process Violation.

Mockovak's argument turns on the assertion that investigators acted with an "improper motive" and that they had "a desire to violate a state criminal law." PRP at 84. This is simply untrue. What started as a federal investigation became a state prosecution when the federal prosecutors said, just before the planned "hit" was to be committed, that there was an insufficient nexus to justify federal prosecution. That is not bad faith.

In general, "cooperation between state and federal authorities is encouraged." State v. Hoffman, 116 Wn.2d 51, 78, 804 P.2d 577 (1991). "It is clear that whether or not to file what charges, against whom, and when to file, are questions to be determined exclusively within the discretionary authority of district attorneys in state court and United States attorneys in federal court." See United States v. Davis, 906 F.2d 829, 834 (2d Cir. 1990) (federal prosecution properly initiated even though based on evidence suppressed in state court). Federal prosecution does not violate due process even where state investigators gathered evidence in violation of federal law. United States v. Melendez, 60 F.3d 41, 50 (2d Cir. 1995), cert. granted, judgment vacated sub nom. Colon v. United States, 516 U.S. 1105 (1996).

The relevant sequence of events was made clear by Agent Carr in his November 17, 2009 memorandum but is ignored in Mockovak's PRP. PRP, Appendix E (Carr memo). Agent Carr briefed an Assistant United States Attorney (AUSA) about the investigation in early August and it was Carr's belief that the case would be prosecuted in federal court. Id. at 5. In the last week of October, just before Mockovak was going to make the down payment for the hit, the AUSA raised a question about whether there was a sufficient federal nexus to justify prosecution in federal court. This is a jurisdictional limit, so it was a legitimate concern to investigators. Because it might be necessary for the case to be prosecuted in state court, the investigators obtained authorization under the Privacy Act. Id. They still expected a federal prosecution, but they sought state authorization out of an abundance of caution. Id. In the end, however, the AUSA decided that the case should be prosecuted in state court. Id. The state prosecutors made clear that they did not know why federal prosecutors had refused to file the case, and they had no idea if the federal prosecutors would agree to file it now. 3RP 8-9.

Mockovak does not cite to a single case that holds that an investigation that starts as a federal investigation must remain a federal prosecution. He cites to United States v. Anderson, 940 F.2d 593 (10th Cir. 1991), but that case simply observes in dicta that a retaliatory motive

or an attempt to avoid speedy trial limits might constitute bad faith. Here, there is no evidence of retaliation and, if Mockovak's interpretation of the Privacy Act is to be believed, there were greater limits in state court than in federal court. When the case appeared destined for federal court, the investigators complied with federal law. When it became possible that the case would be prosecuted in state court, the investigators quickly took action to comply with state law.

Mockovak also cites to United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975). In that case, however, a court found bad faith in that the prosecutors dismissed charges and then refiled the case in a different federal district court in an effort to negate the first court's unfavorable rulings. This caused a lengthy delay and the case was ultimately dismissed on speedy trial grounds. None of those circumstances exist here.

The actions of law enforcement did not violate either state or federal law since the recordings were permitted under the Privacy Act. Should this court decide otherwise, it should still reject defendant's argument because investigators did not act in bad faith; they did not set out to violate state law, they simply adjusted to changed circumstances.

b. The Investigation Did Not Violate The State Constitution.

Mockovak argues that conversations recorded pursuant to federal law that do not comply with the Washington Privacy Act are not admissible in state prosecutions. PRP at 91 (citing State v. Williams, 94 Wn.2d at 541). He then argues that such “recordings also violate the state constitutional guarantee of privacy protected by article I, § 7.” PRP at 91-92. There is no citation to authority following this assertion. It is well-established that some one-party consent recordings violate the Privacy Act but even those do not violate article I, § 7.

This court has clearly established that where one participant in a conversation has consented to the recording of the conversation, the recording does not violate Article I, Section 7 of the State Constitution. State v. Corliss, 123 Wn.2d 656, 663-64, 870 P.2d 317 (1994). Indeed, in State v. Salinas, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992), where a “wired” undercover informant posed as an illegal narcotics seller and secretly recorded conversations with the defendant-buyer, we observed that this constitutional issue was settled, and stated that there is no expectation of privacy under our State Constitution where one party consents to the conversation being recorded.

State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996) (“One who unwittingly speaks to an undercover agent necessarily risks the listener’s trustworthiness, and has no justifiable expectation of privacy that the same conversation that could be recounted under oath in court might not also be played back in court on a tape recorder.”).

There follows in the PRP an extended discussion of *how* a defendant can establish such a violation—whether and to what extent state actors may be involved in violating constitutional rights in another forum. This discussion is irrelevant. The cases Mockovak cites all involve alleged constitutional violations committed by federal and state actors working together. But if obtaining the recordings did not violate the state constitution when gathered in a wholly state investigation, the recording does not become a constitutional violation simply because federal officials were involved.

Mockovak also argues that the recordings violated article I, § 7 because the Privacy Act creates a constitutional right to privacy that can be infringed only pursuant to authority of law. PRP at 95-96. This argument proves too much. If each statutory violation is really a constitutional violation then State v. Clark, and similar decisions would be simply wrong. This argument must be rejected, too.

c. The Investigation Did Not Violate The Tenth Amendment.

Mockovak argues that the Tenth Amendment does not permit federal authorities to dictate criminal law in state court, and that allowing the State to admit recordings gathered in violation of state law is tantamount to allowing federal law enforcement officers to usurp state

law. PRP at 96-98. This argument should be rejected. As argued, neither federal nor state officers violated state law in this case. Moreover, even if the state officer did violate state law while working with a federal investigation, this argument was never raised below, it is not manifest constitutional error (RAP 2.5(a)), and counsel deliberately chose not to seek suppression of evidence. The federal investigators did not force the state court to do anything. Finally, even under Mockovak's new theory, a Tenth Amendment violation would occur only if the three federally recorded conversations were admitted into evidence over his objection. Surely the four state-authorized recordings, if based on information untainted by the federal recordings, could not be considered a federal intrusion into state law. In any event, Mockovak cannot show actual prejudice from any alleged Tenth Amendment violation.

5. TRIAL COUNSEL PROPERLY PROPOSED WPIC 18.05 ON THE ISSUE OF ENTRAPMENT.

This Court held on direct appeal that trial counsel reasonably proposed WPIC 18.05 because there was no case law to suggest the instruction was flawed. Mockovak, slip op. at 13-16. Mockovak argues, however, that this court overlooked his discussion of State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996), and that "WPIC 18.05 [is] irreconcilable with the Lively decision." Supp. PRP at 44. His argument should be

rejected. This court did not overlook the present argument; it was a subsidiary part of the direct appeal argument, but not a stand-alone argument. The attempt to rely on the subsidiary argument now is simply an attempt to relitigate the issues decided on direct appeal.

In any event, the argument is baseless because WPIC 18.05 is compatible with Lively, and no case supports Mockovak's novel argument. Trial counsel was not ineffective for failing to advance that argument.

a. There Is No Cause To Revisit The Entrapment Issue; WPIC 18.05 Is A Correct Statement Of Law.

A personal restraint petition is not a forum to relitigate issues already considered on direct appeal. In re Pers. Restraint of Lord, 123 Wn.2d 296, 329, 868 P.2d 835 (1994); In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998). Simply revising a previously rejected legal argument neither creates a new claim nor constitutes good cause to reconsider the original claim. In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Nor may a petitioner create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching the argument in different language. Lord, 123 Wn.2d at 329; Pirtle, 136 Wn.2d at 491.

Mockovak argued on direct appeal that the entrapment instruction was faulty because it included a sentence that called for an objective inquiry into law enforcement tactics. He argued that in Washington entrapment is a wholly subjective inquiry. He makes the same argument now, except he has shifted focus to rely on a Supreme Court opinion instead of an old Court of Appeals opinion. This is a simple recasting of the direct appeal argument and this Court need not consider it.

Washington has codified the entrapment defense in RCW 9A.16.070. That statute provides:

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

RCW 9A.16.070. The trial court gave the instruction on entrapment proposed by Mockovak which read as follows:

Entrapment is a defense to each of the charges in this case if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and Michael Mockovak was lured or induced to commit a crime that he had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford Michael

Mockovak an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

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

CP 366, 595 (Instruction 29).

The entrapment instruction proposed by Mockovak and given by the court was identical to WPIC 18.05, with two exceptions unrelated to the statement of law: Mockovak's name was substituted for "the defendant" throughout, and the reference to "a charge of ____" in the WPIC instruction was replaced with "each of the charges in this case." Compare CP 595 with WPIC 18.05.

On appeal, Mockovak claimed based on State v. Keller, 30 Wn. App. 644, 637, P.2d 985 (1981), that a single sentence in the pattern instruction—"The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment"—was not a component of the defense of entrapment. He argued that the court in Keller had "unequivocally held that the amount of persuasion used by government agents [is] *irrelevant* to the entrapment defense." Br. of Appellant at 76 (italics added). As a prelude to his Keller-based argument, Mockovak

discussed State v. Lively to show that the test for entrapment in Washington was subjective. Br. of Appellant _____. He did not argue, however, that WPIC 18.05 was incompatible with Lively standing alone, as he claims in his supplemental personal restraint petition. This court rejected his Keller-based argument and held that “because there was no case law at the time of Mockovak’s trial indicating that WPIC 18.05 was incorrect, defense counsel did not provide ineffective assistance by proposing an instruction based upon this pattern jury instruction.” Mockovak, at 13-16.

The ends of justice do not require that this Court reconsider Mockovak’s attempt to make the same argument in his PRP, refined solely to be based on Lively instead of Keller.

- b. Trial Counsel Was Not Deficient In Proposing WPIC 18.05 Because Mockovak’s Novel Argument Is Unsupported By The Statute Or Case Law; The Test For Entrapment is Primarily Subjective But It Also Includes Objective Components.

Mockovak’s present argument should be rejected even if it is considered anew. The argument stems from the flawed premise that a jury’s decision on entrapment considers only the subjective state of mind of the defendant. Proceeding from this false premise, he argues that WPIC 18.05 is flawed insofar as it includes an objective component. This is

simply incorrect. Predisposition and inducement are, essentially, different sides of the same coin. Even in states like Washington that have adopted a subjective test for entrapment, a jury also considers the type and extent of police persuasion, because the nature of the inducement is relevant to determining whether the defendant was predisposed to commit the crime, or was simply overtaken by the inducement.

Washington cases clearly recognize this relationship. In the context of discussing whether a defendant must prove entrapment, the court in State v. Lively observed that the test was primarily focused on the subjective state of mind of the defendant, but that the conduct of the police was relevant, too.

While it is true that *in cases involving entrapment the State's action is integrally involved*, predisposition of the defendant is the focal element of the defense. The defendant has the knowledge and ability to establish whether he or she was predisposed to commit the crime; whether he or she was lured or induced to do so by the State; and whether the criminal design originated in the mind of the police or an informant.

Lively, 130 Wn.2d at 13 (italics added). This is wholly consistent with prior Washington decisions. In State v. Waggoner, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971), the court held that the use of a normal amount of persuasion to overcome reluctance to enter into a criminal transaction does not constitute entrapment. The court reaffirmed that principle in State v.

Smith, 101 Wn.2d 36, 42-43, 677 P.2d 100 (1984). This Court explained the distinction as the difference between solicitation or normal persuasion to commit a crime, which is not entrapment, and undue solicitation, which would be entrapment. State v. Swain, 10 Wn. App. 885, 889, 520 P.2d 950 (1974); accord State v. Keller, 30 Wn. App. 644, 647-48, 637 P.2d 985 (1981). Thus, a jury must necessarily consider both the defendant's state of mind and the government's inducement.

If the government's inducements were grossly inappropriate, however, the defendant might claim a violation of the Due Process Clause, and the analysis would be conducted by the court, not a jury, and it would focus on the actions of the governmental agents.

Under the subjective approach of entrapment, the focal issue is the predisposition of the defendant to commit the offense. Conversely, outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be so outrageous that the due process principles would absolutely bar the government from invoking judicial process to obtain a conviction.

Lively, at 19 and 21 ("we focus on the State's behavior and not the Defendant's predisposition"). In his dissent in Smith, Justice Utter explained that Washington courts have required that the inducement go beyond a normal amount of persuasion, and constitute undue solicitation; he noted that a defendant need not allege outrageous conduct to establish an entrapment defense. Smith, 101 Wn.2d at 47 (Utter, J., dissenting).

That is, the persuasion that would constitute entrapment is more than the normal persuasion required, but less than outrageous conduct. The Court of Appeals in Keller also noted that the statutory defense does not require proof of outrageous conduct, but does require proof of undue persuasion. Keller, 30 Wn. App. at 647-48.

Thus, the defense of entrapment is distinct from a legal due process challenge. The defendant who claims entrapment must prove both that the criminal design originated in the minds of law enforcement and that he “was lured or induced to commit a crime which the actor had not otherwise intended to commit.” RCW 9A.16.070(1). The entrapment statute also provides that the defense “is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.” RCW 9A.16.070(2). The case law simply attempts to explain the distinction between “merely afford[ing] an opportunity to commit a crime,” and inducement by undue persuasion. Waggoner, 80 Wn.2d at 10-11; Smith, 101 Wn.2d at 42-43. The phrase, “a reasonable amount of persuasion to overcome reluctance does not constitute entrapment” defines the inducement that the defendant must prove. Lively holds that the subjective inquiry is the primary focus, but it does not hold that the inquiry is wholly subjective. Because WPIC 18.05 is an accurate

statement of the law, Mockovak has not sustained his burden of establishing deficient performance.

Nor can he establish prejudice, which requires a showing that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d at 226; Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792. The trial court would not have given an instruction that did not accurately reflect the law of entrapment, so it would have done no good for trial counsel to request it. Further, even if Mockovak's instruction had been given, the evidence at trial was not sufficient for a rational juror to find entrapment by a preponderance of the evidence. Mockovak did not testify at trial. The most direct evidence of his state of mind was the recordings of his conversations with Kultin. In those recordings, it is clear that Mockovak initiated and was directing the activity, and that Kultin was simply providing the opportunity for Mockovak to proceed if he chose to do so. There is no evidence that Mockovak lacked the predisposition to commit the crime, and without that element, no entrapment defense can prevail.

Mockovak admitted at trial that he was the first to articulate a plan to kill Klock (although he claimed it was a joke), who was suing the business.16RP 114. His attitude throughout his conversations with Kultin

did not suggest surprise or reluctance. Kultin took Mockovak's intention to kill people seriously; Kultin asked the FBI agents, "What if he decides to kill me?" and told them that he thought the situation was very risky. Tr. 10/22 at 2-3. As soon as Mockovak understood that he might be able to hire hit men, he began to secure cash, weekly, in \$1000 increments, in order to be able to pay for the hit without drawing suspicion. He attempted to determine Dr. King's travel schedule by looking at Dr. King's Alaska Airlines account. He took a picture from the Clearly Lasik offices so that the killers could find their mark. Mockovak said at the October 22 meeting that he had set aside \$11,000 so far, and said at the November 6 meeting that he had been taking out \$1000 per week; at that rate, he had begun setting aside cash on about August 6. Tr. 10/22 at 145; Tr. 11/6 at 12. He called Kultin on November 7, the day after the two had a lengthy planning session about how the murder would be committed, and told Kultin that he was glad they had talked, because, it had given him 24 hours to reflect, and he continued to be absolutely sure that murdering King was the right thing to do. He was uncharacteristically jovial at the office when it appeared that Dr. King would be murdered. These facts were refuted any suggestion that Mockovak was induced to commit a crime that he was not predisposed to commit. Mockovak cannot establish a substantial likelihood that the jury's verdict would have been different.

6. TRIAL COUNSEL EFFECTIVELY IMPEACHED
KLOCK AND KULTIN; FAILURE TO IMPEACH THEM
BASED ON KLOCK'S EMAIL PROBLEMS IN 2005
DOES NOT ESTABLISH INEFFECTIVE ASSISTANCE
OF COUNSEL.

Mockovak claims trial counsel were ineffective in failing to discover and present certain information that PRP counsel discovered on a mirror drive of Mockovak's computer. Supp. PRP at 34-40; Third Decl. of James E. Lobsenz at 1-4. This information included a police report created at the request of Mockovak and Dr. King, investigating the activities of Bradley Klock, former CEO at Clearly Lasik, that shows someone was sending harassing messages to Klock in 2005, that Klock may have mistakenly believed that a woman he had dated was sending the messages, and that Klock asked Kultin to identify the culprit by examining Klock's laptop. Mockovak cannot show deficient performance or prejudice as to this claim. Mockovak's description of these events is inaccurate in a number of important respects. The record shows that prior incident did not impeach either Klock or Kultin, and was likely inadmissible. It certainly cannot be said that Mockovak's new theory would have better impeached Kultin than did the very effective impeachment accomplished by trial counsel by showing that Kultin had not been wholly transparent regarding his contacts with Klock in 2009.

a. Facts Relevant To This Claim.

Mockovak fails in his PRP to accurately summarize the facts relevant to this claim. A full recitation of the relevant facts is set forth below.

i. Background.

Bradley Klock was hired by Mockovak and Dr. King in early 2005 as the CEO and president of Clearly Lasik. 9RP 174-75. He was fired in November, 2006. *Id.* at 179-80. Mockovak and King subsequently accused Klock of improperly charging personal expenses to the company, they hired a private investigator who prepared a detailed report, Mockovak and King brought the case to law enforcement, and King was charged with felony theft in King County Superior Court. Appendix C (Information and Certification for Determination of Probable Cause). Discovery in that criminal case totaled almost 1,000 pages and included memoranda, letters, spreadsheets, and other documents generated by Mockovak, Clearly Lasik, Klock, and various lawyers. Appendix D (Decl. of Barbosa). A sample of the documents shows the acrimony between the parties, and also shows that they made widely disparate accusations about each other. *Compare* Appendix E (Settlement Communication) *with* Supp. PRP, Third Decl. of Lobsenz, Appendix D (Winquist Investigative Memo). All of this

information was provided to trial counsel for Mockovak in the defense of his solicitation to commit murder case. Appendix D (Decl. of Barbosa).

The discovery in that case shows that Mockovak claimed Klock was improperly billing the company for private expenses. Supp. PRP, Third Decl. of Lobsenz, Appendix D (Winqvist Memo). However, the former chief financial officer of Clearly Lasik, Donald Cameron, pointed out that many of the contested expenses were truly business-related. Appendix F (Statement of Donald M. Cameron, CA). On October 28, 2008, prosecutors dismissed the case against Klock in the interests of justice because “additional information provided by the defense has raised reasonable doubt.” Appendix G.

The discovery in the dismissed criminal case against Klock included the report generated by the Renton Police Department. See Supp. PRP, Third Decl. of Lobsenz, Appendix B. The discover also included documents showing that in 2005, four years before the events in this case, somebody had sent harassing email messages to Bradley Klock. Klock believed the culprit might be a woman he had dated briefly, and he hired a lawyer to instruct the woman to desist. Appendix H. When looking into allegations that Klock had misused corporate funds, a private investigator for Clearly Lasik contacted the woman—two years after the fact—and obtained a letter from her claiming she had no idea why Klock

had accused her of sending harassing emails. Appendix H. It appears the harassment stopped after December 12, 2005, although it is unclear if the harasser was ever identified with certainty. Appendix H.

After the criminal case was dismissed in October 2008, Klock filed a civil lawsuit in January 2009 against Clearly Lasik, Mockovak, and Dr. King in order to enforce the severance agreement he had signed with Clearly Lasik. 8RP 54.¹¹ Klock was deposed on January 13, 2010 and the harassing messages and the potential breach of his laptop was a topic of questioning. Klock said that “there were some strange things happening with my MSN account” and that he “was concerned that company information or computers...could be jeopardized or could be at risk.” Supp. PRP, Third Decl. of Lobsenz, Appendix A (Deposition of Klock, at 244-45). Daniel Kultin had been hired by Clearly Lasik in early 2006, shortly after Klock’s incident with the possible computer breach, to perform information technology services. Id. at 34-36. Klock

talked to Daniel Colton (sic)¹² at the time to try and figure out what was going on with my computer... I asked Daniel at the time could it have been compromised somehow, and he wasn’t sure. I believe he checked my computer over and came back and didn’t understand what the issue was.

Id. at 247-48. Klock associated with Kultin on a professional basis but did not see him regularly. Id. at 35. The doctors, too, had a normal

¹¹ The lawsuit was settled and dismissed on May 4, 2010. Appendix I.

¹² Kultin is misspelled as “Colton” in the deposition transcript.

relationship with Kultin regarding “technical issues with laptops or accessing servers or passwords.” Id. at 36-37. Klock knew Kultin was from Russia but, other than sports, he did not discuss Russia with Kultin. Id. at 36. All these events took place in late 2005 and early 2006, while Kultin, Klock, and Mockovak all worked for Clearly Lasik, and at least three years before Dr. Mockovak spoke to Kultin about hiring a hit man.

ii. Trial testimony on impeachment.

Kultin did not testify, as Mockovak suggests in his PRP, that Mockovak had hacked into Klock’s computer. Supp. PRP at 19. Rather, as to the “lunchroom conversation” that occurred in March 2009, he testified that

I remember him saying that guess what, I found out that Brad – I found out through a friend, I remember him saying a friend or somebody he knew, that Brad was going to be traveling to Europe. For some reason I thought it was Germany, but then I thought about it, and don’t know if he said Germany, but he said Europe, the European continent for sure, and then he said the time frame he was going to be traveling, and he said something to the extent that would be -- you know, an opportunity – not an opportunity, I would remember the word opportunity. It would be a good time maybe to have something happen.

11RP 124; 14RP 38. It concerned Kultin that Mockovak would know this, because it suggested to Kultin that Mockovak might be spying on Klock.

This concern sparked his visit to the FBI agent in Portland, which led to the federal investigation into Mockovak's plans. 11RP 126.

Klock did not testify about his Germany plans on direct examination. 9RP 170-86. He simply described his role with Clearly Lasik, his business relationship with Kultin, the circumstances of his (Klock's) being terminated from employment, the fact that a lawsuit was filed, and that he had seen Mockovak very little in the ensuing years. Id. On cross-examination, however, defense counsel asked him through leading questions whether he had previously told the prosecutor that he had travel plans for Europe in the spring of 2009. He confirmed that he had such plans, although he never made the trip. 9RP 191. Counsel then asked whether he had told the prosecutor that "Mockovak would have had to have access to your email in order to know about that because you hadn't talked to him really since 2006." Id. at 192. Klock replied, "I imagine." In other words, defense counsel is the one who raised for the jury the issue of hacking email as a possible way Mockovak could have known. Kultin never testified that Mockovak said he hacked Klock's email, and Kultin never accused Mockovak of that.

When the prosecutor addressed the Europe issue in closing argument, she argued that Mockovak told Kultin that Klock was going to be in Europe or Germany, but the prosecutor did not allege that Mockovak

learned that information by hacking Klock's email. 16RP 60. When defense counsel addressed the issue in closing argument, however, he again raised the email hacking point and then mocked it, and he accused Kultin of inventing the whole conversation. 16RP 128-30. Thus, it is clear from the record that the email hacking was not a part of the prosecutor's theory at trial.

b. Mockovak Has Shown Neither Deficient Performance Nor Prejudice.

Mockovak now claims that trial counsel was ineffective for failure to discover a Renton Police Department report that discussed an incident in 2005 where Klock believed someone had accessed his laptop, and for failing to use that report to "impeach" Kultin and/or Klock. These arguments should be rejected for a myriad of reasons: this "evidence" does not show what Mockovak purports, it would not have impeached either Klock or Kultin, and it would have opened the door to even more damaging evidence.¹³

The same principles of ineffective assistance of counsel analysis that were discussed above apply to this claim. As to impeachment,

¹³ Mockovak's claim that counsel failed to "discover" this evidence is easily dismissed. See Supp. PRP at 34 (referring to the "failure to discover and use" the evidence). The evidence material to this claim was provided to Mockovak's defense team in pretrial discovery, so they had it as they prepared for trial. Appendix D (Decl. of Barbosa). There was no need to rediscover it from the mirror image of Mockovak's hard drive.

“[a]n assertion that trial counsel could have done a better job at cross-examination ... is not enough to demonstrate deficient performance.”

State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007); State v. Brewczynski, 173 Wn. App. 541, 554, 294 P.3d 825, rev. denied, 177 Wn.2d 1026 (2013) (decision not to impeach a witness with a prior conviction was not deficient or prejudicial). Trial counsel is not deficient if he fails to present alleged impeachment as to a collateral matter. State v. Rosborough, 62 Wn. App. 341, 349, 814 P.2d 679 (1991). A matter is “collateral” if the fact, as to which error is predicated, could not have been shown in evidence for any purpose independently of the contradiction.

State v. Allen, 50 Wn. App. 412, 423, 749 P.2d 702 (1988) (citing State v. Oswald, 62 Wn.2d 118, 121, 381 P.2d 617 (1963)). See generally 5A K. Tegland, Wash. Prac., Evidence § 227 (3d ed.1989). See also Hoots v. Allsbrook, 785 F.2d 1214 (4th Cir. 1986) (no prejudice found in failing to offer crimes of dishonesty against the State’s primary witness; “Given the vagaries of attempts to impeach with matter collateral to testimonial trustworthiness, we simply are not able to declare that the failure to impeach by that means here gives rise to a reasonable probability that had it been done Hoots would not have been convicted.”).

Mockovak's theory at trial and in his PRP is that Kultin and Klock conspired to entrap him. Mockovak's argument on this point depends on multiple distortions of the record as to time and circumstance. He asserts:

Klock trusted Kultin so much that he entrusted Kultin with his laptop computer, and let Kultin search it to see if he could figure out who was stalking him. He trusted Kultin so much that he disclosed to Kultin that he had a problem with a former girlfriend. He gave Kultin access to *all* his personal information stored on his computer, and to the passwords necessary to access it. Thus, Kultin was clearly in a position to be able to easily learn Klock's travel plans.

Supp. PRP at 39 (*italics in original*). These events took place at least three years before Mockovak mentioned to Kultin in March of 2009 that Klock might be traveling to Europe. In those intervening years, Klock had left the employ of Clearly Lasik, and he had turned over his laptop computer after removing all private information. Supp. PRP, Third Declaration of Lobsenz, Appendix A (Deposition of Klock at 254-55). There is nothing to suggest the Kultin still had any access to that particular laptop, to any of Klock's current computers, or to any of Klock's data. Thus, it is incorrect to suggest that Kultin had any access whatsoever to Klock's travel plans, and so it is incorrect to assert that testimony about the incident would have impeached Kultin.

Moreover, it is incorrect to suggest that this incident proves a trust relationship between Klock and Kultin. When Klock asked Kultin to

check his computer in early 2006, Klock was simply asking an existing IT employee (newly hired) to check a company laptop for a potential data breach.¹⁴ Nor would it be surprising that, in this context, the employer mentioned to the employee that the possible breach stemmed from a soured personal relationship. Neither of these facts establishes that Klock and Kultin had a close relationship, as Mockovak now asserts. Thus, testimony about this incident would not have had any impeachment value.

Additionally, Mockovak distorts the content and the import of Klock's testimony. Klock said that he imagined it was possible that Mockovak had access to his email. This was a minor point in this testimony; it was a two-word response to a leading question from defense counsel. And Kultin never said anything about Mockovak electronically eavesdropping on Klock, he merely said that he worried that Mockovak must be keeping tabs on Klock. In other words, Mockovak has essentially created a straw-man argument in his PRP; he has attempted to create an inconsistency where one never existed, and a close relationship where one never existed, and to then fault trial counsel for not attacking those points. In truth, Mockovak hacking into Klock's email was never a component of the prosecution case.

¹⁴ Klock did not know Kultin before he hired him to work at Clearly Lasik. 9RP 182-83.

Moreover, there are other reasons that the lines of inquiry suggested in Mockovak's PRP would not have impeached the State's witnesses. Mockovak argues that since Klock earlier suspected that someone tampered with his computer, he was lying when he now speculated that Mockovak had access to his email. But, there is no evidence showing that Klock fabricated the claim that he was being harassed in 2005, or that it was unreasonable for him to suspect that the harassment was tied to a data breach. The evidence shows that Klock hired a lawyer because he was receiving strange messages and his lawyer acted to protect his interests. Appendix H. Even if Klock mistakenly blamed a former girlfriend, there was no evidence he did so maliciously. With no evidence to suggest an earlier falsity, there was no basis to resurrect that old dispute; it would have been collateral, irrelevant, distracting, and a waste of time. ER 401, 402, 403.¹⁵

Moreover, the fact that someone may have harassed Klock three and one-half years before the events of the charged crime does not impeach Klock's testimony (five years after he was harassed) that he believed Mockovak *might* have done the same thing. Indeed, it is likely that a person who had been hacked once would conclude he had been hacked twice. Even if there were some conflict between Klock's

¹⁵ Nor would it impeach Kultin, since Kultin never testified that Mockovak tampered with emails.

testimony and the past dispute, the 2005 dispute was clearly a collateral matter. Rosborough, at 349; ER 403.

Most importantly, pursuing an attack that raised questions about how Mockovak might know Klock's plans would potentially have opened the door to very damaging information about Mockovak. The acrimonious dispute between Mockovak, King, and Klock, including the depth of Mockovak's anger at Klock, and the lengths to which Mockovak went to retaliate against Klock, would have been opened up. For instance, it would have made relevant the observations of Mockovak's private investigator, Rose Winquist, who observed first-hand Mockovak's rage against Klock. After the criminal case against Klock was dismissed in October 2008, Mockovak told Winquist that he wanted help monitoring Klock's movements.

In March or April, 2009, I received a telephone call from Dr. Mockovak, during which time Dr. Mockovak told me that criminal charges against Mr. Klock had been dismissed and that Mr. Klock had filed a lawsuit against CLI and Dr.'s Mockovak and King. ... Dr. Mockovak told me that he wanted to know where Brad Klock was living and when and where he traveled. Dr. Mockovak asked me to monitor Klock's comings and goings in and out of the US and Canada. This request did not make sense to me, so I asked Dr. Mockovak why he needed to find Mr. Klock. He would not explain. His desire to find Mr. Klock did not seem to be in the context of needing to serve him with any legal process since Mr. Klock had an attorney. I told Dr. Mockovak that I was too busy and wouldn't be able to

help him. It did not make sense to me that Dr. Mockovak wanted to put Mr. Klock under surveillance.

Appendix J. This observation appears to have been contemporaneous with Mockovak's "lunchroom conversation" with Kultin wherein Mockovak said he heard from a friend that Klock would be traveling to Europe. Testimony from Winquist on this point would have strongly corroborated Kultin's description of that conversation.¹⁶ Thus, an attempt to probe the 2005 incident and how it relates to Mockovak's statements in the lunchroom would have been perilous for Mockovak, as it could have triggered additional evidence as to Mockovak's desire to keep tabs on Klock and his travel plans.

Finally, Mockovak seriously understates the success that trial counsel had in attacking Kultin's credibility, arguing that "trial counsel struggled to counter the testimony of Klock and Kultin." Supp. PRP at 38. This assertion is contradicted by the record. Counsel conducted a detailed cross-examination of Kultin and Agent Carr regarding telephone calls Kultin placed to Klock personally or to his place of business in Canada during the months that this investigation was on-going, and on some dates closely associated with key events in the investigation. See 11RP 23-41

¹⁶ There was other evidence that showed Mockovak's attempts at electronic surveillance. CEO Christian Monea testified that defendant was angry that he couldn't get access to Alaska Airlines account for Dr. King, suggesting that Mockovak was using computer surveillance to monitor the movements of his victims. 9RP 6-7.

(Carr); 14RP 6-23 (Kultin). Kultin admitted that he never told the FBI about these calls. This cross-examination likely raised significant questions in the minds of the jurors which, even if not fatal to the State's case, were nonetheless excellent arguments grounded in fact. In short, trial counsel's strategy to undermine Kultin by attacking the fact that he had not disclosed telephone calls to Klock was a highly effective strategy. Nit-picking about the 2005 harassment incident with Klock pales in comparison.

For all these reasons, it cannot be said that counsel was deficient in rejecting this line of questioning, or that the result of the trial would have been different if counsel had attacked Klock or Kultin on this theory.

7. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO TELL THE JURY THAT MOCKOVAK WAS MOLESTED AS A TEENAGER.

Mockovak argues that his team of lawyers was ineffective because they did not present a "learned helplessness" defense based on the fact that Mockovak was sexually abused as a teen. Mockovak cannot establish deficient performance because Mockovak has not established that trial counsel knew about the past abuse, that an expert would have testified that he suffered from learned helplessness, that the abuse would have been admissible, or that trial counsel did not consider and reject the defense for

strategic reasons. There were certainly valid reasons not to pursue the defense. In any event, Mockovak cannot establish prejudice, primarily because the evidence showed that Dr. Michael Mockovak was anything but helpless; the defense would have made no difference to the jury, and likely would have undermined the more credible defense that counsel pursued.

The decisions whether to call expert witnesses is generally tactical and cannot serve as a basis for an ineffective assistance argument.

In re Pers. Restraint of Cross, 180 Wn.2d 664, 700, 327 P.3d 660 (2014) (decision not to call mental health experts in a capital murder case was tactical); In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998) (counsel is not required to call all available witnesses); In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004) (decision whether to call a witness generally presumed to be a matter of trial strategy or tactics); State v. Mannering, 150 Wn.2d 277, 287, 75 P.3d 961 (2003) (decision not to call defense expert witness was trial tactic).

Courts have generally refused to find ineffective assistance of trial counsel where counsel chose not to pursue a possible mental defense, or chose one strategy over another. In Anderson v. Attorney General of Kansas, 425 F.3d 853 (10th Cir. 2005), the court found no ineffective assistance where counsel chose not to pursue a claim of insanity. The

same is true in the context of “learned helplessness” defenses. Counsel need not pursue a given defense simply because it is available. Rather, counsel has wide latitude to either pursue the defense, or not. In Michael v. Crosby, 430 F.3d 1310, 1317 (11th Cir. 2005), the court held that it was not ineffective to defend on the basis of learned helplessness, rather than post-traumatic stress disorder or battered spouse syndrome. In Slater v. State, 915 So. 2d 618, 621 (Fla. Dist. Ct. App. 2005), the court held that advising Slater about the state’s plea offer cannot be deemed ineffective assistance of counsel even though an expert had not completed a report, because counsel reasonably concluded that jury would not accept the defense.

Such reasoning applies with full force to Mockovak’s claim that trial counsel should have pursued a defense based on his prior sexual abuse. His ineffective assistance claim should be rejected for several reasons.

a. Mockovak Has Not Established Deficient Performance.

“A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Strickland, 466 U.S. at 690. Mockovak’s claim fails this most basic requirement. He has not

presented any evidence as to how or whether counsel exercised professional judgment on this question. A collateral attack on strategic decision-making cannot be presented in a vacuum.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, at 691.

First, it is not clear when Mockovak told his lawyer about the prior sexual abuse. Mockovak asserts in his brief that "Jeffrey Robinson ... was well aware of the fact that Mockovak was the victim of many years of ongoing childhood sexual abuse," but the evidence he cites relates to sentencing. PRP at 98-99. The report prepared by trial counsel for sentencing was dated March 2011, just before sentencing. PRP,

Appendix D (Conte Disclosure, pp. 1-22). There is no evidence that trial counsel were told about this abuse before trial.

Indeed, there are a number of indications that they were not told. For instance, Mockovak, Jeffrey Robinson, Colette Tvedt, and Joseph Campagna have all provided declarations for Mockovak's personal restraint petition on the issue of counsel's effectiveness and strategic thinking. Conspicuously absent from any of those declarations is information about whether counsel knew Mockovak's history of sexual abuse and whether counsel considered presenting this history to the jury.

Other sources are similarly silent where one would expect them to address the issue. For example, there is no mention of a sexual abuse defense in the lengthy declaration from Mockovak's friend, Mr. Marmer. See PRP, Declaration of Ronald L. Marmer. Mr. Marmer is an accomplished attorney who declares that he has been Mockovak's friend for over 40 years. Id. at 1-2. His declaration describes in detail his role as advisor and consultant to Mockovak and his lawyers before and during the criminal trial. Id. They discussed representation issues, bail, strategic defenses, the *mens rea* and burden of proof for entrapment, whether a diminished capacity defense was possible,¹⁷ the comparable state and

¹⁷ Mockovak's petition refers to the sexual abuse defense as a diminished capacity defense. PRP, at 106. Whether it is truly a diminished capacity defense is open to debate. However, a defense based on a prior history of sexual abuse is a very specific

federal sentencing guidelines, mock juries, the failure of federal authorities to provide discovery, the legal basis and timing for a motion to dismiss, and the merits of federal versus state prosecution. Id. It is clear that Marmer has a close relationship with Mockovak, and that he met or conversed repeatedly with Mockovak alone—Mockovak was out of custody pending trial—and with trial counsel. Id.

Moreover, according to a letter written by a long-time friend, Mockovak kept his history of abuse private, at least partly out of a concern that the information could “damage his medical career.” Supp. PRP, Second Decl. of James E. Lobsenz, Appendix B (letter from John C. Goniorek, p. 1).

Obviously, if Mockovak chose not to share this information before trial, counsel could not prepare a defense on this basis. It is entirely possible that Mockovak shared this information only after he was convicted. From the silence in the detailed declarations, it is reasonable to infer that counsel was not told until after the verdict that Mockovak was the victim of sexual abuse. In any event, his failure to establish that he

defense, and it defies logic to assert that Mockovak shared this information with trial counsel but it is never mentioned specifically in any of the declarations. There were, of course, more plausible and acute reasons that Mockovak may have suffered from diminished capacity, including major depression, his divorce, and the stress of battling his business partners. This is likely what Marmer is referring to. (Of course, this defense would have seemed incongruent with Mockovak’s statements and demeanor as captured in the recordings, as will be explained below.)

told his lawyers about the prior abuse means that he has failed to overcome the strong presumption that counsel acted reasonably.

Second, even if Mockovak had disclosed the abuse to his lawyer, there is no evidence in Mockovak's petition as to why trial counsel rejected the sexual abuse theory and whether Mockovak acquiesced in that decision. An ineffective assistance of counsel claim presumes that a lawyer was competent; evidence must be presented to overcome this presumption. It is entirely plausible that Mockovak did not want to expose his history in a public trial, especially where the abuse was perpetrated by another family member, and where his siblings were victims, too. In other words, it makes perfect sense that the defense was not presented for reasons personal to the defendant. Equally likely, counsel may have rejected the defense because they believed it would be a distraction to the jury, or that it would backfire. Here, Mockovak has presented no evidence, whatsoever, on this question. He has not met his burden of showing that counsel was deficient.

Mockovak's lawyer asserts in the petition that trial counsel rejected the abuse defense because counsel did not understand that the defense could be asserted, and because counsel believed the entrapment inquiry was subjective. PRP, at 106-08. This is pure speculation. A self-serving characterization of trial counsel's decision-making process

is not sufficient to carry the burden in a PRP. Mockovak has failed to show that counsel decided to forego this defense over his objection.

Breitung, at 401.

b. Mockovak Cannot Demonstrate A Substantial Likelihood That A Sex Abuse Defense Would Have Persuaded The Jury.

To prevail on his claim of ineffective assistance of counsel, Mockovak must establish that a sex abuse defense would have changed the result of the trial. Strickland, at 693, 695. Mockovak cannot make this showing for several reasons.

First, Mockovak has not shown that his newly-proposed defense would have been admissible at trial. In State v. Riker, 123 Wn.2d 351, 364-65, 869 P.2d 43 (1994), the court held that battered person syndrome, while generally accepted and admissible to explain a person's relationship within the context of a battering relationship, was not admissible "to show that Riker's history of abuse built a cumulative patina of fear which resulted in her inability to resist or escape Burke's alleged coercion" outside of that abusive relationship. The defense would be admissible only if the defendant could show that it applied to him in the context relevant to trial.

So, too, with Mockovak's proposed defense. "Learned helplessness" is a term used in the context of battered spouse syndrome, and it may also be a by-product of certain forms of child abuse, but Mockovak has made no showing that this disorder or syndrome supports the inference that *anyone* who suffers child abuse would be more inclined to go along with a plan to murder someone wholly unconnected to the abuse.

Similarly, there is no indication in the submitted materials that any expert witness would have opined that the defense was material to Mockovak. The materials prepared by Dr. Conte simply assert in general terms the uncontroversial research findings that victims of sexual abuse can suffer life-long trauma and behavior effects. See Supp. PRP, Second Decl. of James E. Lobsenz, Exhibit D (Disclosure of Expert Opinion - Dr. John R. Conte.). The declaration of Dr. William Foote, Ph.D., purports to establish a general foundation for the sex abuse defense, but it does not address how the defense might apply to Mockovak, and it describes behavior starkly different than Mockovak's observed personality and behavior. The declaration says:

A history of being a victim of child sexual abuse would apply to both of these elements [of entrapment]. 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 . . . 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*.

11. The second leg of the test, which focuses on inducement of defendants to commit crimes that they might not otherwise commit relates to the psychological process of suggestibility. Suspects' suggestibility has been implicated as a factor in false confessions. 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 sex abuse survivors would cause them to actively engage in criminal activity that they might not otherwise do*. This is especially true in the context of repeated contacts with a highly influential individual who is suggesting the offense.

Supp. PRP, Decl. of Foote, at 4 (italics added). There is nothing in these materials to show that prior sexual abuse caused Mockovak to solicit murder, or made him more susceptible to suggestions of murder.

Assuming, arguendo, that a prior history of sexual abuse might be considered relevant to an entrapment defense in a solicitation to murder case, the evidence in this case plainly does not fit Dr. Foote's model. First, there is no evidence in this case that establishes that "someone else

originated the idea of a crime.” Id. To the contrary, the only evidence presented was that Mockovak proposed the plan to kill his business associates. Defense counsel acknowledged this fact in closing argument but claimed Mockovak had been kidding.

Second, Mockovak did not find himself in “a situation which he found counter to his own values and desires.” Id. Rather, he took a number of steps independent of Kultin designed to bring about the murders: he searched for flight information to determine when and where Dr. King would be traveling in Australia, 9RP 153-60; he provided a portrait of Dr. King so that hit men could recognize him; he raised and turned over thousands of dollars to finance the hit; he sealed the deal after careful thought and deliberation, telling Kultin that he had slept on the idea and concluded that it was the right thing to do. Fellow employees described Mockovak as strangely and uncharacteristically jovial on the day scheduled for the murder. 14 RP 94 (Brenda Sifferman); 122 (Sheree Funkhouser). He said, “This is going to be a great day.” 14RP 122. These facts demonstrate that, rather than being foisted on him, the murder of Dr. King was Mockovak’s personal and fervent desire.

Third, and perhaps most importantly, evidence from numerous sources showed that Mockovak was anything but passive. He prospered in a highly competitive academic environment, graduating from Yale

Medical School in 1988.¹⁸ He was at one time licensed to practice Ophthalmology in five states. He was on the Faculty at Northwestern University in Chicago. In January, 2002, Mockovak set out to build a medical surgical empire through Clearly Lasik. The business grew into a multi-million dollar company, he purchased other existing clinics, and he solicited partnerships.

There is no evidence that Mockovak ever shied away from conflict. Mockovak and Dr. King fired the chief operating officer of the company, Bradley Klock, and then they launched an aggressive campaign to retrieve from Klock money that they believed had been misappropriated, including an effort to have Klock prosecuted criminally. According to his own investigator, Mockovak “displayed a rage toward Brad Klock that was personal, and that escalated over time. Dr. Mockovak’s behavior and attitude were not within the range of what I experience as normal for my clients.” Appendix J. Mockovak vigorously pursued the criminal case against Klock, sending long email messages to the prosecutor to explain his position, and to ensure full prosecution. Appendix K. Don Cameron, chief financial officer for Clearly Lasik, reported to the prosecutor’s office that, among other things, that Mockovak had said in a meeting: “Brad is asking for a million dollars. If

¹⁸ According to US News and World Report, Yale is among the top 10 schools in the country, is highly selective, and accepts only around 5% of all applicants.

he is going to be that way, we'll do all we can to make it expensive and drawn out for him..." Appendix L (Bates# 01394MEM). In emails, Mockovak referred to Klock as "an amiable charlatan," and to Klock's "outrageous severance provisions." 8RP 52-53.

Mockovak also had ongoing disputes with his business partner, Dr. King, over several aspects of their business, and he was not the least bit shy or passive in confronting his foes in these disputes. In fact, he was quite aggressive in preserving his interests. CEO Monea described how Mockovak and Dr. King fought a tense battle for two years over profit sharing from the Renton and Canada clinics. 8RP 12-14, 44-52. He refused to agree to the sale of an Edmonton Lasik center because he was afraid that Dr. King would make a side deal with the proposed Canadian purchaser. 8RP 82-83. Mockovak and Dr. King fought over the sale of a jointly owned residence in Vancouver, B.C. 8RP 85. Their dispute reached a very high level of tension that threatened to be a watershed moment for the business. 8RP 85-88. They fought over a shareholder agreement and profit sharing. 8RP 88-90. By mid-2009, both doctors had retained independent lawyers, the partnership was in jeopardy based on their continued fighting, and the CEO was acting as a mediator. 8RP 94-96. At one point, Mockovak responded to a proposal by Dr. King by saying, "You can't just bully an agreement." 9RP 9-10.

Mockovak did not shirk from confronting other employees. In an October 2009 email exchange with CEO Christian Monea regarding Monea's assessment of the value of the business, Mockovak struck back at Monea as follows: "Christian, if your analysis is put forward as a proposal, I prefer to remain a 50% owner of the entire Clearly Lasik enterprise. In my mind, you skew the situation so much in Joe's favor I am quite frankly astonished." 9RP 14. Throughout this time, Mockovak was observed to have a temper, and he told an employee to do as he said (against Dr. King in the business dispute) or she would be terminated. 9RP 45, 48, 103-08 (testimony of employee Dawn Schreck). At one point Mockovak said that if Dr. King insisted on a certain policy, he would challenge Dr. King to a duel like Alexander Hamilton and Aaron Burr. 9RP 49. Monea did not know if the situation might escalate into a physical altercation. Id.

The recorded conversations, as described above, illustrate that Mockovak was driving the plot to kill Dr. King, rather than simply being swept along by the informant. He even said that he had wanted for some time to kill Dr. King. Tr. at 100 (11/06/09 conversation—"You wanna know something funny, I've often thought of going down in to the fucking garage and killing Joe myself."). When the time came to finalize the plan, Mockovak was unflinching, calculating, and certain that his plan was

righteous. In a telephone call with Kultin on November 7th he said the following:

Δ: I'm in the Portland airport. DK: Did you steal the portrait? Δ: I did. {Nice.} You know I'm so glad we went out last night. Know why? {What?} It gave me time to contemplate, 24 hours to think about it. {Uh-huh} It's absolutely the right thing to do. {Oh yeah.} I mean it just is. . . . I'm glad you understood my feelings...

Tr. 11/07/09 3-4. The recorded conversations paint a picture of a bitter, angry, and calculating man who schemed to kill his business rivals for profit and for peace of mind.

Moreover, as noted above, “[t]he reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” Strickland, at 691. Mockovak’s lawyers would have been influenced in their choice of defense by Mockovak’s own actions toward them. He was personally vigilant and aggressive in setting the agenda for his defense. He consulted repeatedly, often, and in detail with trial counsel regarding matters of strategy. PRP, Decl. of Ronald Marmer, ¶¶ 12-14, 28, 30, 40 (describing numerous meetings and conversations); Decl. of James E. Lobsenz, ¶¶ 16-36. Billing records show that Mockovak “met regularly” with trial counsel.” Decl. of James E. Lobsenz, ¶¶ 38-40. He commented on drafts of pleadings, argued with his lawyers when they did not seem to be following his directions, and

prepared long and sophisticated email messages documenting his criticisms and concerns about their strategies.¹⁹ Id. Counsel would likely have concluded from these interactions that Mockovak was anything but a shrinking violet.

Additionally, a “learned helplessness” defense would have opened the door to far more damaging evidence. Dr. King’s remarks at sentencing summarize the views of many people.

Your Honor, I know Michael Mockovak well. He was a friend, a colleague, and he was family. He is a cunning and decisive person, and he believes he is right all of the time. Dr. Mockovak would often refer to himself as Dr. Machiavelli, in reference to the Florentine prince, considered lying and deceit legitimate means to achieve one’s goals. Dr. Mockovak also called himself Dr. Evil. An accomplished chess player, he carefully plans his moves.

20RP 14. Numerous people sent letters to the sentencing judge asking for the maximum sentence. Many of these people described the defendant as manipulative and sociopathic. Appendix M. Clearly, a defense that portrayed Mockovak as passive or helpless would have called for rebuttal by at least some of this unflattering evidence, and would have damaged the credibility of Mockovak’s more measured defense.

¹⁹ The emails attached to the Lobsenz declaration (appendices C – M) reveal Mockovak’s hyper-involvement in mounting a defense. He routinely challenged his lawyers on tactical matters and often sparred with the lawyers if they failed to heed his advice.

For all these reasons, Mockovak cannot meet his burden of showing that counsel was deficient or that he was prejudiced by the failure to present a “learned helplessness” defense. Even if counsel was told about the prior abuse, there were legitimate strategic reasons to forego presenting this evidence, it probably would not have been admissible, and it would not have changed the jury’s verdict.

F. CONCLUSION

Mockovak has not shown that a suppression motion would have led to dismissal of the state prosecution, so he cannot bear his burden of showing ineffective assistance of counsel on that point. Nor can he show that counsel was deficient as to the entrapment instructions, the manner of impeachment, or the failure to tell the jury that he had been sexually abused as a teenager. Thus, Mockovak’s petition should be dismissed.

DATED this 7th day of November, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

FILED
KING COUNTY WASHINGTON
MAR 17 2011
SUPERIOR COURT CLERK
BY Melissa Eiders
DEPUTY

COPY TO COUNTY JAIL MAR 17 2011

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
	)	No. 09-1-07237-6-SEA
)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY (FJS)
MICHAEL EMERIC MOCKOVAK,)	
)	
Defendant,)	

I. HEARING

I.1 The defendant, the defendant's lawyer, JOE COMPAGNA, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 02/03/2011 by jury verdict of:

Count No.: II Crime: SOLICITATION TO COMMIT MURDER IN THE FIRST DEGREE
 RCW 9A.28.030(1) AND 9A.32.030(1)(a) Crime Code: 20124
 Date of Crime: 10/14/2009 - 11/06/2009 Incident No. _____

Count No.: III Crime: ATTEMPTED MURDER IN THE FIRST DEGREE
 RCW 9A.28.020 AND 9A.32.030(1)(a) Crime Code: 10112
 Date of Crime: 11/07/2009 Incident No. _____

Count No.: IV Crime: CONSPIRACY TO COMMIT THEFT IN THE FIRST DEGREE
 RCW 9A.28.040, 9A.56.030(1)(a) AND 9A.56.020(1)(a) AND (b) Crime Code: 32502
 Date of Crime: 08/05/2009 - 11/06/2009 Incident No. _____

Count No.: V Crime: ATTEMPTED THEFT IN THE FIRST DEGREE
 RCW 9A.28.020, 9A.56.030(1)(a) AND 9A.56.020(1)(a) AND (b) Crime Code: 12730
 Date of Crime: 11/07/2009 Incident No. _____

[] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) _____ RCW 9.94A.533(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.533(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h) Domestic violence offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) II + III IV + V RCW 9.94A.589(1)(a). 26
- (j) Aggravating circumstances as to count(s) _____.

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
 Criminal history is attached in Appendix B.
 One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count II	21	XV	200-240 MONTHS 250-333	75% OF STANDARD	100-125 TO 187.50 MONTHS 248.75	LIFE AND/OR \$50,000
Count III	21	XV	200-240 MONTHS 250-333	75% OF STANDARD	100 TO 140 MONTHS 187.50 - 248.75	LIFE AND/OR \$50,000
Count IV	11	II	2-4 MONTHS	75% OF STANDARD	3-4 1.5 - MONTHS 4.5	10 YEARS AND/OR \$20,000
Count V	11	II	2-4 MONTHS	75% OF STANDARD	3-4 1.5 - MONTHS 4.5	10 YEARS AND/OR \$20,000

Same Criminal Conduct
 Same Criminal Conduct

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE

- Findings of Fact and Conclusions of Law as to sentence above the standard range:
 Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.
 Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. The court would impose the same sentence on the basis of any one of the aggravating circumstances.
- An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.
- An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State did did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT
 IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.
 The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.
 Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 Date to be set.
 Defendant waives presence at future restitution hearing(s).
 Restitution is not ordered.
 Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ 472.50 Court costs (RCW 9.94A.030, RCW 10.01.160); Court costs are waived;
 (b) \$100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes committed after 7/1/02);
 (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); Recoupment is waived;
 (d) \$ _____, Fine; \$1,000, Fine for VUCSA \$2,000, Fine for subsequent VUCSA (RCW 69.50.430); VUCSA fine waived;
 (e) \$ _____, King County Interlocal Drug Fund (RCW 9.94A.030); Drug Fund payment is waived;
 (f) \$ _____, \$100 State Crime Laboratory Fee (RCW 43.43.690); Laboratory fee waived;
 (g) \$ _____, Incarceration costs (RCW 9.94A.760(2)); Incarceration costs waived;
 (h) \$ _____, Other costs for: _____

- 4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 1072.50⁷². The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.
 Court Clerk's trust fees are waived.
 Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; [] (Date): _____ by _____, m.

240 months/days on count II; 2 months/days on count _____; _____ months/day on count _____
240 months/days on count III; 4 months/days on count _____; _____ months/day on count _____

The above terms for counts II, III, VI, V are consecutive / concurrent.

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) _____

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 240 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): [] _____ day(s) or days determined by the King County Jail.
[] For nonviolent, nonsex offense, credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number.
[] For nonviolent, nonsex offense, the court authorizes earned early release credit consistent with the local correctional facility standards for days spent in the King County Supervised Community Option (Enhanced CCAP).

4.5 NO CONTACT: For the maximum term of life years, defendant shall have no contact with Dr. Joseph King and his family, Daniel Kulin, Brad Klock, Christian Monea, Sherce Funkhouser, Dawn Schreck, Meggan McKenzie, Brenda Sifferman, and Valrie Jackson, C.L.I. OFFICES

4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

[] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [] COMMUNITY CUSTODY for qualifying crimes committed before 7-1-2000, is ordered for [] one year (for a drug offense, assault 2, assault of a child 2, or any crime against a person where there is a finding that defendant or an accomplice was armed with a deadly weapon); [] 18 months (for any vehicular homicide or for a vehicular assault by being under the influence or by operation of a vehicle in a reckless manner); [] two years (for a serious violent offense).

(b) [] COMMUNITY CUSTODY for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months.

(c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:

- Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
- Serious Violent Offense, RCW 9.94A.030 - 36 months
 - If crime committed prior to 8-1-09, a range of 24 to 36 months.
- Violent Offense, RCW 9.94A.030 - 18 months
- Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
 - If crime committed prior to 8-1-09, a range of 9 to 12 months.

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court. **APPENDIX H** for Community Custody conditions is attached and incorporated herein. **APPENDIX J** for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement, subject to the conditions set out in **Appendix H**.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows:

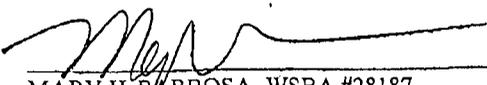
The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

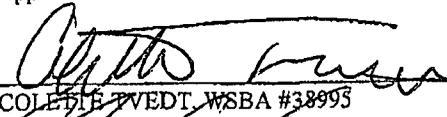
Date: 3/17/11

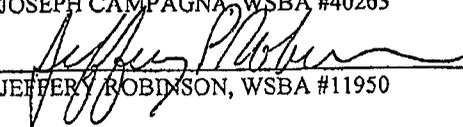

PALMER ROBINSON
JUDGE, King County Superior Court

Presented by:

SUSAN K. STOREY, WSBA #16447
Senior Deputy Prosecuting Attorney


MARY H. BARBOSA, WSBA #28187
Senior Deputy Prosecuting Attorney

Approved as to form:

COLLETTE TVEDT, WSBA #38993

JOSEPH CAMPAGNA, WSBA #40263

JEFFERY ROBINSON, WSBA #11950
Attorneys for Defendant

FINGERPRINTS



RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE:
DEFENDANT'S ADDRESS:

[Handwritten signature]
[Handwritten address]

MICHAEL EMERIC MOCKOVAK

DATED: March 17, 2011
[Handwritten signature]
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK
BY: *[Handwritten signature]*
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

OFFENDER IDENTIFICATION

S.I.D. NO.
DOB: APRIL 10, 1958
SEX: M
RACE: W

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	No. 09-1-07237-6-SEA
Plaintiff,)	
)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
MICHAEL EMERIC MOCKOVAK,	)	AND COUNSELING
)	
Defendant,)	
)	

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: March 17, 2011


 PALMER ROBINSON
 JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
)	
vs.	)	No. 09-1-07237-6-SEA
)	
	)	JUDGMENT AND SENTENCE
	)	APPENDIX H
MICHAEL EMERIC MOCKOVAK,	)	COMMUNITY CUSTODY
)	
)	
	)	Defendant,

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

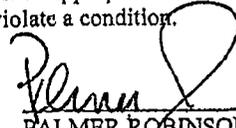
- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community restitution;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location; and
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)
- 7) Notify community corrections officer of any change in address or employment;
- 8) Upon request of the Department of Corrections, notify the Department of court-ordered treatment;
- 9) Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: _____
- Defendant shall remain within outside of a specified geographical boundary, to wit: _____
- The defendant shall participate in the following crime-related treatment or counseling services: _____
- The defendant shall comply with the following crime-related prohibitions: _____
- _____
- _____
- _____

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: March 17, 2011


 PALMER ROBINSON
 JUDGE, King County Superior Court

APPENDIX B

46795

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 RONALD JOHN WILLIAMS,)
)
 Respondent,)
)
)

No. 46795

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

THE HONORABLE WALDO F. STONE, JUDGE

BRIEF OF APPELLANT

DEAN C. SMITH
 Special Prosecuting Attorney
 for Pierce County,
 Washington
 705 South Ninth Street
 Suite 302
 Tacoma, Washington 98405
 206/593-5912

I. APPLICABLE FACTS

Respondent Williams was charged in Pierce County Superior Court in a five-count Information. Count I is a charge of aggravated attempted murder involving the shooting of State Liquor Control Board Agent Melvin Journey. Count II is also a charge of attempted murder relating to an alleged plan to blow up the Night Moves Tavern with knowledge that the building would be occupied. Count III is a charge of first degree arson relating to the same plan to blow up the Night Moves Tavern. Count IV is a charge of conspiracy to commit murder relating to an alleged plan of the Respondent to kill Frank Colacurcio. Count V is a charge of conspiracy to commit first degree arson which likewise relates to the plan to kill Frank Colacurcio by blowing up his automobile.

Much of the information upon which the charges of this case are based stems from an investigation conducted during 1977 and 1978 by the Bureau of Alcohol, Tobacco and Firearms of the U.S. Department of Treasury into alleged racketeering activities in Pierce County, Washington. At the heart of the investigation was an alleged conspiracy on the part of numerous suspects to control tavern and entertainment business in Pierce County. A theory of the investigation was that these individuals, in order to destroy competition, were engaging in harassment, intimidation, arson and violence.

On November 15, 1977, during the course of the investigation, an attempt was made on the life of State Liquor Control Board Agent Melvin Journey. The federal agents were successful in determining the identity of the assassins. The confession of one of the assassins was obtained which implicated Robert Michael Valentine as having contracted for the killing of Mr. Journey, the State contends at the instance of Respondent Williams. Valentine was arrested by federal agents in the Spring of 1978, and, in connection with a plea bargain arrangement, began to cooperate with the agents in the investigation.

From the Spring of 1978 to the Fall of that year, Valentine, at the instance of the federal agents and with their aid and assistance, intercepted and recorded numerous conversations between himself and Respondent Williams. Said interceptions and recordings were done without the knowledge or consent of Williams and were accomplished by various wire recorders and transmission devices by which the conversations were not only recorded, but were also monitored by federal agents.

As a result of Valentine's association with Williams (which had pre-existed his arrest), he was able to introduce federal undercover agents to Respondent Williams. Agent Noman Transeth, posing as a prospective purchaser for "Mr. Lucky's" Tavern and Cardroom, engaged Williams in numerous conversations, part of which, the State contends,

relate to the plan to blow up the Night Moves Tavern which is the subject of the charges in Counts II and III of the Information. Agent Transeth then introduced Williams to Agent Paul Russell who, the State contends, was to be employed to burn the Night Moves Tavern. Williams allegedly then arranged for a contact between Agent Russell and Respondent Williams' co-conspirator, Richard Caliguri, for the purpose of securing Caliguri's assistance to Agent Russell in burning the Night Moves Tavern.

It is the contention of the State that the tape recorded conversations between Respondent Williams and Valentine contain pertinent evidence relating to the shooting of Melvin Journey and that recorded conversations between Williams and Transeth, between Williams and Russell and between Caliguri and Russell contain pertinent evidence relating to the charges in Counts II and III of the Information.

All of the tape recordings referred to herein were used as evidence in the federal criminal trial against Williams, Caliguri and other defendants. The essential character of that federal case was an alleged conspiracy to engage in racketeering. Both Williams and Caliguri were convicted on the federal charges and received substantial sentences.

The State, in the pending prosecution of Respondent Williams, proposes to introduce as evidence tape recordings of conversations between Williams and Valentine and between Williams and Agents Transeth and Russell, as well as tape recorded conversations between Caliguri and Russell. The State further proposes to introduce the testimony of Valentine, Transeth and Russell as to the circumstances and content of the recorded conversations.

Federal agents and Michael Valentine would testify that the tape recordings do, in fact, contain authentic and accurate reproduction of the voices and conversations of Williams and Caliguri. These witnesses would further testify that said tape recordings contain a conversation by Williams and Caliguri that the State alleges contains threats of extortion, blackmail or bodily harm or other unlawful requests or demands.

II. ACTION BY TRIAL COURT

Respondent Williams moved the trial court to order the suppression of the recordings of the conversations as well as the testimony of the participants in the conversations. The trial court granted the motion and ordered suppressed the recordings of conversations with the Respondent as well as with his co-conspirator, Caliguri. The court further suppressed the testimony of Valentine, Transeth and Russell

with regard to the content of the conversations. The court, however, did rule admissible the recorded conversations insofar as they related to threats of extortion, blackmail, or bodily harm or other unlawful requests or demands.

III. ACTION IN THE COURT OF APPEALS

The State filed a motion for discretionary review in Division II of the Court of Appeals. By order dated January 25, 1980, the Court of Appeals granted the motion for discretionary review and ordered that the case be consolidated with the case of State v. Caliguri.

The Court of Appeals then certified the issues in both causes to this Court for decision.

IV. ACTION BY THIS COURT

This Court accepted the certification of the issues from the Court of Appeals and ordered accelerated review.

V. ISSUES ON REVIEW

The actions of the trial court raise the following issues for determination by this Court:

- A. Did the trial court err in suppressing recordings of conversations between the federal agents and informant Valentine and the Respondent Williams?
- B. Did the trial court err in suppressing the testimony of Valentine and the federal agents as to the circumstances and content of the recorded conversations with Williams?

APPENDIX C

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KENT, WA

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CHARGE COUNTY \$200.00

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

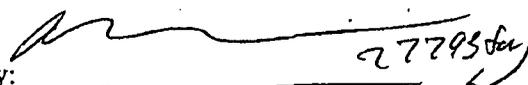
THE STATE OF WASHINGTON,)
Plaintiff,)
v.) No. 08-1-00468-2 KNT
BRADLEY DEAN KLOCK,) INFORMATION
Defendant.)

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse BRADLEY DEAN KLOCK of the crime of Theft in the First Degree, committed as follows:

That the defendant BRADLEY DEAN KLOCK in King County, Washington, during a period of time intervening between October 1, 2005 through November 30, 2006; with intent to deprive another of property, to-wit: U.S. currency, did wrongfully obtain and exert unauthorized control over such property belonging to Clearly Lasik, that the value of such property did exceed \$1,500;

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

DANIEL T. SATTERBERG
Prosecuting Attorney.

By:  27795 for
Melinda J. Young, WSBA #24504
Senior Deputy Prosecuting Attorney

INFORMATION - 1

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

01775 MEM

08-1-00468-2 KNT

CAUSE NO: 07-6713

CERTIFICATION FOR THE DETERMINATION OF PROBABLE CAUSE

1
2
3
4 That Det. N. Ryan is a Detective with the Renton Police
5 Department and has reviewed the investigation conducted in
6 Renton Police Department Case Number 07-6713;

7
8 There is probable Cause to believe that Bradley D. Klock
9 8/5/63 committed the crime(s) of Theft 1st Degree. This
10 belief is predicated on the following facts and circumstances:

11
12 According to victim, witness, private and police investigator
13 reports, the following occurred:

14
15 Rose Winquist, a private investigator hired by doctors M.
16 Mockovak and J. King of Clearly Lasik, Inc., provided
17 documents related to her in-depth investigation of company
18 CEO/sub-contractor, Bradley D. Klock, alleging fraudulent
19 charging of over \$18,455.76 on the company credit card.

20
21 Doctors King and Mockovak own a previously successful Lasik
22 clinic located at 900 SW 16th Street #320 in Renton,
23 Washington as well as others in Kennewick (WA), Vancouver (WA)
24 and Las Vegas, Nevada. In late October of 2005, they were in
25 need of someone to manage/operate the business aspect of the
26 business, so suspect Bradley D. Klock was hired. Klock, a
27 British Columbia (Canada) resident familiar with the Lasik
28 business was secured as company CEO, employed here in
29 Washington on a work Visa.

30

01776 MEM

1 During the course of his employment with Clearly Lasik, Inc.
2 from 10/2005 to 11/2006, Drs. King and Mockavak determined
3 that \$18,455.76 in unauthorized charges were made on the
4 company credit card issued to Klock by C.L.I. According to
5 records provided by Investigator Winquist, approximately
6 \$5,134.89 was reimbursed on two occasions to cover personal
7 expenses charged to the C.L.I. account leaving a balance still
8 owed of \$13,320.87

9
10 Dr. Mockavak cites in his written statement that their
11 company, Clearly Lasik, Inc., under Klock's tenure went from a
12 once profitable company in 2004 to one taxed with substantial
13 debt and "zero" profitability by the close of 2006.

14
15 Documents from Winquist's investigation cite 11 individual
16 incidents of theft, however, there are numerous "questionable"
17 charges on the C.L.I. account that were ongoing during Klock's
18 employment.

19
20 Two major "obvious" incidents include a fraudulent
21 reimbursement made into Klock's personal checking account by
22 the vehicle leasing company in B.C. where C.L.I. provided
23 Klock with a company vehicle. Klock had body shop work done at
24 Mycon Auto Body in Renton, Washington. On 3/27/06 He charged
25 the repairs to his C.L.I. credit card. Since the
26 responsibility of the repairs rested with the vehicle leasing
27 company in B.C., they (Gustafson's) reimbursed Klock
28 personally for the repair. Klock did not forward the funds
29 back to C.L.I. to cover the credit card charge and kept the
30 \$1228.24 for himself.

1 The second incident involved the purchase of an airline ticket
2 to Munich, Germany on 8/14/2006, also secured by C.L.I. credit
3 card. C.L.I. has no business abroad and according to Drs. King
4 and Mockavak, it was definitely not an authorized expense.
5 Although Klock was still employed by C.L.I. at the time he
6 made the purchase of the ticket, he was terminated in 11/2006.
7 After his termination, Klock took the trip anyway from 12/2006
8 through January 2007. The cost of the flight was \$1007.15.

9
10 All other "unauthorized" charges reported by Winquist on
11 behalf of Drs. King and Mockavak involve either ongoing or
12 specific incidents citing charges to the C.L.I. credit card of
13 a personal nature and unrelated to legitimate business travel
14 during the course of normal company business.

15
16 In summary:

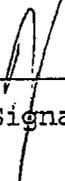
17
18 Out of the \$18,455.76 in unauthorized charges to C.L.I. made
19 by Klock, only \$5,134.89 has been reimbursed for "personal"
20 expenses.

21
22 The balance of \$13,320.87 owed to C.L.I. is in dispute and
23 applied toward consideration of Theft 1st Degree charging
24 against Bradley D. Klock.

25
26 Note: Klock is NOT a United States citizen and is a resident
27 of Surrey, British Columbia (Canada) and at last report,
28 currently residing there.

29

1 Under penalty of perjury under the laws of the State of
2 Washington, I certify that the forgoing is true and correct.
3 Signed and dated by me this 11th day of July 2007, at Renton,
4 Washington.

5
6  11/07 #4404
7 Signature/ID
8

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CAUSE NO. 08-1-00468-2 KNT

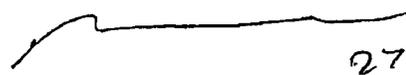
PROSECUTING ATTORNEY CASE SUMMARY AND REQUEST FOR BAIL AND/OR
CONDITIONS OF RELEASE

The State incorporates by reference the Certification for Determination of Probable Cause in Renton incident number 07-6713 signed by Detective N. Ryan on July 11, 2007. In addition, the State notes that the police reports and supporting documentation provide: the credit card statements reflect that the defendant charged his Puget Sound Energy bill to the company credit card, he also charged a trip to Atlanta in the amount of \$456.36 although there was no Clearly Lasik business in Atlanta.

REQUEST FOR BAIL

Pursuant to CrR 2.2(b), the State requests the Court issue a summons directing the defendant to appear in court.

Signed this _____ day of February, 2008.


27785 for
Melinda J. Young, WSBA #24504

APPENDIX D

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
	)	No. 09-1-07237-6 SEA
vs.)	
	)	DECLARATION OF MARY H.
MICHAEL MOCKOVAK,	)	BARBOSA
)	
	)	Defendant.
)	
)	
)	

I, Mary H. Barbosa, hereby declare as follows:

1. I am a Senior Deputy Prosecuting Attorney and was one of the trial deputies in the above captioned case.
2. The entire criminal file in the case of State v. Brad Klock, 08-1-00468-2 KNT, was provided to trial defense counsel, Jeff Robinson and Collette Tvedt in the above captioned case. The discovery is nearly 1000 pages and bears the Bates-stamps 00807-01782. It was given to defense counsel on February 9, 2010. The receipt is attached.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 6th day of November, 2014, at Seattle, Washington.



 MARY H. BARBOSA

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



King County

Office of the Prosecuting Attorney
CRIMINAL DIVISION
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9010

February 9, 2010

Rec'd By: *[Signature]*
Date: 2/9/10
CRAATREE

Colette Tvedt
Schroeter Goldmark & Bender
810 3rd Avenue, Suite 500
Seattle, WA 98104

Re: State v. Michael E. Mockovak
King County Cause No. 09-1-07237-6 SEA

Dear Ms. Tvedt:

I am providing, with this letter, additional discovery in this case (Bates No. 00807 MEM through 01782 MEM). We will let you know if additional discovery becomes available.

This, and all future discovery is provided pursuant to CrR 4.7(h)(3), which prohibits you from providing copies of any of the discovery material to anyone, including the defendant, unless and until appropriate redactions are made and subsequently approved by the prosecutor or order of the court, as follows:

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

Please contact the assigned prosecutors, Susan K. Storey or Mary Barbosa, 206-296-9010 directly should you wish to provide discovery to the defendant.

Although we are careful to photocopy every discoverable item in our possession, mistakes sometimes occur. Please review your photocopies thoroughly to be sure there are no missing pages. Please notify me if you are missing any documents, and I will review our originals and have copies provided. You may review my files to compare your photocopies with the

Prosecuting Attorney
King County
Page 2

documents in my possession to determine if you have a complete set of discoverable materials if you wish.

Sincerely,

For DANIEL T. SATTERBERG, King County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Monicka Ly-Smith", written over a horizontal line.

Monicka Ly-Smith
Paralegal, Complex Cases
Economic Crimes Unit

Enclosures

APPENDIX E

CONFIDENTIAL AND PRIVILEGED SETTLEMENT
COMMUNICATION



1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

Russell L. Perisho
PHONE (206) 359-8494
FAX (206) 359-9494
EMAIL RPerisho@perkinscoie.com

January 9, 2007

Via Email

Mr. Jeffrey A. James
Sebris Busto James
Suite 325
14205 S.E. 36th Street
Bellevue, WA 98006

Re: Clearly Lasik, Inc. and Brad Klock

Dear Jeff:

We are writing to set out Brad Klock's position regarding the decision of Clearly Lasik, Inc. ("CLI") to terminate his employment and offer a severance proposal. Please consider this letter a privileged settlement communication.

Brad Klock was approached by Dr. Mike Mockovak in December 2004 about heading up the CLI organization. Dr. Mockovak and Dr. Joseph King wanted someone with Brad's strong business experience in the lasik industry to help grow the organization rapidly. Discussions ensued. It was agreed that Brad would start as the President, earning an initial annual salary of \$170,000. Further, it was agreed that he would be eligible for bonus compensation of an additional \$170,000, which was to include bonus amounts for overall performance and at least a \$10,000 bonus for each newly opened clinic. CLI and Mr. Klock agreed to memorialize the terms, and Mr. Klock told them that he would work in good faith towards that end. He became a member of the Board of Directors.

The business expanded in 2005 and, implementing the business model set by the Board of Directors, Mr. Klock was instrumental in the opening of five new clinics (Kennewick, Milwaukee, Appleton, Edmonton, and Medford). In January 2006, discussions occurred among Don Cameron, CLI's CFO, Dr. Mockovak, Dr. King, and Mr. Klock about Mr. Klock's 2005 bonus. It was agreed by all that Mr. Klock had earned \$130,000 in bonus. Mr. Klock offered to take only a small cash bonus of \$20,000 if he could invest the remaining portion of his bonus—

63611-0001/LEGAL12962747.1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MENLO PARK
OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

00936 MEM

Mr. Jeffrey A. James
January 12, 2007
Page 2

\$110,000—in the business. Mr. Klock was clear, though, that if his employment was terminated or the company changed direction (i.e. if Drs. Mockovak and King changed direction), he wanted his money back as cash. The deal was struck, Mr. Klock received his small cash compensation, and CLI's lawyer (Chris Marsh) was tasked with drawing up the formal agreement. A formal agreement was drawn up in which CLI expressly acknowledge Mr. Klock's entitlement to the \$130,000 bonus, and committed 220,000 stock options priced at \$.50 a share. The agreement expressly provided that the bonus amount represented by unexercised stock options would be paid back as cash in the event CLI altered its business strategy so that it no longer wished to focus on growth or if Mr. Klock's position as CEO was terminated by CLI for any reason.

Mr. Klock formally demands payment of his unpaid 2005 bonus amount, \$110,000.

In early 2006, the next fiscal year's compensation structure was set and approved at Board meetings. See Inaugural Minutes. Mr. Klock was to receive base annual salary of \$170,000 with at least \$170,000 bonus eligibility based on revenue and new EBITDA formulas. Relying on this, Mr. Klock continued to perform his CEO duties.

It was determined at about the same time that formal employment agreements ought to be entered with the CEO and CFO, and work ensued with Mr. Marsh to accomplish that. (Mr. Klock had been adamant that prior to investing his bonus or any other money in the Company, he needed to have his executive contract completed.) Even though Mr. Klock was anxious to have CLI's commitments in writing, he agreed to continue working as long as progress was being made towards memorializing the terms of his employment. The new compensation approach was incorporated in the draft CEO agreement. As the drafts were reviewed and fine-tuned, the essential terms of Mr. Klock's employment were all appropriately set out upon except for one: severance pay. Dr. King had stated in an email that an appropriate severance would be 3-6 months. Mr. Klock disagreed, and suggested that independent input be utilized to move the issue off dead center and permit the signing of a formal agreement. The Board of Directors and Mr. Klock agreed that a consultant would be hired to survey typical severance pay provisions for CEOs of like sized companies within the same demographics and geographical areas, experience and skill set, and recommend an appropriate severance amount. An outstanding consultant was hired, who performed his study and concluded that the severance amount for the CEO position, given the "mandates, experience and qualifications of the incumbent[s]", should be, other than for legal cause terminations, set at base plus bonus and any remaining LTI for the duration of three years.

While these events dragged on for months, Mr. Klock continued to fully perform and keep his part of the bargain. At the point CLI received the consultant's recommendations it apparently decided to ignore its obligations. CLI failed to finalize the formal CEO contract document and failed to present the document to Mr. Klock for signing.

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January 12, 2007
Page 3

Abruptly, on Wednesday, November 29, 2006, Drs. Mockovak and King met with Mr. Klock. Dr. King stated that they had assessed the business, and had decided to "detract" rather than expand the business. He stated that there was no need to have a "high powered" executive. Dr. Mockovak stated that they had tried to make things work and that through no fault of anyone, the business objectives have not been what were anticipated. Dr. Mockovak stated that he had the utmost respect for Mr. Klock, like him immensely, and wanted to give him some time to digest this change in direction. He stated they had decided to go back to a more "mom and pop" scenario. They stated that they had contacted Jeff James (attorney) to discuss parting company. They stated that they "would like Mr. Klock to stay on for a transition period of say 3 months" and passed Mr. Klock an envelope. The envelope contained a severance document. Mr. Klock was told: "Don't look at it now, read it later." Mr. Klock was told that they knew this was unexpected and that the severance was something that "you are going to need some time to consider." Dr. Mockovak told Mr. Klock that "we would like you to stay on to transition...No pressure." He was told to "take some time off to consider" and "maybe within a week" they could reconvene. Dr. Mockovak told Mr. Klock that they "want to be extremely fair about this" and "you won't have to worry about anything, we will ensure that this is treated in the most professional and fair manner possible." Dr. Mockovak told Mr. Klock that he "liked him as a friend" and that "this isn't about you personally or your performance."

Later that day Mr. Klock found he couldn't access his emails, and found that his lock was changed and credit cards cancelled. (Mr. Klock's email was later restored.)

Instead of responding in anger with this amateurish attempt at "parting company," Mr. Klock contacted Drs. Mockovak and King, and told them that he would be willing to work with them to transition successfully and do it in a way that was best for the business. Mr. Klock said it was important for him that he leave with integrity and respect and that the business was transitioned good shape as it was part of his legacy and track record. He agreed to assist on all transition items, and carry through professionally, and suggested ways to make the transition go more smoothly. One of the things the three discussed on November 29 was an appropriate corporate communication and keeping Mr. Klock's departure confidential until a transition plan was fully worked out. (As part of their transition plan, Drs. Mockovak and King advised Mr. Klock in an email that they would be advising people that CLI was pursuing a "new retrenchment strategy.") Forty five minutes later, Mr. Klock had a call from Kyra Webb, HR Director, saying she understood Mr. Klock was leaving the business. Others learned as well.

On Saturday, December 2, Mr. Klock met with Drs. Mockovak and King, and the three agreed to the transition list provided by Mr. Klock, which Mr. Klock fully accomplished.

Although communications have not been entirely clear, it appears that Mr. Klock's employment was terminated by CLI effective December 31, 2006. He has not been paid his full 2005 bonus,

Mr. Jeffrey A. James
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Page 4

a debt CLI has already acknowledged, and his share of the 2006 bonus was earned, but also has not been paid.

Jeff, as you know, I became involved in representing Mr. Klock in early December. He continued working, implementing the transition items, while I struggled to get some basic information and work out the details of the transition. (The proposal made to Mr. Klock did not come close to what he was owed, and was out of line with the way other departing employees had been paid. Indeed, in light of the fact that CLI had the consultant's data and conclusion, the offer was objectively offensive.) On December 19, 2006, you delivered some astounding news. Drs. Mockovak and King viewed Mr. Klock's termination as a "for cause" termination. You told me that Mr. Klock did not do the job CLI expected him to do, and that he was being held accountable for the fact that the company was losing money. You told me that Drs. Mockovak and King "discovered" two things to support a for cause termination. First, two employees who recently left said they were instructed by Mr. Klock to not communicate with the doctors (King and Mockovak). Second, Mr. Klock was not working when he said he was and was attempting to dishonestly take money from the company. Mr. Klock was taking golf trips and doing wine tastings for personal convenience at company expense. So, you said, Mr. Klock was being let go for "incompetence and dishonesty."

I asked if notice had ever been given to Mr. Klock of the owners' views that he was performing deficiently, and you said you didn't know. I said that I was confident no such notice had been given.

Next came efforts to force Mr. Klock out of his residence at a time when CLI knew that Mr. Klock was unable to be present physically to move his effects. See your December 21, 2006 email. Also Mr. Klock was told he better pay the credit card charges that were run up. See your January 3, 2007 email.

Before we turn to our proposal, we need to address the so-called "for cause" events. The after-the-fact, absurd rationalizations coming from Drs. Mockovak and King weeks after they shabbily dumped Mr. Klock are shockingly and intentionally false. First, as email correspondence shows, the issue of use of corporate credit cards came up in October 2006. Dr. King suggested that all the directors and officers review their credit card purchases as a means of controlling costs. Dr. King stated that he had found charges on his card that were disputed and that others should look for the same. Mr. Klock, who carries five nearly identical silver platinum credit cards, found that he had mistakenly charged some items on the wrong card. He immediately initiated payment of the items, and his personal Wells Fargo check #1054 was given to the company's controller, Tammi Geselius, in late October. Every one of the items you referenced in your January 3 email was paid by Mr. Klock months ago.

Mr. Jeffrey A. James
January 12, 2007
Page 5

Second, the condo payment issue has the same stink. CLI is so anxious to browbeat Mr. Klock into accepting their inadequate offer that it has deliberately ignored and twisted the facts. The last week in May 2006, Mr. Klock was offered, by Dr. Mockovak (when he learned that Mr. Klock was having boat work done), the use of the condo for a few weeks. (Mr. Klock's boat was out of the water having re-fit work done.) Mr. Klock assumed that this was a thoughtful gesture with no dollar obligations attached.

In late June 2006, Mr. Klock learned that his boat would not be ready on time. He approached the Board of Directors about moving into and renting the condo on a more regular basis. Dr. Mockovak responded "no sweat, work it out with Don re: same deal that was presented to Michael King." That deal was \$625.00 per month. In conversations with the CFO, it was agreed that Mr. Klock would pay \$625 per month, which would be offset against 2006 bonus compensation. Emails confirm this arrangement. Accordingly, the amounts Mr. Klock agrees are owed for rent of the condo are:

- Amount Owed:

July	\$625	
August	\$625	
September	\$625	
October	\$625	
November	\$625	
December	\$ 0	(\$950 already deducted from December salary)
<u>January</u>	<u>\$950</u>	
TOTAL	\$4,075.00	

(We are not interested in disputing at this time whether the rent could be increased without notice.)

As for the competence of Mr. Klock, his accomplishments speak for themselves. See attached list of 2006 CEO accomplishments. Mr. Klock successfully implemented CLI's policy and direction in a year marked by difficult trends. If the policy was ill advised, the blame rests with all those sitting on the Board of Directors.

Having set out the events forming the backdrop to our discussions, where do we go from here? Put plainly, CLI needs to meet its contractual obligations and pay Mr. Klock what he is owed. The sequence of events strongly suggests that CLI's owners thought they could fire Mr. Klock without any obligation, so long as they acted before the formal executive agreement was signed. The problem, of course, is that the law does not have blinders to the course of conduct and actions of parties - it will enforce binding obligations, whether formal or informal, where, for example, the parties have clearly manifested their intent to enter an agreement. The law will

Mr. Jeffrey A. James
January 12, 2007
Page 6

enforce promises made that are reasonably relied upon by a party to their detriment. That is exactly what happened here.

CLI owes Mr. Klock the return of \$110,000. CLI acknowledged this debt, and the parties agreed how to handle the payment. Mr. Klock will be entitled to his attorneys' fees should he be required to initiate legal action to recover funds being wrongfully withheld by CLI and owed as compensation.

CLI owes Mr. Klock severance. The parties agreed to finalize the employment agreement, and CLI cannot simply walk away after obtaining Mr. Klock's performance. Mr. Klock will be entitled to his attorneys' fees should he be required to initiate legal action to recover funds being wrongfully withheld by CLI and owed as compensation.

CLI should immediately stop making negative statements about Mr. Klock's job performance and character. It should cease and desist from suggesting to anyone that Brad Klock is dishonest or incompetent, as such statements are per se defamation and subject to an assumption of damages. Juries are quite sympathetic to these claims, particularly when efforts are made to intentionally publish falsehoods that can destroy careers.

In considering CLI's position if litigation should ensue, it is worth noting the deliberate distortion of the truth that emerged as CLI sought to avoid liability for its careless termination. You told me on December 19 that CLI was not changing its business direction; rather, it was only pursuing a "for cause" termination. The point of that representation was to suggest that CLI did not need to return Mr. Klock's \$110,000. After all, the agreement contemplated return of the cash in the event of an "altered business strategy." However, CLI has made written and oral public and private statements about the fact that it is retrenching and pursuing a new business strategy. The falsity of the information provided about Mr. Klock's termination is belied by CLI's own statements, including the statements made by both Dr. King and Dr. Mockovak directly to Mr. Klock on November 29. Whether this intentional misrepresentation is actionably fraudulent is perhaps less important than how a jury will view the transparent dishonesty. (It is also significant that, in all events, Mr. Klock is expressly entitled to return of his bonus if he is terminated for "any" reason.)

Mr. Jeffrey A. James
January 12, 2007
Page 7

We are willing to try to avoid litigation over these issues, and towards that end submit the following proposal. We have offered general points for discussion, anticipating that if progress is made we will begin to include the points of agreement in a formal settlement agreement. In making the following proposal, we reserve the right to modify or withdraw provisions:

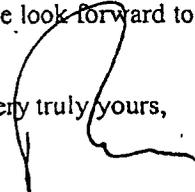
1. CLI pays Mr. Klock \$110,000.00 in 2005 bonus earned.
2. CLI pays Mr. Klock his share of the 2006 bonus based on revenue and EBITDA formula adopted by Board of Directors.
3. CLI pays a severance amount equal to Klock's base salary for two years.
4. CLI reimburses Mr. Klock for cost of medical and dental insurance for next eighteen months.
5. CLI provides a mutually agreed letter of reference for Mr. Klock to use with future prospective employers.
6. Mr. Klock pays condo rent in the amount of \$4,075.00.
7. Mr. Klock pays CLI \$800.00 to purchase 1 year old laptop.
8. Mr. Klock returns all company property, including Blackberry device and cell phone.
9. Mr. Klock vacates Condo on or before January 31, 2007.
10. Adequate provisions to address the potential for defamation damages.

Mr. Jeffrey A. James
January 12, 2007
Page 8

The last point needs explanation. We do not know how many people have been informed that Mr. Klock is "incompetent and dishonest." Defamation may have already occurred, and any settlement can occur only if we know where the lies were spread and what damage has already been done. In addition, of course, we will need to address the future, to make sure that the lies end.

We look forward to a prompt response.

Very truly yours,



Russell L. Perisho

RLP:sh

APPENDIX F

STATEMENT OF DONALD M. CAMERON, CA

Attached are my comments regarding the criminal action against Bradley D. Klock ("KLOCK"), relating to my knowledge and recollection of events from March 8, 2005 until April 17, 2007, the time during which I was engaged through InHouseCFO Inc., to serve as the CFO for Clearly Lasik a group of businesses that collectively branded itself as Clearly Lasik ("CLI").

My background, relation to KLOCK, and to CLI are as follows:

BACKGROUND

I am a Chartered Accountant ("CA") in good standing (Canadian Institute of Chartered Accountants) and have been so since 1978 (30 years). My history as a professional leading up to CLI is as follows:

- a. First 15 years in public accounting;
 - Client, Tax and Managing Partner KPMG;
- b. Next 15 years as entrepreneur and CFO for various companies, including:
 - A company in medical diagnostics business, from start-up, IPO, and sale after 5 years;
 - CFO of RBC Global Private Banking, the private banking business of the Royal Bank of Canada; 2,200 employees, \$165.0 Billion assets under administration, Revenue of \$ 550 Million;
 - In 2003 moved to Vancouver, Canada. Started business outsourcing CFO services to clients, InHouseCFO Inc. ("IHCFO"). The sole focus of IHCFO is to lend it's experience and resume to entrepreneurially oriented, businesses which, because of early success want to grow their business;
 - Clearly Lasik Inc. ("CLI") subsequently became one client in March 2005. I was appointed CFO and a director at that time.

RELATION TO KLOCK

- a. In 2003, met KLOCK through HireDesk ("HD"), a software start-up servicing the Human resource industry:
 - HD was a client of IHCFO;
 - KLOCK was hired by HD hired as VP Sales.
 - o At that time we were not friends and didn't socialize
- b. Did not work with KLOCK after HD until received a call from him in January 2005 re: CLI.

RELATIONSHIP WITH CLI

- a. Approached by KLOCK, who had already been hired by CLI as CEO, regarding providing CFO services to CLI. Interested because:
 - CLI had experienced early success from it's start-up of 2002;
 - CLI owners had stated that they wanted to pursue an aggressive growth strategy;
 - CLI required the skills that can be offered by IHCFO; and
 - CLI was in a business similar to a business IHCFO had provided services to previously (involved in medical diagnostic imaging services).
- c. Interviewed extensively with Drs. King and Mockovak.:
 - Email exchanges with Drs. and KLOCK;
 - Web-X presentation prepared and presented regarding needs created by opportunity ;and
 - Met in person a number of times
- d. They all confirmed that:
 - They wanted business to grow and become the dominant provider of lasik surgery services in North America;
 - That the opportunity existed in the market-place; and
 - They were committed to doing this, and understood they needed to add expertise to the team;
- e. Started work with CLI March, 2005, as CFO and Director;
- f. Remained contracted to CLI until April, 2007.
- g. After KLOCK left in December 2006, I discussed with Drs. the business model. Drs. Indicated that they had concluded that they no longer sought to grow the business, and wanted to retrench back to more of a family operation.
- h. In April 2007, Drs advised that, as a result of g., they felt that they no longer required the level of service from IHCFO, and terminated their contract.
- i. Amounts are still outstanding pursuant to that contract.

I outline firstly general comments and details regarding my recollection of the circumstances surrounding KLOCK and CLI (Appendix A), then specifically on the expenditures in question (Appendix B)

APPENDIX A

COMPENSATION FOR KLOCK

- a. Part of IHCFO mandate was to provide organizational governance advice, and a compensation methodology for the business.
- b. Put together compensation matrix for the whole organization on spreadsheet (see attached). This was discussed and approved by the Board of CLI in December 2005;
- c. Originally, KLOCK compensation: 340k annually with 170k in salary and 170 in potential bonus, which was to be paid partly in cash and partly in equity, subject to termination consequences;
- d. CLI's legal counsel drafted letter confirming agreement by Board for bonus earned but unpaid for 2005 and prepared compensation contract for 2006 and subsequent based on Board approved methodology. All terms agreed to by Drs. except for when severance was payable. Terms agreed to at January, 2006 organizational board meeting. Subsequently, counsel drafted contracts. Never signed by Drs.
 - i. Agreed upon 1 yr severance. Issue of when payable.
 - ii. Every month thereafter issue of severance remained an issue.
 - iii. Agreed to engage an expert, Steve Wace:
 - a. Wace report confirmed the reasonability of severance, and the events where they would be payable
 - iv. September 2006, Drs finally decided that what had been agreed upon was no longer acceptable. It appeared from then on Drs. attempting to figure out way to terminate KLOCK.

KLOCK CREDIT CARD EXPENSES.

- a. A system of authorities delegated from the owners and the Board was approved by the Board, outlining what position had what level of authority to both approve expenditures and commitments for others, and to incur same without other prior approval;
- b. Senior officers and directors had the highest level of authority and discretionary choice:
 - (1) expense items w/o prior approval.
 - Expectation – personal items were not expected to be made on corporate cards, however if they were inadvertently, the Company expected reimbursement or salary set off;
 - Not discussed, just understood;
 - No company policy as to when officers were expected to reimburse;
 - Frequently, in other circumstances I have been involved in as CFO, senior officers reimburse at least once a year;
 - We did have somewhat of a double standard at CLI. The Drs. (as owners) behaved differently. Frequently incurred company expenses that didn't benefit the company. Many perks for family, other personal items charged to company. Felt that this was their right, even though, all employees were on a profit sharing bonus plan, and owned stock options, and they too were subject to the agreed upon delegated authorities chart.
- c. The Drs sent out emails in October, 2006, suggesting all board members go thru expenses. All on the Board thought the idea was prudent.
 - i. My understanding is that:
 - i. KLOCK settled up;
 - ii. Drs did not settle up.
- d. KLOCK credit card expenses
 - i. The credit card activities were all available and visible on-line;
 - ii. Had Controller, Tami Geselius review monthly when posting expenses and arranging for payment;
 - iii. As CFO, I reviewed the expenditures periodically to ensure in line with delegated authorities

- e. KLOCK Reimbursed \$5,255.27.
 - i. After discussion at Board meeting, in October, 2006, I instructed Controller, Geselius to have everyone settle up before the next board meeting;
 - ii. \$5,255.27 provided to Geselius w/o itemization.
- f. First heard of allegations of KLOCK's wrongful credit charges in early, 2007, after KLOCK had been terminated.

KLOCK'S TERMINATION

- a. Originally learned of KLOCK's termination by phone call from the Drs. shortly after KLOCK notified. Told by Drs. reason for termination is that they no longer needed a high power executive like Brad because they were changing their strategy, by hunkering down and following a different tack on business plan with less emphasis on growth and more of a family run business;
- b. Advised by Drs that KLOCK would be staying on until the end of January to finish some items he was working on and to assist with the transition.
- c. Knew that the Drs both had changed their personal financial status through acquisition of new homes in the fall of 2006.

KLOCK'S TERMINATION "FOR CAUSE"

- a. It was made clear to me at the outset when the Drs called me to inform that KLOCK had been terminated, that it was due to a change in business strategy, and not for cause. A telephone conversation that I had with CLI's employment lawyer, James, confirmed that at the termination meeting, it was his understanding that the Drs did not inform KLOCK that he was being terminated for cause;
- b. At monthly meeting in January, 2007, Drs asked me if I knew that KLOCK spent \$75,000 on personal items using company credit card:
 - I indicated that I would be surprised if that was the case, as:
 - I knew of KLOCK's spending habits, and general level of integrity;
 - Our Controller, Tami Geselius was responsible for oversight in this area, and was intimate with the charges on all the cards;
 - I reviewed the credit card charges generally for everyone from time-to-time;
 - I indicated to the Dr's, that if indeed what they were alleging occurred, it would be under my area of responsibility and that a severe breakdown in our internal control systems would have occurred. I wasn't overly concerned that this had occurred because of the checks and balances listed above;

- o I was eventually given a spread sheet:
 - My review after the fact left me with comfort that, if there were personal expenditures on the card, that they were not material, and that KLOCK had provided our Controller with a reimbursement cheque for those amounts.
- c. At January, 2007 Board meeting Mockovak said: "Brad was asking for a million dollars. If he is going to be that way, we'll do all we can to make it expensive and drawn out before KLOCK sees anything. Just like Rothman is doing to us"
 - Rothman was a former partner of the Drs, in Las Vegas, who, because of partnership differences, removed all of the equipment from the clinic there, then proceeded to practice on his own. It was clear that his strategy was never to settle up on amounts owing to the Drs, even though the financial arrangements were agreed to among them. Delay, and the incurrence of unnecessary legal costs to the Drs was Rothman's strategy to make them "go away". Dr. Mockovak seemed to like that strategy.
- d. In March, 2007, King asked me to go through spreadsheet of KLOCK's alleged personal charges to company credit card.
 - Started by having Geselius try to figure out what expenses were represented by KLOCK's reimbursement check. The adding machine tape document represents Geselius' effort to account for expenses that make up reimbursement;
 - Nothing was concluded in this regard as IHCFO contract was terminated.

MISCELLANEOUS

- a. KLOCK's Calendar was always fully available to all senior personnel including the Owners;
- b. Spoke with KLOCK each day upwards to 8 times. Invariably, in the morning and afternoon would touch base. I was fully aware of his activities as CEO;
- c. After KLOCK left CLI, the company needed to hire a general manager. The Drs. organized a business dinner where candidate was being further interviewed. Drs. showed 1 ½ hours late. They showed up with spouses and young children. I believe that it is completely inappropriate to have young children at business meeting. The expense of the dinner was charged to CLI.

APPENDIX B

Review of the specific allegations of claimed misuse of the company credit card (\$18,455.76):

1. **Wireless Services. (\$1,744.83)** Allegation is that CLI provided Mr. Klock with a blackberry and that Mr. Klock made unauthorized charges of \$1,744 for telecommunication services. These services included Broadband Xpress service and BC Telus Mobility Service.
 - a. As CFO, I consider these charges as reasonable business expenses and properly chargeable to CLI:
 - i. Given Klock's position as CEO and his travels, it was a reasonable cost to the business to have him have 24/7 access to the internet and the CLI server. As a CEO of a 15-20 million dollar company, Klock needed this internet access. Other staff members who reported to him had same access for same reasons;
 - ii. It was similarly reasonable to charge the company for the BC Telus Mobility Service because it allowed KLOCK to have his Canadian calls forward to one cell phone. The Company did business in Canada;
 - iii. As CFO I knew that these costs were being incurred by CLI.
2. **Boise Trip. (\$2,608.62)** Allegation is that KLOCK took a personal ski vacation to Sun Valley with Gayle Stephens ("Stephens"), a person whom he was having a romantic relationship with and charged the trip to the company. The charges to the company credit card were \$2,608. It is my understanding, as part of the \$5,200, KLOCK made partial reimbursement.
 - a. I was aware of trip;
 - b. I was aware that KLOCK went into Boise to conduct business each day of the business week portion of the trip;
 - c. Reimbursement was a reasonable methodology for allocation of business to personal.

3. **Napa Trip. (\$3,472.50)** Allegation that KLOCK took a vacation in the wine country that he charged to CLI. Allegation is vacation (\$2,340.49 = travel costs), plus a dinner was wrongfully charged that cost \$1,132.01
- a. I attended the conference with my wife that preceded the Napa event. We returned to Vancouver after the conference, knowing that KLOCK was carrying on to Napa and that Stephens was arriving to join him. I also believed that King and Mockovak and their wives were also participating in Napa event, first to build relationships with supplier Bausch and Lomb, then to meet with potential investors;
 - b. King and Mockovak had full knowledge of the business nature of the event of entertaining the Courtnall group of potential business investors.
 - i. In advance we had spoken about raising investment capital to grow the business. In fact the business plan required it;
 - ii. On that matter, at board meeting we discussed Courtnall as possible source of investors. Discussed how the conference, the Bausch and Lomb wine tour and dinner were all planned;
 - iii. KLOCK responsible for coordinating the events;
 - iv. Including Stephens was reasonable business related expense because 1) mixed company event - other spouses included, 2) Stephens was a contractor working for CLI, 3) King and Mockovak's spouses were to attend, and 4) it was planned openly, where King and Mockovak were fully aware of the circumstances;
 - v. As CFO, the expenditure that covered the costs of Stephens was reasonable. I knew Stephens attended and did not expect reimbursement.
4. **Milwaukee/Atlanta trip. (\$1,303.09)** In October, 2006, KLOCK took a business trip to Milwaukee. While on the trip he flew to Atlanta to visit Michelle Hight. Allegation is that the CLI charged trip to Atlanta was personal and should not have been charged to the business.
- a. I knew of KLOCK's agreement to meet Natalie Townsend. I coordinated meeting with her in Toronto. I knew of KLOCK's planned meeting with Steven Wace, the compensation consultant hired by CLI, in Toronto. I learned after KLOCK had departed on business in the east, that it would have been a waste of time to have the Townsend meeting because she was not sufficiently prepared on the business plan and concluded that her group was not an appropriate investor. I told KLOCK to call off the meeting;
 - b. Drs. would not have been aware of all the business related details of this trip;
 - c. It is my understanding that the side trip to Atlanta didn't cost CLI any additional money. As long as the total costs were less than or equal to what it would have cost the company for the business reason, as CFO, I had no problem with the trip to Atlanta being charged to the business.

5. **Truck Repair (\$1,228.24)**
 - a. I saw the damage to the truck;
 - b. I am familiar with the challenges created by cross border financial transactions;
 - c. The cost of repairs paid by CLI was reimbursed by dealer. It is my understanding that this reimbursement was paid to KLOCK personally as lease was in his name (because CLI didn't qualify for a lease with a Canadian Company), and then reimbursed by him as part of the \$5,200 reimbursement cheque.
6. **Lang and Associates. (\$299.46)**
 - a. I have no knowledge or information about this allegation
7. **Chicago Howes Meeting. (\$1,833.19)** Allegation is that BK charged inappropriately charged personal expenses after concluding his business in Chicago. BK charged \$531 in room service, two Chicago Cubs game tickets, and a \$200 restaurant charge.
 - a. Howes - senior executive for Bausch and Lomb. Agreed to meet with KLOCK in Chicago. He was routing thru Chicago on the way back from a vacation in Miami. This meeting was important as we were having challenges with Howes subordinates in finalizing our national supply and service contract;
 - b. I knew that KLOCK had made plans to take Howes to the baseball game;
 - c. All expenses would have been approved if KLOCK's stay in Chicago did not cost the company extra. It is also reasonable for CLI to pay for reasonable expenses for its CEO if he is working throughout the weekend;
 - d. Generally, regarding working meals, if a staff member continues the work day by working thru the evening, it is reasonable that the company either reimburse the employee for dinner costs, or incur reasonable costs directly for the employee
8. **Bellevue Athletic Club. (\$1,099.75)** CLI paid for KLOCK's membership dues. Allegation is that personal additional club expenses KLOCK charged to the credit card.
 - a. If the charges to CLI in question were for business related meetings, they are reasonable charges to the business.
9. **Autumn Stefoniuk/Miller Nash (\$1,022.80)**
 - a. I was vaguely aware of the harassment issue (approx \$600), and, if it had an effect on CLI, would have approved it as a business related expense.
 - b. I am not aware of any of the other charges from this allegation (approx \$400), but again understand that they were reimbursed.

10. **Munich (\$1,007.15)** Allegation is that this trip was personal, and not reimbursed.

a. I was aware of the trip, but was not aware of the charge being placed on the CLI credit card. It was personal in nature, and I understand that it was reimbursed.

11. **Miscellaneous (\$2,836.13)**

a. I am not aware of the miscellaneous items alleged, other than:

i. Luggage (\$ 376.75 + 155.88):

- The first item was for CLI monogrammed shirts to be used for carrying same to events;, garments for shirts, to send around;
- The second item was to replace KLOCK's laptop bag that was damaged beyond repair during business travel



Donald M. Cameron, CA

APPENDIX G

FILED

08 OCT 28 PM 3:14

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

OCT 28 2008

OCT 28 2008

CERTIFIED COPY TO COUNTY JAIL

CERTIFIED COPY TO WARRANTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 08-1-00468-2 KNT

vs.

BRADLEY KLOCK,

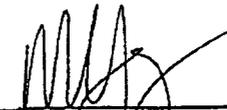
Defendant.

MOTION AND CERTIFICATION
AND ORDER OF DISMISSAL

COMES NOW Daniel T. Satterberg, Prosecuting Attorney for King County, Washington, by and through his deputy, and moves the court for an order dismissing the above-entitled cause as to the above-named defendant for the reasons set forth in the certification of the undersigned deputy prosecuting attorney.

That Melinda J. Young is a deputy prosecuting attorney in and for King County, Washington, and is familiar with the records and files herein: Additional information provided by the defense has raised reasonable doubt. In the interests of justice, the State is asking the court to dismiss the charges.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 24 day of October, 2008, at Seattle, Washington.


Melinda J. Young, WSBA #24504
Senior Deputy Prosecuting Attorney

ORDER

MOTION AND CERTIFICATION AND ORDER OF
DISMISSAL - 1

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

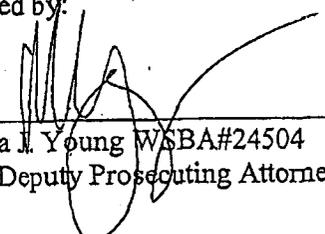
1 IT APPEARING from the motion and certification that the ends of justice do not
warrant further proceedings in this matter; now, therefore,

2 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the above-
entitled cause as to the above-named defendant be, and the same hereby is, dismissed.

3 DONE IN OPEN COURT this 26th day of October, 2008.

4 
5 JUDGE

6 Presented by:

7 
8 Melinda J. Young WSBA#24504
Senior Deputy Prosecuting Attorney

APPENDIX H

MILLER | NASH LLP
ATTORNEYS AT LAW

Miller Nash LLP
www.millernash.com
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352
(206) 622-8484
(206) 622-7485 fax

3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3699
(503) 224-5858
(503) 224-0155 fax

500 E. Broadway, Suite 400
Post Office Box 694
Vancouver, WA 98666-0694
(360) 698-4771
(360) 694-6413 fax

David Schoolcraft
david.schoolcraft@millernash.com
(206) 777-7429 direct line

December 9, 2005

VIA ELECTRONIC MAIL

Ms. Autumn Stefoniuk
mastefon@hotmail.com

Dear Ms. Stefoniuk:

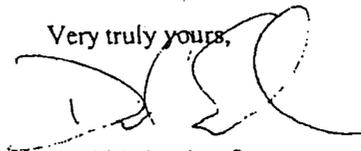
Please be advised that our law firm, Miller Nash LLP, has been engaged by Mr. Brad Klock to assist with the investigation of recent incidents of telephone harassment, improper access and use of personal data, and cyberstalking directed at Mr. Klock, his friends and family.

Based on information we received from Mr. Klock, it is our understanding that certain data including Mr. Klock's personal electronic contact list(s) and/or telephone contact list(s) were improperly accessed and used for the purpose of harassing Mr. Klock, and others close to him. We have reason to believe that the improperly accessed data was used to generate an email message on Friday, December 2, 2005 at approximately 5:00 p.m., and that such email message directly links to you. We also have been made aware of a series of telephone calls-- the first placed Friday, December 2, 2005 at approximately 12:10 a.m., the second placed Sunday evening, December 5, 2005 (which was recorded), the third and fourth calls on December 7, 2005 at 12:25 a.m. and 8:20 a.m., and the fifth call being received this morning at 9:20 a.m. -- made with the intent to harass and intimidate Mr. Klock and/or his friends and family.

The activities described above constitute telephone harassment, cyberstalking, and violation of laws and regulations governing the use and disclosure of personally identifiable data under U.S. and international laws. At present, we are investigating both civil and criminal recourse that may be available to Mr. Klock, his friends and family, as a result of these actions.

We are in the process of working with the applicable telecommunication providers and online service providers to obtain log files and related information to verify the sources of the actionable communications described above. In order to avoid liability or prosecution in this matter, we demand that you cease and desist from any contact, whether by phone, email or other means of communication, with Mr. Klock, his friends or family.

Very truly yours,



David Schoolcraft

B Klock

From: Brad Klock
Sent: December 7, 2005 9:05 AM
To: david.schoolcraft@millernash.com <david.schoolcraft@millernash.com>
Subject: Letter to "Stalker"

David another two calls ... last night at 12:25 a.m. (which was not answered) and again this a.m. @ 8:20 the second call screaming profanities at my girlfriend telling her to answer the phone when it rings (Gayle hung up) ...

I would really like to get a letter out to her asap any thoughts as to how quickly we could do this?

Regards

Brad

Brad D. Klock
President



900 W 16th St.
Suite 200
Renton, WA 98055
p. 425.525.1000
c. 206.856.0552
f. 425.525.2296
www.clearlylasik.com

01593 MEM

B Klock

From: Brad Klock
Sent: December 12, 2005 3:06 AM
To: Schoolcraft, David; Martinez, Kristin
Subject: FW: EMAIL SENT ON BEHALF OF DAVE SCHOOLCRAFT: Letter to Autumn Stefoniuk

Attachments: Your_sca.pdf



Your_sca.pdf (54 KB)

Dave/Kristen it appears this lunatic has changed her email to mastefon@shaw.ca ... I received an email from her on Friday(I must have been added to her group list as it was sent out to a number of people?) anyway ... could you please re-send email to mastefon@shaw.ca ... thanks

Brad D. Klock

President

900 W 16th St.

Suite 200

Renton, WA 98055

p. 425.525.1000

c. 206.856.0552

f. 425.525.2296

www.clearlylasik.com

-----Original Message-----

From: Martinez, Kristin [mailto:Kristin.Martinez@millernash.com]

Sent: Friday, December 09, 2005 3:01 PM

To: Mastefon@hotmail.com

Subject: EMAIL SENT ON BEHALF OF DAVE SCHOOLCRAFT: Letter to Autumn Stefoniuk

01594 MEM

Confidentiality Notice: This e-mail message may contain confidential or privileged information. If you have received this message by mistake, please do not review, disclose, copy, or distribute the e-mail. Instead, please notify us immediately by replying to this message or telephoning us. Thank you.

Tax Advice Notice: IRS Circular 230 requires us to advise you that, if this communication or any information contained herein is intended to be used, and cannot be used, for the



900 W 16th St.
Suite 200
Renton, WA 98055
p. 425.525.1000
c. 206.856.0552
f. 425.525.2296
www.clearlylasik.com

From: Martinez, Kristin [mailto:Kristin.Martinez@millernash.com]
Sent: Thursday, December 08, 2005 4:25 PM
To: Brad Klock
Cc: Schoolcraft, David
Subject: Letter to Autumn Stefoniuk

Brad,

Attached is a draft letter to Autumn Stefoniuk. Please review and forward or call me with any questions or comments. I am hoping to finalize this letter for mailing tomorrow.

Dave

Confidentiality Notice: This e-mail message may contain confidential or privileged information. If you have received this message by mistake, please do not review, disclose, copy, or distribute the e-mail. Instead, please notify us immediately by replying to this message or telephoning us. Thank you.

Tax Advice Notice: IRS Circular 230 requires us to advise you that, if this communication or any attachment contains any tax advice, the advice is not intended to be used, and cannot be used, for the purpose of avoiding federal tax penalties. A taxpayer may rely on professional advice to avoid federal tax penalties only if the advice is reflected in a comprehensive tax opinion that conforms to stringent requirements. Please contact us if you have any questions about Circular 230 or would like to discuss our preparation of an opinion that conforms to these IRS rules.

STEFONIUK/MILLER NASH OVERVIEW

In October, 2005, Mr. Klock invited friend Autumn Stefoniuk, to visit Seattle. This was a personal trip, however, out of convenience, Mr. Klock booked the flight for Ms. Stefoniuk through his pre-set corporate Alaska Airlines travel profile.

Through reconciliation, Mr. Klock reimbursed CLI in full for the flight (\$US 301.80) and a meal charge (\$US 83.00) totaling \$US 384.80.

Several weeks after Ms. Stefoniuk's visit, Mr. Klock started to receive strange email messages, telephone calls and MSN messages. Although not being able to directly link it to Ms. Stefoniuk, Mr. Klock deduced, based on some of the content that it was likely that Ms. Stefoniuk was behind the strange behaviour. Mr. Klock had many of his key staff linked via MSN in order to communicate in "real time" more effectively, and became concerned about a potential compromise of the CLI system, files, server, etc. Mr. Klock approached CLI's Director of IT, Mr. Daniel Kultin, explaining the concerns to Mr. Kultin (and later to his assistant Ms. Cacia Hunter as he was also concerned about his outlook calendar being compromised). Mr. Kultin said he would look into it immediately and get back to Mr. Klock. Mr. Klock then contacted CLI attorney Mr. Chris Marsh to apprise him of the situation and get corporate legal advice. Mr. Marsh was unavailable to speak (out of town) however, via email, referred Mr. Klock to attorney David Schoolcraft of Miller Nash, "a good electronic media and rights lawyer" (see Document #87 -

Klock/Chris Marsh Emails).

Mr. Klock outlined his concerns to Mr. Schoolcraft explaining the potential security implications involved (privileged patient communication, charts, files, etc) and that CLI's Director of IT was looking into it internally.

Mr. Klock and Mr. Schoolcraft agreed that it would be appropriate to send a letter to Ms. Stefoniuk, instructing her to cease and desist all forms of communication with Mr. Klock. The letter was drafted, finalized and sent on December 9, 2005.

Mr. Klock received another email from Ms. Stefoniuk 3 days later on December 12th, 2006 even though the letter had been sent. Mr. Klock instructed Mr. Schoolcraft to once again send the cease and desist letter (see **Document #89 – Klock/Miller Nash Attorney David Schoolcraft Emails**, to an alternate email address as it appeared in the most recent email, Ms. Stefoniuk had changed email addresses. Mr. Klock heard or received nothing further from Ms. Stefoniuk after December 12, 2005.

As per the delegated authority chart incorporated within the CLI organizational meeting minutes, and per the potential business compromises and privacy issues at stake, Mr. Klock was authorized to sign off on the Miller Nash invoice as a business related expense.

APPENDIX I

FILED

10 MAY 04 AM 8:33

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 09-2-03018-9 SEA

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

BRADLEY KLOCK,

Plaintiff,

vs.

CLEARLY LASIK, INC., et al.,

Defendants.

NO. 09-2-03018-9

NOTICE OF PRESENTATION TO
EX PARTE
(NT)

I. NOTICE

The undersigned submitted the documents listed below to the Ex Parte and Probate Department as part of an Ex Parte via the Clerk submission:

Stipulation and Order of Dismissal with Prejudice

Dated: 5/4/10

S/ Patrick M. Madden
Signature of Lawyer or Moving Party

The Honorable Julie Spector

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

BRADLEY KLOCK,

Plaintiff,

No. 09-2-03018-9

STIPULATION AND ORDER OF
DISMISSAL WITH PREJUDICE

v.

CLEARLY LASIK, INC., a Nevada corporation; MICHAEL MOCKOVAK and HEATHER MOCKOVAK, and the marital community composed thereof; and JOSEPH KING and HOLLY KING, and the marital community composed thereof,

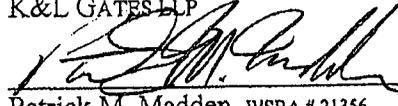
Defendants.

STIPULATION

IT IS HEREBY STIPULATED by and among the parties hereto, through their respective undersigned attorneys, that this lawsuit should be dismissed in its entirety with prejudice and without costs or fees to any party.

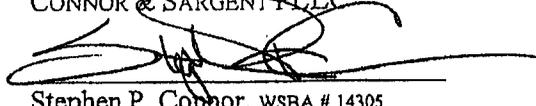
DATED this 2nd day of May, 2010.

K&L GATES LLP



Patrick M. Madden, WSBA # 21356
Attorneys for Defendant
Clearly Lasik, Inc.

CONNOR & SARGENT PLLC



Stephen P. Connor, WSBA # 14305
Anne-Marie E. Sargent, WSBA # 27160
Attorney for Plaintiff Bradley Klock

STIPULATION AND ORDER OF
DISMISSAL WITH PREJUDICE - 1

K&L Gates LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

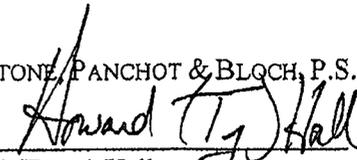
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COHEN & IARIA


Michael Iaria, WSBA # 15312

Attorney for Defendant Michael Mockovak

WOLFSTONE, PANCHOT & BLOCH, P.S., INC.


Howard (Terry) Hall, WSBA # 10905

Attorneys for Defendants
Joseph King and Holly King

STIPULATION AND ORDER OF
DISMISSAL WITH PREJUDICE - 2

K&L Gates LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
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ORDER

Based upon the foregoing stipulation, it is hereby ORDERED that this lawsuit is dismissed in its entirety with prejudice and without costs or fees to any party.

DATED this ____ day of _____, 2010.

JUDGE

Presented by:

K&L GATES LLP



Patrick M. Madden, WSBA # 21356
Attorneys for Defendant Clearly Lasik, Inc.

Approved as to Content and Form;
Notice of Presentation Waived:

CONNOR & SARGENT PLLC



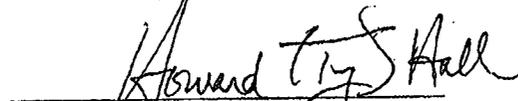
Stephen P. Connor, WSBA # 14305
Anne-Marie E. Sargent, WSBA # 27160
Attorney for Plaintiff Bradley Klock

COHEN & IARIA



Michael Iaria, WSBA # 15312
Attorney for Defendant Michael Mockovak

WOLFSTONE, PANCHOT & BLOCH, P.S., INC.



Howard (Terry) Hall, WSBA # 10905
Attorneys for Defendants
Joseph King and Holly King

STIPULATION AND ORDER OF
DISMISSAL WITH PREJUDICE - 3

K&L Gates LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

APPENDIX J

WINQUIST

March 7, 2011

Judge Palmer Robinson
King County Superior Court
516 3rd Ave, Room C-203
Seattle, WA 98104
Mailstop: KCC-SC-0203

To The Honorable Judge Robinson:

I, Rose Winquist, established Winquist Investigations in 1988. My firm is a member of the Washington Association of Legal Investigators and of the Pacific Northwest Association of Investigators. Rose Winquist Co., Inc. is a licensed private investigative agency headquartered in Washington State. I have worked as an investigator for over 23 years.

In 2007 I was retained by doctors Michael Mockovak and Joseph King to assist them and their business, Clearly Lasik, Inc. (CLI), in an investigation of the CLI former CEO, Brad Klock, for alleged theft from the company. In this capacity, between 2007 and mid 2009, I had numerous contacts with, and got to know Dr. Michael Mockovak. The following are some of my observations of Dr. Mockovak that may be helpful to the court in entering sentencing in his pending criminal case.

Dr. Mockovak's behavior was unusual throughout my investigation of Mr. Klock. Unlike most of my clients, Dr. Mockovak dove into the investigation himself. He was intent on getting Mr. Klock prosecuted. Dr. Mockovak's outrage toward Mr. Klock, who he reasonably believed had both stolen from him and lied to him was certainly

P.O. Box 82322 Kenmore, WA 98028 / 425.482.0943 / Fax 425.486.7212

justifiable. However, Dr. Mockovak displayed to me a rage toward Brad Klock that was personal, and that escalated over time. Dr. Mockovak's behavior and attitude were not within the range of what I experience as normal for my clients.

On June 26, 2007, I wrapped up my investigation of Klock and turned it over to the police. From that point on, I had very little contact with Dr. Mockovak or CLI. I understood that criminal charges were filed and the case would be moving forward. I talked to Dr. Mockovak after Mr. Klock was arrested - he was thrilled that things were moving forward criminally.

In March or April, 2009, I received a telephone call from Dr. Mockovak, during which time Dr. Mockovak told me the criminal charges against Mr. Klock had been dismissed and that Mr. Klock had filed a lawsuit against CLI and Dr's Mockovak and King. (According to the King County Clerk's records, the theft dismissal occurred on October 28, 2008 and the civil suit was filed in January 2009). Dr. Mockovak told me that he wanted to know where Brad Klock was living and when and where he traveled. Dr. Mockovak asked me to monitor Klock's comings and goings in and out of the US and Canada. This request did not make sense to me, so I asked Dr. Mockovak why he needed to find Mr. Klock. He would not explain. His desire to find Mr. Klock did not seem to be in the context of needing to serve him with any legal process since Mr. Klock had an attorney. I told Dr. Mockovak that I was too busy and wouldn't be able to help him. It did not make sense to me that Dr. Mockovak wanted to put Mr. Klock under surveillance.

Unrelated to the Klock matter, in approximately September or early October, 2007, Dr. Mockovak called me on a weekend. He was crying hysterically and explained that he had just that day discovered that his wife Heather had left him. He was adamant that he needed to know where his wife was, and wanted me to help him find her. This conversation left a pit in my stomach. Dr. Mockovak's tears did not appear to be consistent with the tone of Dr. Mockovak's statements and the requests he made of me. Dr. Mockovak did not express sorrow, hurt, or surprise that Heather had left him. Rather his anger and frustration were focused on the fact that Heather had been able to pull off leaving him without his having a clue that she had been planning to

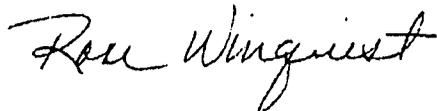
Mockovak Letter

leave. He was intent on trying to figure out where Heather was, and pressured me to help him find her.

I told Dr. Mockovak that I could not help him find Heather, and that we could discuss this situation more during the coming week. A few days later I called Mockovak to see how he was doing. It was like someone had flipped a switch. He told me he was fine, and seemed to accept that Heather had left him. According to Clark County Clerk's records, Heather Mockovak filed for divorce on October 11, 2007.

I hope this letter is helpful to you.

Sincerely,

A handwritten signature in cursive script that reads "Rose Winqvist". The signature is written in dark ink and is positioned above the typed name.

Rose Winqvist

APPENDIX K

Young, Melinda

From: Michael Mockovak [michaelm@clearlylasik.com]
Sent: Friday, September 05, 2008 1:36 PM
To: Young, Melinda
Subject: Brad Klock
Attachments: Brads Personal Expenses Billed to CLI credit cards(1).xls; BDK Atlanta Trip Nov 06.pdf; BDK Sun Valley Trip Feb 06.pdf

Hi Mindy,

Joe King and I have responded to the items brought up in our phone discussion. I'd like to address the specific items, and then discuss broader concerns as well. Joe's email below goes into greater detail of the specific items below.

The specific items are:

1. Brad's expense reconciliation. This is a document you presented to us. We had never seen it before. In the fall of 2006 when Dr. King asked Brad to reimburse us for personal expenses charged to our credit card, we received a check with some hand written amounts, and a adding machine print out as well. Brad never presented us with this expense reimbursement. It would be interesting to look at the computer Hopefully you can locate Tami Geselius to testify to this as well. It seems that Brad has fabricated a record of expense reimbursement so he can claim that he reimbursed us for the Micon auto body work on the truck, and for the airline ticket to Germany. It is my position that he wants to say he paid for these items because they are among the most egregious of the credit card expenses. A good question is how Brad recreated the expense report and came up with the exact amount he paid us in the first place. He did this by assigning obviously contrived percentages of personal use to expenses. For example he attributed 39.99% (not 40% mind you) of one of his car rental charges as personal, and 21.3% of the gas charges as personal. The entire Sun Valley trip was personal, yet he attributed only 20% of the hotel bill as personal. The entire hotel bill in Sun Valley was for a ski trip. He was accompanied by Gayle Stevens, one of Brad's many mistresses, who did do some independent contracting work for Clearly Lasik. I spoke with Gayle about the Sun Valley trip. She confirmed that it was 100% personal. I spoke with the commercial real estate agent in Boise. Brad spent a total of three hours with this man. Those details should be in the binder originally given to you. Brad could easily have flown in and out of Boise the same day. So Brad's expense reconciliation is an after the fact fabrication. He did not reimburse us for Micon Auto Body, nor for the plane ticket to Germany. Dr. King goes into more detail below.
2. The trip to Atlanta. Brad flew from Chicago to Atlanta and then from Atlanta to Seattle. He never went to Toronto. (I don't believe there was a legitimate business reason for going to Toronto anyway.) Dr. King spoke with Marita Liwag of the Sheraton Gateway Hotel in Toronto (905-405-4959). Ms. Liwag cannot find him in their system for that date and if he stayed that night, he would appear in their system. She thinks it is a no-show charge, but they can find no record of it. In addition, analysis of Brad's cell phone bill shows that he flew from Atlanta to Seattle.
3. The concept of theft. Brad and his attorney maintain that no theft occurred if he is given an opportunity to return the funds and he does so. I must confess that I was stunned by this concept. To me it is analogous to a shoplifter saying he must be given the opportunity to return a sweater stuffed into a shopping bag. Nonetheless, after you confirmed this concept on the phone, I can accept it. If you would please submit the expenses detailed in the attachment labelled "Brads Personal Expenses Billed to CLI credit cards." If Mr. Klock is sincere, he will return about \$77,000, less the \$5k and change he has already paid us. If it is more proper for us to submit this to Brad's attorney directly, please let me know and I will do so.

The more general issues are:

1. The clever change in emphasis in this case. In 2007 when we discovered the magnitude of the theft committed by Mr. Klock, we were stunned. He was such an incredible thief. We consulted initially with a private investigator, and also received feedback from the law enforcement officials working on the case and from independent law enforcement friends who were not working on the case. The opinion was pretty unanimous: Brad Klock is a predator and a thief and should be prosecuted less he repeat these crimes on other victims. During our phone conversation, it was apparent that you were displeased with us because we had not given you documents pertaining to Mr. Klock's outrageous claim that we owed him about \$900,000 in severance. Mr. Klock's attorney had successfully shifted the emphasis of the case from Mr. Klock's criminal behavior onto us! This reminds me of the excellent lawyering that Johnny Cochrane and Alan Dershowitz did for OJ Simpson when they successfully shifted the emphasis of the case, for a while at least, onto Mark Furman and the question of whether he was racist. The discussion about Brad's claim for severance is just obfuscation. I'll say

more about this item below. As I said on the phone, another analogy is like an attorney for a rapist turning the emphasis onto the personal life of the rape victim. The question at hand, and in my mind the only question, is did Brad Klock commit theft by deception. I think the answer is resoundingly yes. I am dismayed that the emphasis of the case has shifted to: do these guys who are pressing charges have other reasons to dislike Brad Klock? In my mind, just like the personal life of a rape victim should not excuse the behavior of a rapist, whether we love Brad or dislike Brad for his other behavior should have no bearing on whether he is guilty of theft.

2. Brad's claim that we owe him severance. This is a separate issue that I believe is unrelated to theft committed by Brad. In deference to you, I will tell you that Brad was an independent contractor. Don Cameron was also an independent contractor. Both of them were pressuring and cajoling both Dr. King and me to sign a contract that would give them severance. We never agreed to severance, and never signed a single document saying we would. Brad's independent contractor relationship was terminated for cause, and that is all there is to it. He hired a fancy attorney to say that there was a guarantee of severance, even though nothing was ever signed. I will grant you that Brad's current defense attorney is correct in stating that we are displeased with Brad's demand of severance. If you were in our shoes, and the facts are as I stated, wouldn't you be? In my mind, Brad's claim for severance was nothing more than a shakedown. The fact that we are unhappy with the shakedown attempt by Brad does not allow him to get away with theft. Again, his defense attorney is correct in that we are unhappy that Brad stole from us and we are also unhappy that he tried to shake us down for severance that was never granted or promised.

3. I also want to emphasize that we are very appreciative of your efforts in this case, and understand the difficulties you encounter in pursuing this case. I have intended to make clear all along how much we appreciate your efforts, and apologize if I have not been clear in this. You have obviously worked diligently to bring the case to this point. I hope that the efforts of Mr. Klock and his attorney to turn the magnifying lens away from Mr. Klock's criminal behavior and onto our distaste for Mr. Klock have not dampened your zeal for justice. In my opinion, Brad Klock is nothing more than a carpetbagging con man and thief. We have worked extremely hard, employ many Washingtonians, and pay a lot in WA state B&O and other taxes. Regardless of anyone's feelings toward us, and regardless of our feelings towards Mr. Klock, I do believe that we are still entitled to the protection of law enforcement.

4. Finally, what we are asking at this point, to reiterate, is for Mr. Klock to receive the attached spreadsheet outlining his personal expenses. If he is sincere, he will repay us. If you receive more obfuscation, the question of Mr. Klock's character and motives will be clear.

Please also read Dr. King's response below.

--

Best Regards,
Michael E. Mockovak, MD
Surgeon

900 SW 16th St.
Suite 320
Renton, WA 98057
C. 206-850-1492
www.clearlylasik.com

----- Forwarded Message

From: Joseph King <jking@clearlylasik.com>
Date: Wed, 3 Sep 2008 11:47:58 -0700
To: Michael Mockovak <michaelm@clearlylasik.com>
Conversation: Brad Klock-DRAFT
Subject: FW: Brad Klock-DRAFT

To: Michael Mockovak
Subject: Brad Klock-DRAFT

Dear Melinda,

As requested, we are providing further information regarding the alleged theft committed by Mr. Klock.

A. Regarding Mr. Klock's false claim that personal expenses were customarily charged to company cards:

1. Attached is an Excel spreadsheet that documents Mr. Klock's extreme pattern of abuse of our company credit cards, totaling over \$75,000. As many of these charges are questionable, and many are obviously personal, the extreme extent of Mr. Klock's use of the card strongly supports a pattern of deliberate misuse, well beyond the occasional personal charge.
2. Mr. Klock's defense that Dr. Mockovak and Dr. King may have charged an occasional personal expense to the company card is irrelevant. We are the sole owners of the company. The extreme nature of Mr. Klock's egregious use of the card for personal purposes is rivaled only by that of his friend and CFO Don Cameron who similarly charged many personal meals to our business cards.
3. Even if Dr. Mockovak or Dr. King made an occasional minor charge that is not obviously business related, almost all items that Mr. Klock has identified as 'personal' on Dr. Mockovak's or Dr. King's credit cards can be justified as a business expense. For example, Clearly Lasik maintained a business residence in Canada due to the considerable amount of work Dr. King performed in Canada. Therefore there are charges for groceries (Safeway, Save on Foods, etc); drugstore charges are incurred for office medications or supplies (Shoppers Drug Mart); repairs for the company vehicle were charged to the card (Bankers Auto); Dr. King's wife and children accompanied him during trips for business events and staff social events and their travel charges were legitimate; charges to Canadian Tire and Walmart are for oil changes or repairs to the company vehicle, etc.
4. What is not legitimate are charges to Match.com or Relationship.com. Our suspicion is it was Mr. Klock who used the card and possibly even the name of Dr. King or Mockovak for his own personal internet account. Please let us know if you find out anything further in this area regarding the fraudulent charges and possible identity theft.
5. Other than Brad Klock and Don Cameron, no other employee or consultant ever made any unauthorized charges to their credit cards or committed theft.

B. Regarding Mr. Klock's false claim that he was not terminated "for cause":

1. We were gentle in terminating the independent contractor relationship between Brad and Clearly Lasik and we were not as blunt as perhaps we should have been, but this does not alter the fact that we terminated his consulting due to Mr. Klock's incompetence. Telling Mr. Klock that Clearly Lasik would be going 'in a different direction' meant we were no longer going to follow his flawed leadership as Clearly Lasik was heading into further financial ruin.
2. Beyond that statement, we did not provide further explanation to Mr. Klock as we were advised by our attorney that we had no obligation to provide Mr. Klock any justification for ending his engagement and we did not want an angered Mr. Klock to damage relationships with our vendors or staff. Mr. Klock was not an employee. He was paid as a consultant through his Canadian company, LasikPMG. We decided to get rid of Brad because he was incapable of properly running the company, he was rarely present in the office, and good employees quit because of his bad leadership. We wanted to let him save face, and we agreed to present the parting of ways as a mutual decision, although in reality, we decided to terminate our relationship with him due to his poor performance. The egregious extent of his abuse credit cards was not learned until several months after he was terminated.
3. In any event, there was never a contractual agreement with either Mr. Klock or Mr. Cameron regarding severance pay. Throughout our entire affiliation with Klock and Cameron, we were very consistent that they would never sign any contract that obligated them to pay severance pay unless Klock and Cameron actually delivered on their promises that Dr. King and Mockovak would receive millions if Clearly Lasik ever were listed on a stock exchange or sold to a venture capital firm.
4. The alleged "CEO Services Agreement" that Brad presented to Dr. King and Mockovak was unacceptable and thus, it was unsigned by us. At no time did Drs. King or Mockovak ever agree to severance pay.
5. Mr. Klock's claim that he was owed approximately \$100,000 in earned bonus is simply false. We agreed that he would have the option of purchasing stock options, but we NEVER agreed that he would be entitled to receive \$110,000 if his employment were terminated. The unsigned document that you emailed to us was prepared by Brad and Don, not Michael Mockovak, the purported author whose name appears at the bottom.
6. We can provide many statements from past employees and vendors regarding his incompetence. Objectively, the financial statements speak for themselves. When Klock joined Clearly Lasik, we were highly profitable (earning

millions per year) and debt free. At the time Brad left, we were not profitable (in fact we lost \$1.9 million in 2006 under Mr. Klock's leadership), burdened with heavy debt, and in danger of bankruptcy.

1. Regarding Klock's False Claim that he properly reimbursed Clearly Lasik for his personal expenses charged to company credit cards

1. The so-called Klock reimbursement breakdown is an after the fact attempt to make it seem that he properly reimbursed us when he did not. It is obvious that he has tried to make the numbers fit by allocating an arbitrary percentage to certain charges, claiming that there was a percentage of personal use. To illustrate, he allocated 20% of his hotel charges in Sun Valley to personal use, but 39.99% of the car charges were personal and only 21.3% of the gas charges were considered personal! I've attached a spreadsheet that lists questionable or obviously personal charges that Mr. Klock billed to his personal card. Not only has he omitted certain items that were obviously personal, but he has misstated the true amount of the charges. For example, on his Sun Valley trip, he left out charges at the Roosevelt Tavern, Atcheson Market, Knob Hill Inn and he misstated the charge at Felix's Restaurant (see attached spreadsheet)
2. The numbers in his recent after the fact 'expense reconciliation' do not even match those in the original printout from his calculator in 2006 which show how he arrived then at a figure of \$5255.27 (see documents sent by you earlier)
3. In any event, his 'expense reconciliation' doesn't even come close to reimbursing Clearly Lasik properly.
4. If Mr. Klock's record keeping of personal expenses is any indication of how he functioned as a CEO, it should be pretty clear why Clearly Lasik was heading in the wrong direction.

5. Attached cell phone records confirm that Mr. Klock spent the vast majority of his time in and around Sun Valley during this trip.

1. Finally, Regarding Brad's Trip to Atlanta in October, 2006

1. Per the calendar you provided from Brad, Brad flew from Milwaukee on Thursday, October 12, 2006 at 1:05 pm. He was scheduled to leave Atlanta on Monday, October 16 at 9:18 am. Basically, he spent Thursday, Friday, Saturday, Sunday, and Monday travelling to and from Atlanta at Clearly Lasik's expense, charging on his company card meals (\$249.52 and \$150.12), and hockey games in Atlanta (\$156.55) for him and his girlfriend. He is trying to argue that that activity was somehow cheaper than flying home to Seattle! Ridiculous.
2. The credit card records disprove his claim anyway as he already had a return ticket paid for by Clearly Lasik. On October 2, 2006, Brad charged \$924.60 for a first class ticket to Chicago leaving Seattle on 10/10/06 and returning 10/17/06. On October 2, he paid for his ticket from Milwaukee to Atlanta using his company card also, in the amount of \$456.36. On October 15, he charged \$290.74 for a ticket from Atlanta to Seattle. An Air Canada ticket purchased on October 2, 2006 from Toronto to Chicago was not used (Air Canada has since deleted this record from its system).
3. It does not appear that Brad even travelled to Toronto on Monday, October 16, 2006, as his credit card records show he was back in Seattle eating at the Keg restaurant on October 16!
4. There is a charge for the Starwood Sheraton Gateway in Toronto on October 16, 2006, but the hotel confirms that Mr. Klock did not stay in the hotel that night as there is no record of him in their system. It was concluded that the charge was a no-show charge.

5. The attached cell phone records confirms that Mr. Klock flew directly from Atlanta to Seattle and he did not go to Toronto as claimed.

I trust that this dissection of his defense illustrates clearly that his defense is obfuscation.

Thank you.

Sincerely,

Joseph King

01014 MEM

From: Michael Mockovak
Sent: Wednesday, August 27, 2008 1:26 PM
To: Joseph King
Subject: FW: Documents for today's phone call

--
Best Regards,
Michael E. Mockovak, MD
Surgeon

900 SW 16th St.
Suite 320
Renton, WA 98057
C. 206-850-1492
www.clearlylasik.com

----- Forwarded Message
From: "Young, Melinda" <Melinda.Young@kingcounty.gov>
Date: Wed, 27 Aug 2008 13:19:28 -0700
To: Michael Mockovak <michaelm@clearlylasik.com>
Conversation: Documents for today's phone call
Subject: Documents for today's phone call

Please find several documents attached that I will discuss in our conference call today. There is no need to read everything before the meeting; there are too many documents to be able to do that. Many of these are documents you have probably seen before today. I will call your conference line at 2 pm.

<<Klock-Atlanta trip.pdf>> <<Klock-attorney letters.pdf>> <<Klock-board minutes & D contract.pdf>> <<Klock-bonus.pdf>>
<<Klock-credit cards.pdf>> <<Klock-emails re reimbursement.pdf>> <<Klock-emails re severance.pdf>> <<Klock-Gustafson
statement.pdf>> <<Klock-letter re termination.pdf>> <<Klock-reimbursement breakdown.pdf>> <<Klock-reimbursement
evidence.pdf>> <<Klock-severance analysis.pdf>>

Melinda J. Young
*Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
King County Administration Building
Complex Prosecutions and Investigations Division
500 Fourth Avenue, 8th Floor
Seattle, WA 98104
(206) 205-3337*

New email address: melinda.young@kingcounty.gov

----- End of Forwarded Message

----- End of Forwarded Message

APPENDIX L

COPY

STATEMENT OF DONALD M. CAMERON, CA

Attached are my comments regarding the criminal action against Bradley D. Klock ("KLOCK"), relating to my knowledge and recollection of events from March 8, 2005 until April 17, 2007, the time during which I was engaged through InHouseCFO Inc., to serve as the CFO for Clearly Lasik a group of businesses that collectively branded itself as Clearly Lasik ("CLI").

My background, relation to KLOCK, and to CLI are as follows:

BACKGROUND

I am a Chartered Accountant ("CA") in good standing (Canadian Institute of Chartered Accountants) and have been so since 1978 (30 years). My history as a professional leading up to CLI is as follows:

- a. First 15 years in public accounting;
 - Client, Tax and Managing Partner KPMG;
- b. Next 15 years as entrepreneur and CFO for various companies, including:
 - A company in medical diagnostics business, from start-up, IPO, and sale after 5 years;
 - CFO of RBC Global Private Banking, the private banking business of the Royal Bank of Canada; 2,200 employees, \$165.0 Billion assets under administration, Revenue of \$ 550 Million;
 - In 2003 moved to Vancouver, Canada. Started business outsourcing CFO services to clients, InHouseCFO Inc. ("IHCFO"). The sole focus of IHCFO is to lend it's experience and resume to entrepreneurially oriented, businesses which, because of early success want to grow their business;
 - Clearly Lasik Inc. ("CLI") subsequently became one client in March 2005. I was appointed CFO and a director at that time.

RELATION TO KLOCK

- a. In 2003, met KLOCK through HireDesk ("HD"), a software start-up servicing the Human resource industry:
 - HD was a client of IHCFO;
 - KLOCK was hired by HD hired as VP Sales.
 - At that time we were not friends and didn't socialize
- b. Did not work with KLOCK after HD until received a call from him in January 2005 re: CLI.

RELATIONSHIP WITH CLI

- a. Approached by KLOCK, who had already been hired by CLI as CEO, regarding providing CFO services to CLI. Interested because:
 - CLI had experienced early success from it's start-up of 2002;
 - CLI owners had stated that they wanted to pursue an aggressive growth strategy;
 - CLI required the skills that can be offered by IHCFO; and
 - CLI was in a business similar to a business IHCFO had provided services to previously (involved in medical diagnostic imaging services).
- c. Interviewed extensively with Drs. King and Mockovak.:
 - Email exchanges with Drs. and KLOCK;
 - Web-X presentation prepared and presented regarding needs created by opportunity ;and
 - Met in person a number of times
- d. They all confirmed that:
 - They wanted business to grow and become the dominant provider of lasik surgery services in North America;
 - That the opportunity existed in the market-place; and
 - They were committed to doing this, and understood they needed to add expertise to the team;
- e. Started work with CLI March, 2005, as CFO and Director;
- f. Remained contracted to CLI until April, 2007.
- g. After KLOCK left in December 2006, I discussed with Drs. the business model. Drs. Indicated that they had concluded that they no longer sought to grow the business, and wanted to retrench back to more of a family operation.
- h. In April 2007, Drs advised that, as a result of g., they felt that they no longer required the level of service from IHCFO, and terminated their contract.
- i. Amounts are still outstanding pursuant to that contract.

I outline firstly general comments and details regarding my recollection of the circumstances surrounding KLOCK and CLI (Appendix A), then specifically on the expenditures in question (Appendix B)

APPENDIX A

COMPENSATION FOR KLOCK

- a. Part of IHCFO mandate was to provide organizational governance advice, and a compensation methodology for the business.
- b. Put together compensation matrix for the whole organization on spreadsheet (see attached). This was discussed and approved by the Board of CLI in December 2005;
- c. Originally, KLOCK compensation: 340k annually with 170k in salary and 170 in potential bonus, which was to be paid partly in cash and partly in equity, subject to termination consequences;
- d. CLI's legal counsel drafted letter confirming agreement by Board for bonus earned but unpaid for 2005 and prepared compensation contract for 2006 and subsequent based on Board approved methodology. All terms agreed to by Drs. except for when severance was payable. Terms agreed to at January, 2006 organizational board meeting. Subsequently, counsel drafted contracts. Never signed by Drs.
 - i. Agreed upon 1 yr severance. Issue of when payable.
 - ii. Every month thereafter issue of severance remained an issue.
 - iii. Agreed to engage an expert, Steve Wace:
 - a. Wace report confirmed the reasonability of severance, and the events where they would be payable
 - iv. September 2006, Drs finally decided that what had been agreed upon was no longer acceptable. It appeared from then on Drs. attempting to figure out way to terminate KLOCK.

KLOCK CREDIT CARD EXPENSES.

- a. A system of authorities delegated from the owners and the Board was approved by the Board, outlining what position had what level of authority to both approve expenditures and commitments for others, and to incur same without other prior approval;
- b. Senior officers and directors had the highest level of authority and discretionary choice:
 - (1) expense items w/o prior approval.
 - Expectation – personal items were not expected to be made on corporate cards, however if they were inadvertently, the Company expected reimbursement or salary set off;
 - Not discussed, just understood;
 - No company policy as to when officers were expected to reimburse;
 - Frequently, in other circumstances I have been involved in as CFO, senior officers reimburse at least once a year;
 - We did have somewhat of a double standard at CLI. The Drs. (as owners) behaved differently. Frequently incurred company expenses that didn't benefit the company. Many perks for family, other personal items charged to company. Felt that this was their right, even though, all employees were on a profit sharing bonus plan, and owned stock options, and they too were subject to the agreed upon delegated authorities chart.
- c. The Drs sent out emails in October, 2006, suggesting all board members go thru expenses. All on the Board thought the idea was prudent.
 - i. My understanding is that:
 - i. KLOCK settled up;
 - ii. Drs did not settle up.
- d. KLOCK credit card expenses
 - i. The credit card activities were all available and visible on-line;
 - ii. Had Controller, Tami Geselius review monthly when posting expenses and arranging for payment;
 - iii. As CFO, I reviewed the expenditures periodically to ensure in line with delegated authorities

- e. KLOCK Reimbursed \$5,255.27.
 - i. After discussion at Board meeting, in October, 2006, I instructed Controller, Geselius to have everyone settle up before the next board meeting;
 - ii. \$5,255.27 provided to Geselius w/o itemization.
- f. First heard of allegations of KLOCK's wrongful credit charges in early, 2007, after KLOCK had been terminated.

KLOCK'S TERMINATION

- a. Originally learned of KLOCK's termination by phone call from the Drs. shortly after KLOCK notified. Told by Drs. reason for termination is that they no longer needed a high power executive like Brad because they were changing their strategy, by hunkering down and following a different tack on business plan with less emphasis on growth and more of a family run business;
- b. Advised by Drs that KLOCK would be staying on until the end of January to finish some items he was working on and to assist with the transition.
- c. Knew that the Drs both had changed their personal financial status through acquisition of new homes in the fall of 2006.

KLOCK'S TERMINATION "FOR CAUSE"

- a. It was made clear to me at the outset when the Drs called me to inform that KLOCK had been terminated, that it was due to a change in business strategy, and not for cause. A telephone conversation that I had with CLI's employment lawyer, James, confirmed that at the termination meeting, it was his understanding that the Drs did not inform KLOCK that he was being terminated for cause;
- b. At monthly meeting in January, 2007, Drs asked me if I knew that KLOCK spent \$75,000 on personal items using company credit card:
 - I indicated that I would be surprised if that was the case, as:
 - I knew of KLOCK's spending habits, and general level of integrity;
 - Our Controller, Tami Geselius was responsible for oversight in this area, and was intimate with the charges on all the cards;
 - I reviewed the credit card charges generally for everyone from time-to-time;
 - I indicated to the Dr's, that if indeed what they were alleging occurred, it would be under my area of responsibility and that a severe breakdown in our internal control systems would have occurred. I wasn't overly concerned that this had occurred because of the checks and balances listed above;

- o I was eventually given a spread sheet:
 - My review after the fact left me with comfort that, if there were personal expenditures on the card, that they were not material, and that KLOCK had provided our Controller with a reimbursement cheque for those amounts.
- c. At January, 2007 Board meeting Mockovak said: "Brad was asking for a million dollars. If he is going to be that way, we'll do all we can to make it expensive and drawn out before KLOCK sees anything. Just like Rothman is doing to us"
 - Rothman was a former partner of the Drs, in Las Vegas, who, because of partnership differences, removed all of the equipment from the clinic there, then proceeded to practice on his own. It was clear that his strategy was never to settle up on amounts owing to the Drs, even though the financial arrangements were agreed to among them. Delay, and the incurrence of unnecessary legal costs to the Drs was Rothman's strategy to make them "go away". Dr. Mockovak seemed to like that strategy.
- d. In March, 2007, King asked me to go through spreadsheet of KLOCK's alleged personal charges to company credit card.
 - Started by having Geselius try to figure out what expenses were represented by KLOCK's reimbursement check. The adding machine tape document represents Geselius' effort to account for expenses that make up reimbursement;
 - Nothing was concluded in this regard as IHCFO contract was terminated.

MISCELLANEOUS

- a. KLOCK's Calendar was always fully available to all senior personnel including the Owners;
- b. Spoke with KLOCK each day upwards to 8 times. Invariably, in the morning and afternoon would touch base. I was fully aware of his activities as CEO;
- c. After KLOCK left CLI, the company needed to hire a general manager. The Drs. organized a business dinner where candidate was being further interviewed. Drs. showed 1 ½ hours late. They showed up with spouses and young children. I believe that it is completely inappropriate to have young children at business meeting. The expense of the dinner was charged to CLI.

APPENDIX B

Review of the specific allegations of claimed misuse of the company credit card (\$18,455.76):

1. **Wireless Services. (\$1,744.83)** Allegation is that CLI provided Mr. Klock with a blackberry and that Mr. Klock made unauthorized charges of \$1,744 for telecommunication services. These services included Broadband Xpress service and BC Telus Mobility Service.
 - a. As CFO, I consider these charges as reasonable business expenses and properly chargeable to CLI:
 - i. Given Klock's position as CEO and his travels, it was a reasonable cost to the business to have him have 24/7 access to the internet and the CLI server. As a CEO of a 15-20 million dollar company, Klock needed this internet access. Other staff members who reported to him had same access for same reasons;
 - ii. It was similarly reasonable to charge the company for the BC Telus Mobility Service because it allowed KLOCK to have his Canadian calls forward to one cell phone. The Company did business in Canada;
 - iii. As CFO I knew that these costs were being incurred by CLI.
2. **Boise Trip. (\$2,608.62)** Allegation is that KLOCK took a personal ski vacation to Sun Valley with Gayle Stephens ("Stephens"), a person whom he was having a romantic relationship with and charged the trip to the company. The charges to the company credit card were \$2,608. It is my understanding, as part of the \$5,200, KLOCK made partial reimbursement.
 - a. I was aware of trip;
 - b. I was aware that KLOCK went into Boise to conduct business each day of the business week portion of the trip;
 - c. Reimbursement was a reasonable methodology for allocation of business to personal.

3. **Napa Trip. (\$3,472.50)** Allegation that KLOCK took a vacation in the wine country that he charged to CLI. Allegation is vacation (\$2,340.49 = travel costs), plus a dinner was wrongfully charged that cost \$1,132.01

- a. I attended the conference with my wife that preceded the Napa event. We returned to Vancouver after the conference, knowing that KLOCK was carrying on to Napa and that Stephens was arriving to join him. I also believed that King and Mockovak and their wives were also participating in Napa event, first to build relationships with supplier Bausch and Lomb, then to meet with potential investors;
- b. King and Mockovak had full knowledge of the business nature of the event of entertaining the Courtnall group of potential business investors.
 - i. In advance we had spoken about raising investment capital to grow the business. In fact the business plan required it;
 - ii. On that matter, at board meeting we discussed Courtnall as possible source of investors. Discussed how the conference, the Bausch and Lomb wine tour and dinner were all planned;
 - iii. KLOCK responsible for coordinating the events;
 - iv. Including Stephens was reasonable business related expense because 1) mixed company event - other spouses included, 2) Stephens was a contractor working for CLI, 3) King and Mockovak's spouses were to attend, and 4) it was planned openly, where King and Mockovak were fully aware of the circumstances;
 - v. As CFO, the expenditure that covered the costs of Stephens was reasonable. I knew Stephens attended and did not expect reimbursement.

4. **Milwaukee/Atlanta trip. (\$1,303.09)** In October, 2006, KLOCK took a business trip to Milwaukee. While on the trip he flew to Atlanta to visit Michelle Hight. Allegation is that the CLI charged trip to Atlanta was personal and should not have been charged to the business.

- a. I knew of KLOCK's agreement to meet Natalie Townsend. I coordinated meeting with her in Toronto. I knew of KLOCK's planned meeting with Steven Wace, the compensation consultant hired by CLI, in Toronto. I learned after KLOCK had departed on business in the east, that it would have been a waste of time to have the Townsend meeting because she was not sufficiently prepared on the business plan and concluded that her group was not an appropriate investor. I told KLOCK to call off the meeting;
- b. Drs. would not have been aware of all the business related details of this trip;
- c. It is my understanding that the side trip to Atlanta didn't cost CLI any additional money. As long as the total costs were less than or equal to what it would have cost the company for the business reason, as CFO, I had no problem with the trip to Atlanta being charged to the business.

5. **Truck Repair (\$1,228.24)**
 - a. I saw the damage to the truck;
 - b. I am familiar with the challenges created by cross border financial transactions;
 - c. The cost of repairs paid by CLI was reimbursed by dealer. It is my understanding that this reimbursement was paid to KLOCK personally as lease was in his name (because CLI didn't qualify for a lease with a Canadian Company), and then reimbursed by him as part of the \$5,200 reimbursement cheque.

6. **Lang and Associates. (\$299.46)**
 - a. I have no knowledge or information about this allegation

7. **Chicago Howes Meeting. (\$1,833.19)** Allegation is that BK charged inappropriately charged personal expenses after concluding his business in Chicago. BK charged \$531 in room service, two Chicago Cubs game tickets, and a \$200 restaurant charge.
 - a. Howes - senior executive for Bausch and Lomb. Agreed to meet with KLOCK in Chicago. He was routing thru Chicago on the way back from a vacation in Miami. This meeting was important as we were having challenges with Howes subordinates in finalizing our national supply and service contract;
 - b. I knew that KLOCK had made plans to take Howes to the baseball game;
 - c. All expenses would have been approved if KLOCK's stay in Chicago did not cost the company extra. It is also reasonable for CLI to pay for reasonable expenses for its CEO if he is working throughout the weekend;
 - d. Generally, regarding working meals, if a staff member continues the work day by working thru the evening, it is reasonable that the company either reimburse the employee for dinner costs, or incur reasonable costs directly for the employee

8. **Bellevue Athletic Club. (\$1,099.75)** CLI paid for KLOCK's membership dues. Allegation is that personal additional club expenses KLOCK charged to the credit card.
 - a. If the charges to CLI in question were for business related meetings, they are reasonable charges to the business.

9. **Autumn Stefoniuk/Miller Nash (\$1,022.80)**
 - a. I was vaguely aware of the harassment issue (approx \$600), and, if it had an effect on CLI, would have approved it as a business related expense.
 - b. I am not aware of any of the other charges from this allegation (approx \$400), but again understand that they were reimbursed.

10. **Munich (\$1,007.15)** Allegation is that this trip was personal, and not reimbursed.
- a. I was aware of the trip, but was not aware of the charge being placed on the CLI credit card. It was personal in nature, and I understand that it was reimbursed.
11. **Miscellaneous (\$2,836.13)**
- a. I am not aware of the miscellaneous items alleged, other than:
- i. Luggage (\$ 376.75 + 155.88):
- The first item was for CLI monogrammed shirts to be used for carrying same to events;; garments for shirts, to send around;
 - The second item was to replace KLOCK's laptop bag that was damaged beyond repair during business travel


Donald M. Cameron, CA

CLI Board of Directors

January 29, 2007

Gentlemen

Without Prejudice

Via my attorney, I have received your response to my position and wish to respond to the board directly. I include both documents for your reference.

I am deeply troubled by the allegations and inaccuracies contained in your response document. I was unaware of any harbored ill-feelings toward me personally or my job performance.

Mike and Joe, in our meeting of November 29, 2006, you articulated very clearly that your desire to "go in another direction", was not, in any way, a personal issue. You stated in very believable terms, that you had re-assessed your business & personal goals, the industry as a whole and stated, again very clearly & articulately, that "we have had a good run at it and that through no fault of anyone, we have been unable to achieve our goals and it is our desire to re-trench". In that 25 minute meeting, you used words and sentences like "we want to go back to a more Mom & Pop style company", "as a result, we just don't see a need to have a high powered executive", you recognized me as a "good person and a friend" "what was not to like", that "it was an incredibly agonizing decision" and that you would ensure that all would be handled fairly.

You both looked me in the eyes and gave me your word that you would ensure that I would have nothing to worry about. You asked me to consider staying on for a period of time, to transition the position and "day to day" operations.

These were your words - we know the meeting dialogue.

The following Saturday, we met at Starbucks where I presented to you (based on my suggestion and concern for the business, transition and it's people) a comprehensive transition list and communication strategy which we agreed to and adopted in that meeting. You both thanked me profusely, articulated several times that you were incredibly impressed with my level of integrity and the professional way in which I continue to handle things - to the point of offering me an additional month of severance as a "thank you". I trust you can understand my dismay at hearing and reading an entirely different platform, many weeks after our meeting and my completing the transition plan, as I had said I would.

Gentlemen, month on month, we convened for a full day each and every month as a Board group (as the meeting agendas reflect), to share monthly results, review each business unit, review execution to plan (reported live & directly by each unit head), review competition and the industry in general and to jointly, as a board, review & argue strategy, challenges, obstacles and solutions. These meetings were designed to put absolutely everything on the table and our goal (and we talked of this often), was to always leave a board meeting united on strategy and with a clear understanding of the execution plan for the next month. The President's mandate has never been one of unilateral operation. As a board we have always been clear on this and as such, have operated as a group and within the guidelines of the

01399 MEM

adopted corporate governances and authorities. I am unaware of any communication by/from the board as a group or by a shareholder independently of the board, regarding or addressing concerns over my job performance or personal integrity as it relates to the company's success or shareholder value.

I would have expected there to be, with shareholder value in mind, a serious board level obligation to discuss, and discuss frankly, any leadership concern - should a concern exist.

Again I trust you understand my dismay to hear, many weeks later, and after being asked and agreeing to help transition CLI back to a "re-trenching" mode, that the board is now claiming and pursuing a "for cause" termination.

This is an incredible change of environment and claim.

I would urge that you convene, as a board, to discuss the issues tabled in my position document. I would ask that you give it the attention it deserves and do what is right.

Please discuss:

- 1) Initial terms of agreement around salary and 2005 bonus components
- 2) Board approved 2005 bonus \$\$ for both President and CFO
- 3) My intentions in, and caveats around, approaching the board to invest my 2005 bonus money in CLI (see Chris Marsh prepared document based on agreed terms)
- 4) 2006 bonus amount based on the revenue/EBITDA formula adopted by CLI in January 06'
- 5) A fair and appropriate severance quantum (total package could be paid in monthly installments)

I would ask, respectfully, that you do what is right in terms of treating people fairly, and honoring your obligations and agreements. As a board we all know what has been discussed and agreed to.

As an alternative means of finding resolution, should you wish to consider meeting to discuss this as a group, I would be happy to make myself available at a mutually convenient place and time.

I will continue to act with integrity and in a professional manner and remain optimistic that we can reach a fair settlement in a timely and cost effective manner.

I ask that the CLI board, consider, and do the same.

Sincere Regards

Brad

01400 MEM



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Open Folder sent-mail

> From: Jeff James (mailto:jaj@sebrisbusto.com)

> Sent: Tuesday, March 06, 2007 6:23 PM

> To: Perisho, Russell L. (Perkins Coie)

> Subject: FOR SETTLEMENT PURPOSES ONLY - ER 408

> CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE

> Russ,

> I have spoken with Dr. King and Dr. Mockovak and have convinced them to

> pay Mr. Klock cash for the stock options valued at \$110,000, less the

> amount owed for back rent and personal expenses charged to CLI. This

> payment would be to resolve all claims - they are not willing to go any

> farther than that. You already know the rent charges; they are still

> tallying up the personal expenses and I will get you that number soon.

> As the next step, Mr. Klock must return CLI's property or indicate his

> willingness to exchange it for \$5,000 cash. Once you know Mr. Klock's

> preference, please send me a draft agreement that includes appropriate

> settlement provisions.

01401 MEM

APPENDIX M

Excerpts From Letters Presented At Sentencing

"Dr. Michael Mockovak is one of the most manipulative human beings I have ever come into contact with. ... [He] is an incredibly narcissistic person. Enough so that he doesn't think the typical rules the rest of us live by apply to him. He's only concerned about himself and his own self-preservation."

-- Dawn Schreck (Clearly Lasik employee)

"I ... used to be very close with Michael. We met in 1989 during our residency together in Chicago. We became very good friends and eventually were partners in the same medical practice in Chicago. This situation unraveled horribly and eventually ended up in court. ... During the decade we associated, I got to know the true Mike. He makes a good first impression. He is well-spoken, friendly, charming, ambitious; and he can be a lot of fun. However, beneath this exterior lies a disturbed, self-absorbed individual. He is truly amoral, not knowing or caring the difference between right and wrong – only how to benefit himself at any cost. Clearly, this pathology has escalated."

-- David S. Hillman, M.D

"As a mental health professional, my guess is that Mockovak is a sociopath. We know that sociopaths can be quite charming and even disarming."

-- Lynn Fraley (family member of Dr. King)

"[Mockovak] is a very smart and extremely calculating person. As an elementary school teacher for the past 19 years, I have worked with a few students who had sociopathic tendencies. In my professional opinion, Dr. Mockovak is a sociopath."

-- Maria Dorothy King B.Sc. / M.A.

"Knowing [Mockovak] I have absolutely no problem envisioning [the failure of his murder plot] causing him to snap and possibly plan some sort of revenge. ... Michael Mockovak is a very smart man and is capable of manipulating people."

-- Brenda Sifferman (Clearly Lasik employee)

"I have known Dr. Mockovak almost entirely in a professional capacity for over 10 years. Dr. Mockovak is not, nor has he ever been, a personal friend of mine. ... I believe that Dr. Mockovak was the driving force behind the underhanded and unprofessional tactics that were utilized against me at the time of our business separation such as personal threats, intimidation by third parties, filing of false police reports, and lying to colleagues and patients to damage my practice and reputation. I believe that this past behavior exhibited by Dr. Mockovak directly foreshadowed his actions in the matter before you."

-- Richard C. Rothman, M.D.

Storey, Susan

From: Dawn Schreck [REDACTED]
Sent: Saturday, March 12, 2011 2:07 PM
To: Storey, Susan
Subject: letter to judge robinson - mockovak trial
Judge Robinson,

I wanted to share with you my thoughts about Dr Michael Mockovak's sentencing which I understand will be decided next week. I worked rather closely with Dr Mockovak for close to four years before his arrest. We had a decent work relationship, although he was certainly the most difficult surgeon I have ever worked with. When he was arrested, I thought there had to be some sort of a mistake, a misunderstanding. He certainly wasn't an overly friendly person – he was quite arrogant – but not one that I thought would ever solicit murder. I had a hard time coming to the realization of what he had done, and what he was capable of planning.

When I was interviewed by the prosecution and the defense, and also when I testified, I tried my best to give my answers without a lot of emotion. I tried to answer the questions coming from the frame of mind I had as things were happening, and tried not to let my feelings after his arrest affect my testimony. I felt that this was in the best interest of finding the most fair outcome for the case. At this time, I'd like to share with you how this trial and the events prior to it have affected me and my life.

I would expect that you will be receiving many letters stating that Dr Mockovak is a changed man, he has found the church, etc. I want to express to you that Dr Michael Mockovak is one of the most manipulative human beings I have ever come into contact with. We had many private conversations where I thought he was confiding in me, but as I was able to piece things together afterward, I realized these conversations were only intended to skew my thinking to make me sympathetic to his position. He didn't only do that with me, he did the same to many other employees of Clearly Lasik.

I had no idea what he was planning, but I did see a change in him once he thought Dr King would be murdered, once he had paid his down payment. He was giddy, there's no other way to describe it. I heard the same giddiness later in the recordings, and it all came together for me.

I couldn't wrap my head around, for the longest time, how he could possibly think that his plan would ever work – how he would ever get away with it. How he could even consider having someone murdered, no matter how sour that relationship had turned. The answer is – he's just that arrogant. He's not mentally ill, although you would think he'd almost have to be. How can someone that smart make such dumb decisions? Dr Mockovak is an incredibly narcissistic person. Enough so that he doesn't think the typical rules the rest of us live by apply to him. He's only concerned about himself and his own self-preservation. He was like that before planning Dr King's murder, and he continues to be even now, in my opinion.

Dr Robinson, please don't be swayed by the letters you receive explaining that Dr Mockovak is a changed man. I'm certain the people in his life now are being manipulated to think he's a different man than he really is. They didn't have to experience the very real fear I had (as well as many others that are affected by this case), when I walked out into the parking lot late after work, walking my dog alone at night, or even just working in our office – wondering if he would just show up. I wasn't afraid of the Dr Mockovak I worked for, I was afraid of the man I realized he really was after his arrest.

I am certain that deciding how long to sentence in this case is a difficult decision, but in my opinion he deserves the maximum sentence possible.

Thank you,
Dawn Schreck

Dawn Schreck
Center Director

3/14/2011



February 17, 2011

Judge Palmer Robinson
King County Washington

Dear Judge Robinson:

I am writing this letter in advance of the sentencing of Dr. Michael Mockovak. I, very much like Dr. Joseph King, used to be very close with Michael. We met in 1989 during our residency together in Chicago. We became very good friends and eventually were partners in the same medical practice in Chicago. This situation unraveled horribly and eventually ended up in court. In 1999, a settlement was reached; and Michael moved on to new chapters in his life. I remember when I first heard that he had met a new friend (Dr. King) who became his business partner and even family member. My feeling was that this new colleague could be in for a sad surprise. The reason for this lies in Michael's character. During the decade we associated, I got to know the true Mike. He makes a good first impression. He is well-spoken, friendly, charming, ambitious; and he can be a lot of fun. However, beneath this exterior lies a disturbed, self-absorbed individual. He is truly amoral, not knowing or caring the difference between right and wrong - only how to benefit himself at any cost. Clearly, this pathology has escalated. This stems from an unhappy childhood from which he cannot escape the demons implanted during that period.

When I first heard about the arrest in November 2009, I was upset but not shocked that Michael was capable of plotting such a crime. Friends and colleagues that know us both called me stating that I was lucky that my situation only ended up in the courtroom! I agree with their comments and feel fortunate.

I understand that his sentencing is taking place in March. My reason for writing this letter is to warn the proper authorities that he is truly a dangerous, disturbed individual.

Even though he may have a much cleaner record than the vast majority of criminals receiving similar sentences, he still poses a great risk to society. He is far more intelligent and far more cunning than your average criminal. As for any record of "community service", there was none to my knowledge during his time spent in Chicago.

If I may be of any additional help with this unfortunate matter, please feel free to contact me at your convenience.

Sincerely,
David S. Hillman, M.D.



Storey, Susan

From: Lynn Fraley [REDACTED]
Sent: Thursday, February 17, 2011 12:43 PM
To: Storey, Susan
Subject: Letter re Sentencing of Mockovak

Susan Storey
Senior Deputy Prosecuting Attorney, King Count
516 Third Avenue, Room W554 King County Courthouse
Seattle WA 98104 USA

Attorney Storey:

This letter is in regards to the sentencing of Michael Mockovak.

As an Aunt and close family member to Joe King and his family, it has been a difficult two years since the murder-for-hire plot was exposed and Joe's friend and business partner Michael Mockovak was accused of the crime. Every day I worried about Joe's safety, and his ability to continue to work his business, owned in partnership with Mockovak. I listened to the grief and sorrow expressed by his wife. I worried about how Joe's three children were affected by what had to be Joe's preoccupation with safety. Joe had to continue his "normal" life, in the face of the heinous actions of his business partner and brother-in-law.

I happened to be visiting from out of state on the day that Joe was getting his physical for a life insurance policy. A devoted father, he cared that his family would be taken care of in the case of his untimely death. In retrospect, I wonder if Mockovak hadn't even encouraged Joe to get a larger life insurance policy, as part of Mockovak's plot for murder and to profit further from Joe's death.

It appears that Mockovak has crafted his post-arrest period as carefully as he crafted the crime itself, certainly aware of elements that are taken into consideration when sentencing is made. Mockovak appears to have "gotten religion", knowing the day would come when sentencing would take into account his behavior. (I'm reminded of the saying, *"It's the convert who sings the loudest in the choir."*) Certainly, many will attest to what a nice man Mockovak appears to be, and write wonderful letters of support. Surely, members of his church will plead for lenience. I too have no doubt that Mockovak is experiencing remorse --- not for his action but for getting caught.

As a mental health professional, my guess is that Mockovak is a sociopath. We know that sociopaths can be quite charming and even disarming.

I hope the court is not swayed by Mockovak's recent stepped up involvement in his church, and pleas for a lighter sentence. Hopefully, he will have a very long time in prison during which he can help others develop their spirituality.

Mockovak appeared to have had no problem with the murder of his business partner, and leaving Joe's three children without their father, and Holly without her husband. Mockovak is a cold, calculating man who deserves to be in prison for as long as the law allows. And, please,

2/18/2011

not out free on bail during any appeal process.

Sincerely,

Lynn Fraley, RN, MN, DrPH

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

February 15, 2011

Judge Palmer Robinson
King County Superior Court
516 3rd Ave, Room C-203
Seattle, WA 98104

Dear Honourable Judge Robinson,

I am Dr. Joseph King's older sister, and I'm writing regarding the sentencing of Dr. Michael Mockovak.

When Dr. Mockovak was arrested and I found out about his plot to kill my brother I was deeply traumatized. I can't describe how disturbing I found the whole situation. I was upset and troubled that Dr. Mockovak was allowed to remain free prior to the trial because I was worried he would try to kill my brother himself, or try to kill Daniel Kultin to prevent him from testifying.

I have had nightmares about these scenarios for the last fifteen months. I was deeply relieved when Dr. Mockovak was finally found guilty by the jury last month.

Not only was Dr. Mockovach Joseph King's business partner, he was also Joseph's brother-in-law and was present at many family gatherings. After his separation, in October 2008, from Heather (Holly's sister), there was a marked negative change in Dr. Mockovak's behaviour towards my brother and his immediate and extended family.

I have heard that Dr. Mockovak has been attending church and trying to paint himself as reformed, or in some way different from the person he actually is. I don't believe that the change is genuine. His flimsy "change of heart" and quickly adopted interest in the church is not authentic. He is a very smart and extremely calculating person. As an elementary school teacher for the past 19 years, I have worked with a few students who had sociopathic tendencies. In my professional opinion, Dr. Mockovak is a sociopath.

I have seen the changes in my brother, Joseph, his wife, Holly and especially in their three children, William, 6, Lucie, 4, and Charles, 2. The revelation of the plot, the ensuing fifteen months of pre-trial preparation and the trial itself have taken an enormous toll on their well-being. Both Joseph and Holly are normally very relaxed, joyous parents. Their children are delightful. But the last fifteen months have been stressful and traumatic for all of them and it shows in their immediate and extended family in a variety of ways. My parents and siblings are all deeply traumatized by the devastating murder plot. The trauma will not easily go away. Justice will truly be served if Dr. Mockovak will be sentenced to a very long prison term. Only this will prevent his sociopathic behaviours affecting our family's safety again.

Thank you very much for your attention to these serious concerns; please feel free to contact me for any additional information.

Respectfully,

Maria Dorothy King
Grade 5 Teacher/B.Sc. (University of British Columbia)/MA (University of Illinois)

[REDACTED]
[REDACTED]
[REDACTED]

Storey, Susan

From: Dorothy King [REDACTED]
Sent: Wednesday, February 16, 2011 10:13 PM
To: Storey, Susan
Subject: letter to Honorable Judge Robinson
Susan Storey, King County Deputy Prosecutor's County Office

Dear Honorable Judge Robinson:

In Your Honor's court recently, accused Michael Mockovak was convicted of criminal solicitation to commit first degree murder of our son, Joseph King; attempted first degree murder of Joseph; conspiracy to commit first degree theft, and attempted first degree theft of the life insurance policy which would be related to Joseph's death. These unfathomable and heinous crimes cry out for justice.

These criminal activities have impacted our family heavily and severely. These deliberate and premeditated actions of Mockovak have struck my wife, myself, and my children like a proverbial thunderbolt.

With absolutely no regard for the life of our son, Joseph, or the impact his murder would have on his children, Mockovak secretly perpetrated these crimes. The serious life lasting repercussions, if he were successful in murdering Joseph, would have made no difference to Mockovak. The resulting sorrow of Joseph's wife, Holly, and their three children, our grandchildren, namely; William (6), Lucienne (4), and Charles (2) were inconsequential to Mockovak. He would have deliberately killed the father of three children and this is a most hateful act. The murder plans to kill Joseph devastated my wife, Dorothy and myself, our family members, extended family members, and of course, Joseph. It was incredulous and evil.

We all as family members were horrified and felt threatened by Mockovak's callous and despicable actions. Mockovak has betrayed all of us by his criminal planning to have Joseph murdered.

As Joseph's parents, we strongly request maximum sentencing and incarceration for Mockovak. The impact of this crime has deeply affected us all.

God bless us all and guide your decision regarding Mockovak's heinous crimes. We recommend full term incarceration. Our families and communities deserve to live in peace and not under threat or murder.

Respectively,

Walter and Dorothy King

2/18/2011

1 March 2011

Honorable Judge Robinson:

Michael Mockovak, even now, awaiting his impending sentencing, is using his sociopathic charm to once more escape reality with the excuse that he must see his dentist and receive a last check up from his doctor. To allow this would be to put the entire community at risk.

Michael Mockovak continues to deny any responsibility for his actions. To date he has neither expressed nor shown any remorse or concern for the lives of not only Joseph King (our nephew), his wife Holly and their children but his own family, his daughter and his former wife.

It is incomprehensible to me that he would now demand to be treated as a human being worthy of human considerations. Rightfully he has been denied bail. We urge that in his sentencing he feel the full weight of the law.

Sincerely,

Dr. and Mrs. Edwin King


March 9, 2011

Dear Judge Robinson,

I am writing a letter to voice my feelings about the upcoming sentencing of Dr. Mockovak. I have heard through the grape vine that Dr. Mockovak has the support of his church and close family friends that they attest he is not a threat or is "a changed man". I worked with Dr. Mockovak at arms length for 5 years and the man I saw in the court room and in the hallways was not the same man I met and worked for. Up until the charges I thought of Dr. Mockovak as a good boss, a great surgeon, a wonderful father and a all round nice guy.

The man I saw in the court room was distant, detached and lacked any remorse for his actions. What I saw was a man who crossed over to the dark side and his eyes were empty. I hope that people see that he is manipulating the church and its fellowship for his own gain. It is pure evil and it scares me the power he has to convince people that he was wronged.

I know my life is for ever changed from this ordeal and I can only imagine the terror that Dr. King and his family must feel. My friends joke about a hit list of the people that testified? I don't think it is funny it is a real fear...hearing his voice, his laughter it is all too surreal. This is what movies are made of and it is sad and scary that these are real life events.

I hope that Dr. Mockovak is behind bars for as long as possible (the rest of his life) to give the King family a chance to have closure and possibly some level of a normal life. This is something they will never get over. As the children grow older they will have to hear the story repeated times and there is still the potential of unforeseen emotional trauma. Imagine Dr. King's daughter 1/2 hr late coming home from an evening out with friends... I as a parent let my imagination get the best of me with my childrenI could not even begin to comprehend what life for them would be like if Mockovak were a free man. Knowing he could be walking the streets would leave them always living in fear. He is a dangerous man and should be contained and his every move monitored.

I feel sad for his daughter Marie Claire... she is an innocent child that I feel would be better off without him or his manipulation in her life. Imagine how hard that would be to know your dad tried to have your uncle killed...crazy and incomprehensible. As I child I think she too needs to be protected by the system.

Thank you for giving us the chance to share our experience and thoughts.

Sincerely
Val Jackson

February 22nd, 2011

Judge Palmer Robinson
516 Third Avenue
Seattle, WA, 98104

RE: Michael Mockovak

Dear Judge Robinson,

My name is Michael King, and I am Dr. Joseph King's younger brother. I have also worked alongside of him at CLEARLY LASIK for over five years.

I understand that Michael Mockovak will be sentenced on March 17th and I would like to provide you with my personal thoughts and suggestions on the matter.

Having worked alongside of Michael Mockovak for years and also having lived in his home as a tenant for almost a year, I believe that I am able to speak about his character. Dr King, Michael and I spent much time together socially and at one time, we were all close friends. Michael and I have even attended each others weddings.

I attended much of the trial and it is my belief that Michael Mockovak had every intention to have my brother killed. Hearing the undercover tapes from my standpoint, I heard zero remorse or hesitation. In fact, he sounded like someone who was taking joy in having his former brother in law murdered.

Michael has exhibited psychopathic behaviour and deserves to go to jail for a long time for this crime. This trial has caused considerable anguish and fear in our families and we are concerned that if he receives a lenient sentence that once released, he will be a danger to society.

His defense lawyers may point out how he has been a "model citizen" since his arrest, but knowing Michael, this is an attempt to manipulate the system to receive a reduced sentence. Michael never was a religious man and in my opinion, he is acting like a man caught in a crime.

Please give Michael Mockovak the standard sentence for these crimes. He deserves to go away for a long time for acting on the belief that killing someone is right and justified.

Yours sincerely,

Michael King

Storey, Susan

From: John King [REDACTED]
Sent: Wednesday, February 23, 2011 3:21 PM
To: Storey, Susan
Cc: King, Walter
Subject: Michael Mockovak Sentencing
To: Susan Storey, Senior Deputy Prosecuting Attorney, King County

Subject: Michael Mockovak Sentencing

I am writing to you to describe the terrible anxiety, fear, and terror that Mr. Mockovak has put me and my family through and to ask that you make sure that he does not walk freely in our society ever again

Dr. Joseph King is my nephew and the son of my dear brother, Walter, and his wife, Dorothy, both of whom I care for deeply. Walter and Dorothy have already endured the loss of one son, and I am not sure they would have been able to bear the loss of another. That weighed heavily on us during this ordeal.

Words cannot describe the fear and terror Mr. Mockovak inflicted on our lives during this ordeal. His intimate knowledge of Dr. King and his family were especially terrifying to us. We were never sure who else he might have hired to do us harm, even when he was held behind prison bars.

The fact that Mr. Mockovak enjoyed the best education and training that our society could provide and then conducted himself in a manner so opposed to his Hippocratic oath of service to others means he has a disregard for the laws of decency and remorse. For that, he has relinquished his right to live freely.

I hope you will make sure that he does not walk freely in our society ever again.

Thank you for your public service

Sincerely,
John J. King
[REDACTED]

2/28/2011

Storey, Susan

From: Brenda Sifferman [REDACTED]
Sent: Tuesday, March 08, 2011 4:35 PM
To: Storey, Susan
Subject: Michael Mockovak

Dear Judge Robinson,

My name is Brenda Sifferman and I worked at Clearly Lasik with Michael Mockovak. I wanted to let you know that the idea of him getting out of prison is very frightening to me. The last year has not only been terrifying for Dr. King and his family, but it has been for the employees as well.

The day Mockovak was released from custody to await trial, we thought we saw him drive into the parking lot and it was maybe one of the scariest times of my life. A big concern for those of us that work here is that now, not only has his plan to have Dr. King murdered been foiled, the very man he had sought to have killed will get everything! Knowing him I have absolutely no problem envisioning that causing him to snap and possibly plan some sort of revenge. I do worry that when he gets out he will not only still be angry about the situation, but will have spent time with people that really do know how to have people "taken out."

Michael Mockovak is a very smart man, and is capable of manipulating people. I worry that his last year of "being healed" and "finding Jesus" is just a part of a bigger plan to appear to be a kinder human being. I believe abbreviating his sentence would be a huge mistake and I know that I, having testified will be nervously watching my back when he gets out.

Regards,

Brenda Sifferman
Patient Counselor / Technician



3/8/2011

Storey, Susan

From: Zachary King [REDACTED]
Sent: Thursday, February 17, 2011 8:10 AM
To: Storey, Susan
Subject: Mr. Mockovak

Hi Susan,

My name is Zachary King. I was told that Mr. Mockovak will be having his sentencing soon and that the Judge may like to hear from the family of the victim. I'm writing to put in my two cents.

I was speechless when I was told of the events and Mr. Mockovak's actions that led to all of this. It's the sort of callous and greedy act that seemed reserved for only television dramas and crime shows. To have had it affect our family has left me at a total loss. The gulf that exists between the morality of the most common among us and Mr. Mockovak is incomprehensible. The thought of how close we came to losing Joe has changed my view on the world as a whole and hatched a feeling of distrust I'd never known before now.

I consider his actions to be those of a sociopath and see his quickly adopted interest in Church functions as more evidence of his willingness to manipulate - at any cost - the world to his whims. I hope that the judge will see fit to impose a sentence that matches the defendants lack of mercy when planning the murder of Joe.

Thanks for your time,

Zachary King

March 8, 2011
RE: Michael Mockovak Sentencing

Dear Judge Robinson,

My name is Sheri Robertson. I have worked at Clearly Lasik for five years, I currently manage the Edmonton center.

I just wanted to express my concerns of any leniency being given to Dr. Mockovak in his sentencing. His crimes have terrified me, my staff, and our families. The thought that this man, a medical doctor, for whom we all looked up to, could try and pay someone to murder Dr King is disgusting. The fact that he is a doctor, and therefore very educated I believe he just thought he was smart enough to get away with it. I have two young children, and I have always taught they could trust certain people, such as their teachers, doctors and family members. It is very disturbing to hear that a man that took a moral oath could be capable of committing such a terrible crime, and damaging so many lives. It has negatively affected my trust in doctors by what he has done. I also know that he being our boss at one time, he would have had access to our personnel files including our addresses and other personal information. I'm afraid that he may try to hurt us if he were to get out sooner, or try and get revenge on us somehow for not taking his side. I am asking that you please consider how terrible this has been for so many of us when sentencing him. And I pray he will get the maximum time behind bars, and we will all be able to move on with our lives without having to fear him any longer. Thank you for taking the time to read this.

Sincerely,

Sheri Robertson

February 21, 2011

Judge Palmer Robinson
516 3rd Ave.
Room W554
King County Courthouse
Seattle, WA 98104

Dear Judge Robinson,

I am writing you today with the hope of assisting you in determining the proper sentence for Dr. Michael Mockovak who has been recently convicted of multiple felony charges in your court. I believe that I have a unique perspective on Dr. Mockovak's character as a result of my past dealings with him and would like to share this information with you.

I have known Dr. Mockovak almost entirely in a professional capacity for over 10 years. Dr. Mockovak is not, nor has he ever been, a personal friend of mine. Drs. King and Mockovak were my business partners in a LASIK practice that opened in 2003 in Las Vegas where I currently reside. As the on-site managing partner and sole surgeon, I essentially single handedly built this practice into a highly successful and profitable entity. After 18 months, Dr. Mockovak suddenly withdrew \$20,000 from our joint Las Vegas business checking without notice. When confronted about this action (which I believed at the time was likely to have been a theft from our bank account), his response was simply "I've decided to take a management fee and that's the end of this discussion". Shortly after this, Dr. Mockovak informed me that he and Dr. King were going to take complete control of the practice and thereby change my role from an active managing partner to essentially that of their employee. In essence, they were going to steal the practice. After a year of litigation, my relationship with King and Mockovak ended. It was less than 2 years after this that Dr. Mockovak's planning for the murder of Dr. King began. Here is some additional information for your consideration:

1. I believe that Dr. Mockovak was the driving force behind the underhanded and unprofessional tactics that were utilized against me at the time of our business separation such as personal threats, intimidation by third parties, filing of false police reports, and lying to colleagues and patients to damage my practice and reputation. I believe that this past behavior exhibited by Dr. Mockovak directly foreshadowed his actions in the matter before you.
2. The only conclusion that Dr. Mockovak is likely to draw from this entire experience (especially should he be given a lenient sentence) is not that he committed numerous criminal acts and now must pay a price for his actions, but rather that "he simply didn't do it correctly". This risk factor alone would hopefully guide your judgment substantially. If he is given a light sentence, he will take this as evidence of his "exceptionality" and of his being "above the law" and will be more likely to try to "punish his enemies" either through legal or extralegal means.
3. I believe that Dr. King and his family and any other individual that may have "escaped Dr. Mockovak's wrath" may be exposed to an ongoing and real risk of physical harm given Dr. Mockovak's unrepentant attitude and his significant financial resources.
4. I believe that Dr. Mockovak simply will not realize the error of his ways without the imposition of the maximum sentence possible.

I know what it is like to be threatened by Dr. Mockovak. I believe that Dr. King and his family simply do not deserve to spend a lifetime "looking over their shoulders" should Dr. Mockovak receive a light sentence. I sincerely hope that decisive and forceful action will be taken by the court to prevent this man from making good on these threats.

Sincerely,



Richard C. Rothman, M.D.

Storey, Susan

From: philomena king [REDACTED]
Sent: Friday, February 18, 2011 8:35 PM
To: Storey, Susan
Subject: Michael Mockovak
Follow Up Flag: Follow Up
Flag Status: Red

Dear Judge Robinson,

Joe and his wife and family feared for their lives betrayed by a partner and "friend". The fact he could meet and work with Joe regularly while planning Joe's demise is unthinkable! This is an extremely calculating man who cannot comprehend how his actions affect others. It appears he can only feel sorrow and pain when he is directly affected.

Our family has been fearful and devastated by Mockovak's actions. This was compounded by his denial of intent.

When informed of the murder for hire our family was in disbelief which turned quickly to fear for Joe's life as well as his family.

We had many sleepless nights and tears.

It appears Mockovak is a calculating manipulative person. If he has truly changed his life and ways why has he not admitted to the court his actions and taken full responsibility for his actions. The need of a jury trial would have been unnecessary and the family would not have had to suffer and relive the pain Mockovak inflicted on us.

Mockovak has caused me to change my relationship with friends.
I am not as trusting.

I do think if he is ever released the people he meets or works with will not be safe. He is driven by greed.

Sincerely,

Philomena King
[REDACTED]

Storey, Susan

From: Crystal Markowski [REDACTED]
Sent: Tuesday, March 08, 2011 2:21 PM
To: Storey, Susan
Subject: Mockovak's Sentence

Dear Judge Palmer Robinson,

I am writing you this letter to express my extreme concerns about Michael Mockovak's sentencing.

This man does not deserve the right to have the opportunity to receive a lighter sentence. He was full aware of the crimes he was willing to commit.

He is an educated man, and defiantly knows the difference between right and wrong.

He needs to be punished for his crimes.

He has proved that he would stop at nothing to get what he wants. He was willing to commit murder of a Family member/Business partner.

I believe Michael Mockovak should spend the rest of his life behind bars, for willingly trying to take another man's life.

Please take my concerns into consideration,

Crystal Markowski
Patient Counselor

King Vision
CLEARLY LASIK

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

TYTAN

February 15, 2011

RE: Michael Mockovak sentencing

Dear Judge Robinson

I am the father-in-law to Joseph King and previously Michael Mockovak. I know both men very well. I have been in sales all my life at high levels and have dealt with all types of personalities. These two men are from opposite ends of the scale. Michael's outlook on life, will not change in prison.

I am writing you this letter to explain the total fear that was put into all my family when Michael was allowed out on bail. Every member of the family has been worried constantly the entire time he was out, day by day. That means all doors checked each night to be locked, windows closed, garage doors down and your phone on the bed stand.

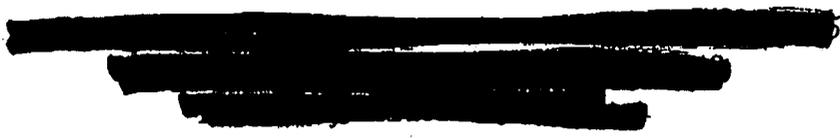
Although Michael is very well educated, he has some severe personality defects that include being ruthless and extremely dangerous. Had he been successful in his case, you would have had a Ted Bundy on your hands, thinking he could get away with anything and could outsmart anyone. He will go to any means to win over the Courts and has multi personalities that aid him in that effort. Letting him out of prison early will put Joseph King, Holly King (Joe's wife & my daughter), his ex-wife Heather (my daughter), Heather's new husband Derek, the Grand Parents and Grand Children, all in danger. Michael is not a person who should participate in raising Marie Claire. If he is out early, there is a high probability that he would grab Marie Claire and never be seen again.

This whole thing is a game with him and shinning up to the Court for a lighter sentence or appealing etc, are all means to an end and he will never in any way express being sorry for what he attempted to do. Had my daughter Heather been more demanding and less congenial in her divorce with Michael, I am convinced, she would not be alive today. I am certain there are stories in Michael's past, that are yet to be uncovered.

This situation is sad. Giving him a reduced sentence will put an entire family and many other people in danger. I urge you to have time served, to be exactly for what the Law calls for and no less.

Sincerely

Mark Leonard



February 15, 2011

Judge Palmer Robinson
516 Third Avenue
Seattle, WA 98104

RE: Michael Mockovak

Dear Judge Robinson:

I understand it is customary to review comments and thoughts from individuals who knew and worked with an individual prior to sentencing. I felt compelled to do so in this case as the March 17, 2011 sentencing date approaches. Thank you in advance for reading my comments and feel free to contact me if anything I mention triggers questions.

I worked with and for Dr. Mockovak since 2007. Due to my role in the company, I was often in the middle of the business partnership disputes between Drs. King and Mockovak. Both individuals are small business owners who created this enterprise together. I certainly understand that there are times when disputes can turn personal considering most business owners consider their business as part of their family. It is also not unusual for partnerships to split over time due to different partner goals. However, I felt that Dr. Mockovak was willing to destroy everything in the event he felt Dr. King took advantage of him. To him it would be better that they both would suffer. This was evident by comments that Dr. Mockovak made alluding to drawing pistols like Alexander Hamilton and Aaron Burr. At first I thought these comments were borne out of frustration but after mentioning this multiple times I did worry what type of reaction would come from him if he perceived the business was not split fairly.

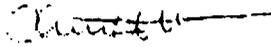
After Dr. Mockovak's arrest in November 2009, many of the staff members in our Renton, WA location worried about their physical safety. I believe this fear was generated from their work interactions with Dr. Mockovak. A common theme from all the testimony given in court was that he was someone who had a temper and edge to his personality. I personally believe the reason why he abided by the courts order to stay away from the business was that he believed he was entrapped and he would be cleared of his charges.

I am hopeful that a prison term will allow Dr. Mockovak to reflect on his actions and come to terms with his bad decisions. I imagine it differs with each person how long it takes to come to terms with their decisions. I do know that myself, Clearly LASIK staff

and the King family are concerned about what could happen if Dr. Mockovak was released from prison prior to accepting the consequences and ramifications of his decisions. I would ask that during your sentencing deliberation you please consider that Dr. Mockovak has nothing to lose anymore. He most likely will never practice medicine again and will have a zero net worth. He can certainly be deemed a dangerous individual if released with nothing to lose and if he internally has not accepted responsibility for his actions.

Thank you again for reading my comments and taking them into consideration. Again, if any of these comments have caused additional questions, please do not hesitate to contact me.

Sincerely,



Christian Monca
CEO - Clearly LASIK
(425) 525-2206
cmonca@clearlylasik.com

Storey, Susan

From: Cunningham, Cheryl
 Sent: Thursday, February 24, 2011 9:52 AM
 To: Barbosa, Mary; Campagna, Joe; Crabtree, Andrea; Robinson, Jeff; Storey, Susan; Tvedt, Colette
 Subject: FW: re March 17 sentencing of (Dr) Michael Mockovak,

Counsel: The following email was received by the court regarding State v. Mockovak.

Cheryl Cunningham
 Bailiff to Judge Palmer Robinson
 Department 41
 (206) 296-9103, E835
 cheryl.cunningham@kingcounty.gov

IMPORTANT: In order to avoid inappropriate ex parte contact, you are hereby directed to forward this communication to all other counsel not already copied on this email.

-----Original Message-----

From: Akiva Kenny Segan, MFA [mailto:underwings@pacaccess.com]
 Sent: Wednesday, February 23, 2011 1:22 PM
 To: Robinson, Palmer
 Subject: re March 17 sentencing of (Dr) Michael Mockovak,

Dear Honorable Judge Palmer Robinson:
 re the conviction and forthcoming sentencing of Michael Mockovak:
 As the defendant is 52 years old, I urge you to sentence him to the 30 years maximum he can receive (as reported in the local media). At the age he'd be released, assuming he were to serve his full sentence, he would then be unlikely to try and engage in violent harm targeting anyone.. One way to ensure that is for you to sentence him to a long term.

Thanks,
 Akiva Kenny Segan
 Seattle

--

(Mr.) Akiva Kenny Segan, Artist
 Creator of the Under the Wings of G-d Holocaust art series & Sight-seeing with Dignity contemporary human rights art series for children, youth and adults
 |Facebook Visual Artist Page:
 Under the Wings of G-d and Sight-seeing with Dignity art series
 url:
<http://www.facebook.com/home.php?#!/pages/Under-the-Wings-of-G-d-and-Sight-seeing-with-Dignity-Art-series/324570681045?ref=ts>

Under the Wings of G-d & Sight-seeing w/ Dignity artworks can be viewed at this url (no registration is required):
<http://www.flickr.com/photos/59084976@N02/> flickr.com How to access all the images: Only 56 images will show up - less than 1/3 of the works posted - so after my page shows look for the words Photos (in black type), Groups (blue type), People (blue type). Click People. Then click akiva_kenny_segana (blue type) and 164 items (images) will show in much larger thumbnails.

e-mail: underwings@pacaccess.com

843 Hiawatha Pl. S., Loft 307
 Seattle, WA 98144 U.S.A.
 Phone (206) 624-4154.

I don't hear esp well so pls speak slowly, CLEARLY & LOUDLY if you reach voice-mail,
 thanks - SELECT RECENT PUBLICATIONS:

Book cover art:
 "Primo Levi and Humanism after Auschwitz: Posthumanist Reflections," by Jonathan Druker,

Palgrave MacMillan publishers - publication date June 6, 2009.

Album cover & inside album cover art:

Daniel Kahn and the Painted Bird's latest album "Partisans & Parasites" published by Oriente Musik, Germany, 2009 [www.oriente.de]

Theatre poster art: A drawing of a boy in the Warsaw Ghetto reproduced on the poster & postcards for Dr Korczak's Example, produced by the Royal Exchange Theatre, Manchester, England, spring 2008.

THE 20179TH

Like ink on the blotting paper, the number tattooed in Auschwitz splinters and spreads on the inside of my lower left arm when I ride the tram in the summer and, forgetting myself, I happen to reach up in my short-sleeved shirt to hang on to the strap.

* * * *

May I never lift my right arm
if I forget the mark on my left.

-
poem by Andras Mezei, a Hungarian Jewish child Holocaust survivor and poet, who died in his native Budapest on May 30, 2008 (translated from the Hungarian by Thomas Orszag-Land; reported in The Forward, Sep 5 '08)

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jim Lobsenz, the attorney for the appellant, at lobsenz@carneylaw.com, containing a copy of the State's Response to Personal Restraint Petition, in Re Personal Restraint of Michael Emeric Mockovak, Cause No. 69390-5, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 7th day of November, 2014.

U Brame

Name:

Done in Seattle, Washington