

NO. 66924-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EMERIC MOCKOVAK,

Appellant.

REPLY BRIEF OF APPELLANT

James E. Lobsenz
Attorney for Appellant

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020



James E. Lobsenz
Attorney for Appellant

ORIGINAL

TABLE OF CONTENTS

Table of Authoritiesv

A. INTRODUCTION1

B. ARGUMENT IN REPLY4

1. BECAUSE LAW ENFORCEMENT
MANUFACTURED CRIMINAL ACTIVITY,
CONTINUOUSLY CONTROLLED IT, AND USED
THREATS OF VIOLENCE TO GOAD MOCKOVAK
INTO APPROVING A MURDER PLOT, THERE
WAS A DUE PROCESS VIOLATION4

a. The Prosecution Avoids An Application of the *Lively*
Factors.4

b. By Combining The Plot To Kill *Klock* With The Plot
To Kill King, The State Ignores the Evidence Which
Shows That Kultin Was The “Originator” Of The
Idea To Kill King.5

c. The *Lively* Due Process Test Focuses on Who Was
the “Instigator” of the Crime, *Not* On Who First
Thought It Up. Who “Originated” the Crime Is
Central To A Defense of Entrapment, But Not To A
Due Process Claim of Outrageous Governmental
Conduct......9

d. The State Concedes That There Was No Infiltration
Of Ongoing Criminal Activity11

e. Whether a Crime Was Committed For The
Defendant’s “Own Benefit” Is Not One Of The
Lively Factors.11

f. Mockovak’s Due Process Claim Is Not Predicated
Upon Any Act of Deception.12

g.	<u>This Case is Not Comparable to <i>McClelland</i>. There the Defendant Provided The Hired Assassin (A Real Person) With A Poisoning Device, A Back Up Poisoning Device, A Disguise, Airplane Tickets, And Transportation To The Airport.....</u>	13
h.	<u>It Is Fundamentally Unfair For Government to Create Crime Where None Existed, And Then To Prosecute The Person Whom The Government Recruited To Perpetrate The Crime. This Is Particularly True When The Government Prosecutes A “Unilateral Conspiracy” In Which No One Has Really Agreed To Commit A Crime With The Defendant.....</u>	17
i.	<u>Courts Have Found A Due Process Violation Where Government Agents Used Threats Of Violence To Impel The Defendant To Go Ahead With the Planned Criminal Activity.</u>	18
2.	<u>DUE TO TRIAL COUNSEL’S DEFICIENT CONDUCT, THE JURY WAS MISLED BY AN INSTRUCTION WHICH INTERJECTED AN IRRELEVANT FACTOR INTO ITS CONSIDERATION OF THE ENTRAPMENT DEFENSE, AND IMPROPERLY INCREASED THE DEFENDANT’S BURDEN OF PROOF</u>	21
a.	<u>There Was No Claim Of Ineffective Assistance Of Counsel In <i>Henderson</i>.</u>	21
b.	<u>This Court’s Recent Decision In <i>Wilson</i> Is An Example Of A Case Where The Invited Error Doctrine Did Not Preclude Review of the Instruction Because Trial Counsel’s Act Of Proposing The Instruction Was An Act Of Ineffective Assistance Which Caused The Instructional Error.</u>	22
c.	<u><i>Wilson</i> Holds That Counsel’s Proposal Of The Defective Instruction Was Deficient Conduct, Even Though <i>Cronin</i> and <i>Roberts</i> Had Not Yet Been</u>	

<u>Decided, Because The Instruction Was Inconsistent with the Accomplice Liability Statute.....</u>	24
d. <u>Similarly, the Entrapment Instruction Proposed by Mockovak’s Trial Counsel Was Inconsistent With the Statute Defining the Entrapment Defense And With <i>State v. Lively</i>, <i>State v. Smith</i> and <i>State v. Keller</i>.</u>	25
e. <u>The State’s Puzzling Assertion That Instruction No. 29 Was a “Correct Statement of the Law” Appears to Be Another Semantic Dodge.....</u>	27
3. THE STATE ATTEMPTS TO RECAST MOCKOVAK’S SECOND CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AS IF IT WERE A CLAIM OF PROSECUTORIAL MISCONDUCT	28
4. SOLICITATION OF MURDER (Count II) MERGES INTO ATTEMPTED MURDER (Count III) WHEN A VERBAL OFFER TO COMPENSATE ANOTHER TO COMMIT THE CRIME IS FOLLOWED BY DELIVERY OF A PAYMENT FOR FUTURE PERFORMANCE OF THAT SERVICE.....	30
5. THE STATE IGNORES THE <i>ORANGE</i> PLACEHOLDER ANALYSIS. BECAUSE THE SUBSTANTIAL STEP TOWARDS ATTEMPTED MURDER WAS THE SOLICITATION OF MURDER, CONVICTIONS FOR BOTH OFFENSES VIOLATES DOUBLE JEOPARDY.....	35
6. THE STATE IGNORES THE PLETHORA OF CASES WHICH CONDEMN THE SPLITTING OF ONE CONTINUOUS CRIME INTO TEMPORAL COMPONENTS AS AN IMPERMISSIBLE MEANS OF EVADING THE PROHIBITION AGAINST MULTIPLE PUNISHMENT.....	36
7. BECAUSE ALL OF THE ELEMENTS OF ATTEMPTED THEFT 1 <i>ARE</i> CONTAINED WITHIN CONSPIRACY TO COMMIT THEFT, THE ENTRY	

OF CONVICTIONS FOR BOTH CRIMES VIOLATES DOUBLE JEOPARDY.....	37
8. UNLIKE THE WORD “ATTEMPT,” THE PHRASE “OVERT ACT” DOES NOT CONVEY THE ELEMENT OF A “SUBSTANTIAL STEP. THEREFORE, THE INFORMATION FAILED TO ALLEGE ALL THE ESSENTIAL ELEMENTS OF THE CRIME OF CONSPIRACY TO COMMIT THEFT (Count IV).....	41
9. WITHDRAWAL OF THE CLAIM THAT THE FAILURE OF THE INFORMATION TO NAME MOCKOVAK’S CO-CONSPIRATOR WAS A VIOLATION OF THE ESSENTIAL ELEMENTS RULE.	45
10. THE CONSPIRACY TO COMMIT THEFT CONVICTION (Count IV) MUST BE VACATED BECAUSE IT VIOLATES DUE PROCESS TO MAKE IT A CRIME TO CONSPIRE WITH ONESELF.....	45
11. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR CONSPIRACY TO COMMIT THEFT (Count IV).	48
C. <u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

STATE CASES

<i>In re Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	35, 36
<i>In re Restraint of Borrero</i> , 161 Wn.2d 532, 167 P.3d 1106 (2007).....	42
<i>In re Restraint of Wilson</i> , ___ P.3d ___. 2-12 WL 2511190 (July 2, 2012)	2, 22, 23, 24, 25
<i>State v. Bobic</i> , 140 Wn.2d 250, 265, 996 P.2d 610 (2000).....	38
<i>State v. Borrero</i> , 147 Wn.2d 353, 58 P.3d 245 (2002).....	42, 44
<i>State v. Campbell</i> , 125 Wn.2d 797, 888 P.2d 1185 (1995).....	44
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	23, 24
<i>State v. Dent</i> , 123 Wn.2d 467, 869 P.2d 392 (1994)	38
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	29
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	34, 35
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	29-30
<i>State v. Gay</i> , 4 Wn. App. 834, 486 P.2d 341, <i>rev. denied</i> , 79 Wn.2d 1006 (1971)	33
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	21, 22
<i>State v. Jensen</i> , 164 Wn.2d 943, 195 P.3d 512 (2008).....	31, 32, 33, 34
<i>State v. Keller</i> , 30 Wn. App. 644, 637 P.2d 985 (1981).....	25, 26, 27
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	42

<i>State v. Kyлло,</i> 166 Wn.2d 856, 215 P.3d 177 (2009).....	2, 21, 23, 24, 25
<i>State v. Lively,</i> 130 Wn.2d 1, 921 P.2d 1035 (1996).....	4, 5, 8, 9, 10, 11, 12, 25, 26, 27
<i>State v. McCarty,</i> 140 Wn.2d 420, 998 P.2d 296 (2000).....	44
<i>State v. Moavenzadeh,</i> 135 Wn.2d 359, 364, 956 P.2d 1097 (1998).....	38, 42, 43
<i>State v. Pacheco,</i> 125 Wn.2d 150, 882 P.2d 183 (1994).....	18, 46, 48
<i>State v. Rhode,</i> 63 Wn. App. 630, 821 P.2d 492 (1991).....	42, 43, 44
<i>State v. Roberts,</i> 142 Wn.2d 471, 14 P.3d 713 (2000).....	23, 24
<i>State v. Russell,</i> 125 Wn.2d 24, 882 P.2d 747 (1994).....	30
<i>State v. Schneider,</i> 36 Wn. App. 237, 673 P.2d 200 (1983).....	32
<i>State v. Smith,</i> 93 Wn.2d 329, 610 P.2d 869 (1980).....	27
<i>State v. Smith,</i> 101 Wn.2d 36, 677 P.2d 180 (1984).....	1, 25
<i>State v. Stark,</i> 158 Wn. App. 952, 244 P.3d 433 (2010).....	45, 49-49
<i>State v. Sutherby,</i> 165 Wn.2d 870, 204 P.3d 916 (2009).....	37-38
<i>State v. Thomas,</i> 158 Wn. App. 797, 243 P.3d 941 (2010).....	37

FEDERAL CASES

<i>Bell v. United States,</i> 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).....	36-37
<i>Blockburger v. United States,</i> 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 305 (1932).....	35, 41
<i>Boyde v. California,</i> 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)	22, 50

<i>Combs v. Coyle</i> , 205 F.3d 269 (6 th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1035 (2000)	30
<i>Greene v. United States</i> , 434 F.2d 783 (9 th Cir. 1972)	18, 19, 20
<i>Girouard v. United States</i> , 328 U.S. 61 (1946)	46
<i>In re Snow</i> , 120 U.S. 274 (1887)	36, 40
<i>Jeffers v. United States</i> , 432 U.S. 137 (1977)	40, 41
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	47
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979)	22-23
<i>Schwimmer v. United States</i> , 279 U.S. 644 (1929)	46
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969)	47
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	27
<i>United States v. Gurolla</i> , 333 F.3d 944 (9 th Cir. 2003)	12
<i>United States v. McClelland</i> , 72 F.3d 717 (9 th Cir. 1995), <i>cert. denied</i> , 517 U.S. 1148 (1996)	12, 13, 14, 15, 16
<i>United States v. Simpson</i> , 813 F.2d 1462 (9 th Cir.), <i>cert. denied</i> , 484 U.S. 898 (1987)	12
<i>Washington v. Hofbauer</i> , 228 F.3d 689 (6 th Cir. 2000)	30

OTHER STATES

<i>Commonwealth v. Egardo</i> , 426 Mass. 48, 686 N.E.2d 432 (1997)	30
<i>McFadden v. State</i> , 342 S.C. 637, 539 S.E.2d 391 (2000)	30-31

STATUTES AND RULES

RCW 9A.16.070(1)(a)9

RCW 9A.28.0202

RCW 9A.28.03016, 33, 35

RCW 9A.28.04017, 38, 41, 43

WPIC 18.0521, 22

Websters' Ninth New Collegiate Dictionary (1983).....10, 44

Black's Law Dictionary (9th ed. 2009)44

A. INTRODUCTION

This appeal presents a straightforward issue of law: What are the elements of entrapment under Washington law? In Appellant's opening brief, he demonstrated that the entrapment defense has two elements: (1) that the criminal design originated with the defendant; and (2) that the defendant was lured or induced to commit the crime. Those two elements are expressly set forth in RCW 9A.16.070 and repeated in Washington Supreme Court case law. *See State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 180 (1984) "Thus, both by statute and court decision the defense requires proof of *two* distinct elements") (emphasis added). The State, however, contends that Washington law also imposes upon the defendant the burden of proving a third element: the defendant must prove that the government used an unreasonable amount of persuasion. *Brief of Respondent* ("*BOR*"), at 41-42.

If Appellant is correct that entrapment has two elements – not three – then the remaining questions are:

- (1) Whether his trial counsel rendered ineffective assistance by failing to object to the prosecutor's closing argument when she told the jury: "There are three elements to entrapment. You must believe all of them are more probably true than not before you can find entrapment." RP XII, 93-94; and

(2) Whether his trial counsel rendered ineffective assistance by submitting an incorrect pattern jury instruction that injected an irrelevant factor – the objective reasonableness of the conduct of law enforcement – into the jury’s consideration of the entrapment defense. *See State v. Kylo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009) (“if instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review.”); *In re Restraint of Wilson*, ___ P.3d ___, 2012 WL 251190 (July 2, 2012) (“The instruction in this case [‘using ‘a crime’ instead of ‘the crime’ for accomplice liability] was inconsistent with the statutory definition in RCW 9A.28.020. The statute had not been amended in almost 30 years and therefore the argument that the pattern jury instruction was wrong was always available. [Citation]. Wilson’s trial attorney should have seen the inconsistency between the pattern jury instruction and the statute There is no legitimate strategic reason for allowing an instruction that incorrectly states the law and lowers the State’s burden of proof.”) *See* Argument, Parts 2(b) and (c), *infra*.

As shown below, and as this Court’s decision in *Wilson* confirms, the performance of appellant’s trial counsel was so seriously deficient and prejudicial that the convictions for the solicitation of murder and

attempted murder, must be reversed and sent back for retrial.

The State also continues to misperceive the differences between a due process claim of outrageous governmental conduct, which is considered only by judges, and the defense of entrapment, which is considered by a jury. In this case, the government, through use of its informant, manufactured criminal activity where none existed before. Putting aside the dispute over whether it was the informant or the appellant who first floated the idea of hiring someone to kill Bradley Klock (a solicitation charge that appellant was ultimately *acquitted* of), a tape recorded conversation unequivocally shows that it was the informant who first suggested that they should hire someone to kill Joseph King. Moreover, the recordings show that the informant played upon Mockovak's fears that (a) King might try to kill him before he could kill King; and (b) that the Russian Mafia hit men, whom the informant had lined up to kill King, would get upset and come after Mockovak if he backed out of the plan to pay them to kill King. Given such egregious governmental conduct, the prosecution of this case should have been barred. *See* Argument, Part B(1), *infra*.

Finally, the State's creative and overzealous charging of this case requires that several of the appellant's convictions be vacated and dismissed. The prosecution's (1) amendment of the information, so as to

split one continuous course of criminal conduct into two separate counts; (2) the bringing of duplicative charges in violation of the Double Jeopardy Clause; (3) the charging of a unilateral conspiracy in which the defendant conspired only with himself; and (4) the failure to prove any conspiratorial agreement to commit the intended crime of the charged conspiracy (theft) require the vacation of appellant's convictions on Counts II, IV, and V. See Argument, Parts B(4), (5), (6), (7), (8), (10), and (11), *infra*.

B. ARGUMENT IN REPLY

1. BECAUSE LAW ENFORCEMENT MANUFACTURED CRIMINAL ACTIVITY, CONTINUOUSLY CONTROLLED IT, AND USED THREATS OF VIOLENCE TO GOAD MOCKOVAK INTO APPROVING A MURDER PLOT, THERE WAS A DUE PROCESS VIOLATION.

a. The Prosecution Avoids An Application of the *Lively* Factors.¹

Whether the conduct of the government agents violated due process is a question of law for this Court to resolve by applying the five-factor test of *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).²

¹ For ease of reference, Appellant follows the sequence of arguments presented in his opening brief, stating first the reasons why, as a matter of due process, prosecution should have been barred in this case.

² Rather than address those factors head-on, the prosecution seeks to evade the issues by making a host of irrelevant comments. For example, the State recognizes that Mockovak relies on the decision in *Lively*. *BOR*, at 21. At the same time, the State falsely asserts that Mockovak “has not cited the constitutional basis” for his outrageous governmental conduct argument. *Id.* As if it were supplying information which Mockovak somehow withheld, the State then notes that *Lively* “is premised on the Fifth and Fourteenth Amendments.” *Id.* In fact, Mockovak quoted the very passage from *Lively* which identifies due process as the constitutional basis for his outrageous governmental conduct claim: “[O]utrageous conduct is founded on the principle that the conduct of law

The State admits that whether the government has engaged in outrageous conduct is “reviewed as a matter of law,” *BOR*, at 21, and agrees that *de novo* appellate review applies. But the State then asserts that “trial court findings of fact will be accepted unless clearly erroneous,” *Id.*, without acknowledging that the trial court *never made any findings of fact* in connection with Mockovak’s due process motion to dismiss.

As if to suggest that perhaps such a dismissal motion cannot be brought at all, the State says that “[a] majority of the United States Supreme Court has not approved the defense” of outrageous governmental conduct. *BOR*, at 22. Even if that were true, the Washington Supreme Court has explicitly approved of the “defense”³ and applied it in *Lively*. There is simply no legal basis for the State’s attempt to suggest that this Court need not recognize this type of due process claim. It is the established law of Washington.

b. By Combining The Plot To Kill Klock With The Plot To Kill King, The State Ignores the Evidence Which Shows That Kultin Was The “Originator” Of The Idea to Kill King.

When the State finally gets around to considering the *Lively* factors, it misrepresents the record. Cleverly packaging both Bradley Klock and

enforcement officers may be ‘so outrageous that *due process principles* would absolutely bar the government from invoking judicial process to obtain a conviction.’ *Brief of Appellant (“BOA”)*, at 53-54, quoting *Lively*, 130 Wn.2d at 19 (emphasis added).

Joseph King into the same sentence, the State makes this assertion: “In this case, the uncontroverted evidence is that the plot to kill Klock and King *originated* with Mockovak.” BOR, at 25 (emphasis added). While attempting to make it appear as if there were *one* plot to kill both men, the State ignores the fact that there were *two* separate solicitation of murder charges with *two* different victims, Klock and King, and that Mockovak was *acquitted* of the charge of soliciting Klock’s murder. CP 605. Building on its first misrepresentation, the State makes this second assertion: “The defense agreed that Mockovak raised the subject, but argued that he was not serious.” BOR, at 25. Having put the two alleged plots into one, the State falsely states that Mockovak “conceded” that he was the “instigator” because he was the one who raised “the subject.”

It is true that Mockovak’s trial counsel conceded that Mockovak once jokingly asked the informant if he knew anyone who could solve the company’s problem with Klock. RP III, 24.⁴ But Mockovak never conceded that he was the one who first raised “the subject” of killing King. On the contrary, Mockovak’s attorney specifically argued that the informant, Daniel Kultin, was the one who first raised this subject. RP

³ Strictly speaking, this type of a due process claim is not a “defense” to a crime; it’s a bar to prosecution.

⁴ And Kultin *agreed* that when Mockovak said this it was done in a joking sort of manner. RP VII. 118-19.

XII, 118. Moreover, the taped conversations between Kultin and Mockovak clearly show that Kultin was the one who “instigated” this crime of conspiracy. In the recorded conversation of August 11, 2009, it is Daniel Kultin who says that once the murder of Klock has been accomplished by means of a staged robbery/murder, then they can talk about killing King.⁵ Two months later, when Mockovak hesitated to give approval to Kultin’s suggestion that they hire hit men to kill King, the tapes show that it was Kultin who suggested that King might be plotting to kill Mockovak. *Tr.* 10/20/09, at 52 (“Is he going to have you killed. You know? That would be ideal for him, because he gets the five million dollars, doesn’t he?”).

Similarly, the tapes show that it was Kultin who made the suggestion that perhaps they should hire someone to kill King’s wife Holly, *Tr.* 10/22/09, at 143, or to kill King’s father-in-law. *Tr.*, 11/6/09, at 56 (“I can do the father.”) The tapes also show that Mockovak vehemently rejected both suggestions. *Tr.* 10/22/09, at 143 (“Nooo. No. No. No. No.”); *Tr.* 11/6/09, at 56 (“No. I don’t want to do the father.”). Mockovak also asks Kultin twice why Kultin thought he could bring to Mockovak the idea of

⁵ Kultin: “Klock’s a victim of a crime. A-T-M, whatever he comes in, out of the gas station and gets his gas, you know, they take his watch, they take his wallet, you know, they take his car or whatever, drop his body somewhere in the river or whatever. So. It’s

killing either Klock, *Tr.* 8/11/09, at 62 (“so I have to ask you, why did you, uh, choose to offer this to me?”); or King. *Tr.* 11/6/09, at 78 (“I have to ask you what made you confident in you could say this to me and I wouldn’t wig out?”). On both occasions Kultin fails to deny that he was the one who brought up the idea. Kultin does *not* respond with anything like, “What do you mean, you were the one who first raised the idea. Instead, Kultin deflects Mockovak’s questions. *Tr.* 8/11/09, at 62 (Might as well.”); *Tr.* 11/6/09, at 78 (“[W]e’ve been talking for a long time, we played chess together. Trust me. . . . When I play chess with somebody I know that, the way this person thinks.”)

Lively directs courts to consider “whether the police conduct instigated a crime. . .” 130 Wn.2d at 22. Mockovak was convicted of the inchoate crimes of soliciting someone to kill Joseph King, and making an attempt to kill King by taking a substantial step towards accomplishing that murder. The tape recordings show that Daniel Kultin, not Michael Mockovak, first raised the idea of killing King. It was precisely because Mockovak was *not* agreeing to go forward with the idea of hiring someone to kill Klock that Daniel Kultin suggested a new criminal plot – let’s hire someone to kill King. Mockovak said he wanted to wait and “see what’s

easy. Its Russians, man. . . . *And then*, once the practice is free, *we can talk about Joe [King].* (Chuckles.)” *Tr.*, 8/11/09, at 69-70 (emphasis added).

gonna happen” at Klock’s deposition, because if that went well then “this whole thing” – this idea of paying someone to kill Klock – “may disappear.”⁶ It was during this conversation -- *after* Mockovak said that the plan to kill Klock “may just go away at that point,”⁷ -- that *Kultin* made the suggestion that after they had dealt with Klock, “we can talk about Joe [King].”⁸

c. **The *Lively* Due Process Test Focuses On Who Was the “Instigator” Of The Crime, Not On Who First Thought It Up. Who “Originated” The Crime Is Central To A Defense of Entrapment, But Not To A Due Process Claim of Outrageous Governmental Conduct.**

The State continues to muddle the fundamental difference between the entrapment defense (tried to the jury) and the due process claim (decided by the Court) that there can be no prosecution at all because outrageous governmental conduct bars the bringing of the charge. The *Lively* opinion clearly distinguishes between these two things. To prevail on an *entrapment* defense, the accused must show that “[t]he criminal design ***originated*** in the mind of law enforcement officials, or any person acting under their direction” RCW 9A.16.070(1)(a) (emphasis added). But there is no “origination” requirement for a due process claim. As *Lively* shows, a defendant can win dismissal of the prosecution on due process

⁶ *Tr.* 8/11/09, at 43.

⁷ *Id.* at 44.

grounds, even when he is not even entitled to a jury instruction on the entrapment defense. See *Lively*, 130 Wn.2d at 22: “The government conduct may be so extensive that even a predisposed defendant may not be prosecuted on the ground of deprivation of due process.”

Instead, *one* of the five factors to be considered in connection with a due process claim is whether law enforcement was the “instigator” of the crime. The verb to “instigate” is defined as “to goad or urge forward.” *Webster’s Ninth New Collegiate Dictionary* 627 (1983). One need not be the “originator” of an idea in order to “urge [it] forward.” Here the idea was to hire someone to kill King. The record unequivocally shows that this was an idea that Daniel Kultin incessantly “urged forward” with his remarks to Mockovak that (1) perhaps King is “going to have you killed”; that King is trying to “completely kick you out” of your jointly owned business; that King may have been the one who deliberately scratched up your car; and that King’s “been screwing you over for a long time . . .”⁹ Thus, even if the record did not establish that Kultin was the “originator” of the idea to have King killed – and the tape recordings plainly confirm that it was indeed Kultin who “originated” the idea – the record overwhelmingly establishes that Kultin was the “instigator” of the idea.

⁸ *Id.* at 69-70.

⁹ *Tr.* 10/20/09, at 52; *Tr.* 8/11/09, at 28; *Tr.* 10/20/09, at 42.

d. The State Concedes That There Was No Infiltration of Ongoing Criminal Activity.

The State acknowledges that *Lively* directs courts to consider whether government “merely infiltrated ongoing criminal activity.” 130 Wn.2d at 22. But the State makes no attempt to argue that any such infiltration occurred here. Instead, the State silently concedes that until Kultin, the government’s agent got involved, there was no criminal *activity* at all (much less any *ongoing* criminal activity). At the very most the evidence showed that Mockovak was engaged in *thinking* about the possibility of hiring someone to kill Klock, but there was no evidence that he had *done* anything at all to put such thoughts into action.

e. Whether A Crime Was Committed For The Defendant’s “Own Benefit” Is Not One of the Lively Factors.

The State argues that there was no due process violation here because “Mockovak [c]ommitted [t]hese [c]rimes [f]or [h]is [o]wn [b]enefit.” *BOR*, at 26. So do nearly all criminal defendants. It’s a rare event when a person commits a crime for the benefit of someone else. In any event, *Lively* does not identify the absence of any perceived self-benefit as a relevant factor.¹⁰ This is hardly surprising since *Lively* recognizes that the

¹⁰ Once again, the State confuses the factors relevant to the defense of entrapment with those relevant to a due process claim of outrageous governmental conduct. There is plenty of Ninth Circuit case law which recognizes that “whether the defendant engaged in the activity for profit” is relevant to an *entrapment defense*. See, e.g., *United States v.*

focus of the due process inquiry is “on the State’s behavior” and *not* on the defendant’s state of mind. *Lively*, 130 Wn.2d at 22. Put another way, a due process claim of outrageous governmental conduct assumes that the defendant engaged in the wrongful behavior of which he was accused, but nevertheless due process prevents the government from proceeding because of the government’s own disqualifying behavior. If it were otherwise, prosecutions would be barred only in those instances where the defendant would be acquitted in any event, and the *Lively* due process claim would be relegated to a legalistic afterthought, rather than a constitutional protection.

f. Mockovak’s Due Process Claim Is Not Predicated Upon Any Act Of Deception.

In an attempt to set up a straw man that it can then knock down, the State notes that courts routinely hold that the use of an informant who uses deceit to gain the trust of the defendant is not an indicator of outrageous governmental conduct. *BOR*, at 26, citing *United States v. Simpson*, 813 1462 (9th Cir.), *cert. denied*, 484 U.S. 898 (1987). No argument there. Mockovak has never argued that Kultin’s deceitful portrayal of a person with connections to the Russian Mafia violated due process.

McClelland, 72 F.3d 717, 722 (9th Cir. 1995), *cert. denied*, 517 U.S. 1148 (1996)(factor #3). *Accord United States v. Gurolla*, 333 F.3d 944, 955 (9th Cir. 2003). But there is no

g. This Case is Not Comparable to *McClelland*. There The Defendant Provided The Hired Assassin (A Real Person) With A Poisoning Device, A Back Up Poisoning Device, A Disguise, Airplane Tickets, And Transportation to the Airport.

The State argues that Mockovak's case is like *McClelland*, *supra*, but when one compares the complaints made regarding the conduct of the law enforcement in the two cases, it is evident that they are light years apart. In *McClelland* the defendant "initiated conversations with Russell [his employee] about harming Margie McClelland. In early March, McClelland told Russell that he wanted his estranged wife killed and discussed numerous plans for accomplishing that goal" *Id.* at 719. McClelland "argue[d] that the government conduct was outrageous for three reasons." *Id.* at 721.

First, he says that the government failed to take any steps to corroborate Russell's story or his reliability as an informant. Second he contends that the government manufactured the offense because it allowed Russell to persuade him to pursue the murder plan despite his own reluctance to do so, and because it waited until the element of interstate travel was committed before it arrested him. Finally, he asserts that the government failed to take steps to prevent the crime or to protect Margie McClelland.

Id.

Although the State might want this Court to think so, Mockovak makes none of these allegations. He does *not* base his outrageous conduct

precedent which holds that whether the defendant profited or benefited from the criminal activity is relevant to a due process claim.

claim on any assertion that the FBI failed to take steps to monitor Kultin. He does not argue that it was outrageous to wait until after Mockovak delivered payment to Kultin before arresting him. Nor does he argue that there was anything outrageous about failing to provide protection to Dr. King, since obviously no protection was needed. Since no *real* Mafia hit men had been hired to commit a murder, there was nothing real to protect against.

Instead, Mockovak's due process claim rests upon the contentions that the FBI manufactured the crimes of conspiracy and solicitation to murder King, and that the government was in control of these criminal activities from start to finish. In *McClelland*, when one considers the "start" of his crime,¹¹ the opinion states: "There is uncontradicted evidence that McClelland made the initial suggestion of criminal activity." *Id.* at 723. In Mockovak's case, the recording of the conversation of August 11, 2009, (at page 43) shows that it was Kultin – the government agent – who brought up the idea of killing King, and there is no evidence or testimony from anyone that indicates that prior to this time Mockovak brought up this idea. Thus, a government agent was in control of the criminal enterprise of soliciting someone to kill King from the "start."

From that point on, the FBI, through its informant, was always in

control of the venture. It was Kultin who directed Mockovak when and where to deliver the money to pay the (fictitious) hit men. It was Kultin who instructed Mockovak that Mockovak needed to supply Kultin with a photo of King so the hit men could recognize him. Compare these facts with the facts of *McClelland*. There it was McClelland who was taking independent action on his own to assist Russell to carry out McClelland's plan to poison his estranged wife. For example:

McClelland gave Russell money for the airline tickets, [so Russell could fly to where the victim lived], and Russell, ***following McClelland's instructions***, purchased the tickets from a travel agency under a fake name.

Id. at 720 (emphasis added).

While Russell pretended to have obtained a poison, McClelland designed the "poisoning device" that Russell was to use:

Russell and McClelland purchased various supplies needed to construct a simple poisoning device consisting of a finger splint with a protruding poisoned tack. ***McClelland directed Russell in constructing the device and gave him a ring to brace it.*** As part of a backup plan, ***McClelland also purchased a magnet that Russell was to use to attach a poisoned tack to the handle of Margie McClelland's car.*** McClelland helped Russell pack and gave him a map of Kansas and a picture of the intended victim.

McClelland drove Russell to Spokane Airport on Thursday, March 31, stopping along the way to buy him a baseball cap to use as a disguise

McClelland, 72 F.3d at 720 (emphasis added). The Ninth Circuit easily

¹¹ Use of Interstate Commerce Facilities in the Commission of Murder-for-Hire.

concluded that there was no due process violation because “The government involvement in this case was not sufficiently extensive to meet the ‘manufactured the crime’ standard.” *Id.* at 722.

The facts of the present case are obviously distinguishable. Mockovak did not provide guns, or ammunition, or disguises, or transportation, for use by the (fictional) Russian Mafia hit men. Mockovak did not attempt to instruct or assist the hit men, nor did he attempt to instruct Kultin on how to deal with them either. In this case the government agent, Kultin, was in control from start to finish. Moreover, in *McClelland* there was a real existing person (Russell) whom the defendant approached and offered to employ as an assassin. McClelland approached Russell and asked him “if he could obtain some poison” and kill his wife. *Id.* at 719. But in the present case, there never was any *real* assassin, only fictional ones.

By definition, the crime of solicitation requires the existence of another person. Solicitation is committed when the defendant “offers to give or gives money or other thing of value *to another* to engage in specific conduct which would constitute such crime . . .” RCW 9A.28.030 (emphasis added). No one contends that Mockovak intended to hire Kultin to carry out a murder himself, so in order for the crime to be committed, the government had to *invent* a person to carry out the crime. In this way the government literally *manufactured* a crime. There was no

ongoing criminal activity before Kultin created some. Kultin, following FBI instructions, fabricated a solicitation crime for Mockovak to commit.

Similarly, the Government literally *created* the crime of conspiracy. By definition, the crime of conspiracy requires an agreement between two or more persons to commit a crime. RCW 9A.28.040. In order for Mockovak to commit the crime of conspiracy, he had to have someone to conspire with, and therefore the FBI supplied him a conspirator. Agent Carr *instructed* Kultin to tell Mockovak that he was traveling to Los Angeles to visit his childhood friend with connections to the Russian Mafia. RP VI, 73. When (according to Kultin) Mockovak finally took the bait and contacted Kultin to discuss “that thing” involving his childhood friend, Kultin became Mockovak’s *only* (apparent) co-conspirator.

h. It Is Fundamentally Unfair For Government to Create Crime Where None Existed, And Then To Prosecute The Person Whom The Government Recruited To Perpetrate The Crime. This Is Particularly True When The Government Prosecutes A “Unilateral Conspiracy” In Which No One Has Really Agreed To Commit A Crime With The Defendant.

It is fundamentally unfair for Government to *create* criminal activity where none previously existed, and then to prosecute those who participated in the Government’s own creation. As Mockovak argued in his opening brief,¹² legislation which purports to allow the State to

¹² *Brief of Appellant*, at pp. 139-144.

prosecute “unilateral conspiracies,” where there is no “true” agreement between two people to commit a crime, also violates due process because it purports to allow State agents to first create criminal conspiracies and then prosecute those whom it ensnares in such a “feigned,” conspiracy.

In a unilateral conspiracy the State not only plays an active role in *creating the offense*, but also becomes the chief witness in proving that crime at trial. [Citation]. We agree with the Ninth Circuit *this has the potential to put the State in the improper position of manufacturing crime*.

State v. Pacheco, 125 Wn.2d 150, 157-58, 882 P.2d 183 (1994) (emphasis added).

The “agreement” in a “unilateral conspiracy” is thus merely “a legal fiction, a technical way of transforming nonconspiratorial conduct into a prohibited conspiracy.” *Id.* at 157. The creation of a “unilateral” conspiracy crime by supplying a fictional co-conspirator is a due process violation because the government has manufactured a conspiracy. The outrageous governmental conduct due process doctrine is a more general statement of that same principle.

i. Courts Have Found A Due Process Violation Where Government Agents Used Threats Of Violence To Impel The Defendant To Go Ahead With The Planned Criminal Activity.

In the present case, as in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1972), the government used threats of violence to goad the defendant into participating in criminal conduct. In *Greene* the Ninth Circuit found a

due process violation, reversed convictions for the illegal sale of liquor, and barred any prosecution of the defendants. The factors which impelled the Court's decision were (1) the degree to which the government agent controlled the criminal activity, and (2) the use of a "veiled threat" of violence to get the defendants to keep participating in the criminal venture:

[The ATF agent's] involvement in the bootlegging activities was not only extended in duration, but also substantial in nature. He treated Thomas and Becker as partners. He offered to provide a still, a still site, still equipment, and an operator. He actually provided two thousand pounds of sugar at wholesale.

[He] applied pressure to prod Becker and Thomas into production of bootleg alcohol. The Government concedes that Courtney made the statement, "the boss is on my back." And we believe that *in the context of criminal "syndicate" operations, of which Courtney was ostensibly a part, this statement could only be construed as a veiled threat.*

Greene, 454 F.2d at 786-87 (emphasis added).

The *Greene* Court recognized that the defendants had no viable defense of entrapment.¹³ And yet they prevailed on their outrageous governmental conduct claim because the government agent "created" criminal activity and employed the despicable technique of making a "veiled threat" of violence to keep them involved in it:

¹³ "Defendants Thomas and Becker had a predisposition to manufacture and sell bootleg whiskey from the time of Courtney's first contact with them, and the usual entrapment defense is therefore not available." 454 F.2d at 786 (n. 4 omitted).

We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators. . . . [A]lthough this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative. Under these circumstances, the Government's conduct rises to the level of "creative activity". . . .

Greene, 454 F.2d at 787 (italics in original).

The repugnant conduct of using threats to keep the defendant in the criminal enterprise is even more clearly present in this case. Kultin's question to Mockovak, "Is he going to have you killed. You know? That would be ideal for him, . . ." is on tape. "Tr. 10/20/09, at 52. In addition, Kultin told Mockovak that if he failed to pay the (fictional) Russian hit men then, although "they're probably not going to kill us, yeah, but they'll fucking, you know . . . make it so we pay them, and probably more than that." Tr. 11/6/09, at 86. Mockovak responded to this very clear threat, "I just want to go the whole way through to make sure that there's no, cuz, I don't want anybody serious people like this upset." *Id.* at 89.

Here, as in *Greene*, this court should reverse and remand for dismissal of the charges because of the government's egregious conduct in manufacturing crime, partly by means of using threats of violence to secure the defendant's participation in the criminal venture.

2. DUE TO TRIAL COUNSEL’S DEFICIENT CONDUCT, THE JURY WAS MISLED BY AN INSTRUCTION WHICH INTERJECTED AN IRRELEVANT FACTOR INTO ITS CONSIDERATION OF THE ENTRAPMENT DEFENSE, AND IMPROPERLY INCREASED THE DEFENDANT’S BURDEN OF PROOF.

Appellant has raised the issue of whether WPIC 18.05 violates due process because it contains a highly misleading sentence that should never be included in any instruction on entrapment. The State appears to be of two minds. On the one hand, the State contends that Appellant’s claim cannot be reviewed because “the invited error doctrine bars relief even if the error is of constitutional magnitude.” *BOR*, at 38, citing *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).¹⁴ And yet, on the other hand, citing to *State v. Kyllo*, 166 Wn.2d at 861-71, the State acknowledges that “in the context of a claim of ineffective assistance of counsel,” courts “do review the instructions challenged,” even though the defendant proposed the instruction. *BOR*, at 38-39. To the extent that the State seeks to persuade this Court that Appellant’s due process claim of instructional error cannot be raised here, its argument is fatally flawed.

a. There Was No Claim Of Ineffective Assistance Of Counsel In Henderson.

In support of its contention that Mockovak cannot obtain review of his

claim that WPIC 18.05 violates due process, the State cites to *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). The State points to language in *Henderson* that states that even if an instruction is tainted by constitutional error, that error cannot be reviewed at the defendant's request if the defendant's own attorney proposed the instruction.

But there was no claim of ineffective assistance of counsel ("IAC") in *Henderson*. Thus, there was no occasion to discuss whether the claimed flaw in the instruction could be reviewed even though defense counsel proposed it, because the proposal of the instruction was itself an act of IAC. The Supreme Court's decision in *Kyllo*, decided 19 years after *Henderson*, holds that the invited error doctrine is *not* a bar to appellate review of the instructional error if there is an IAC claim. It is impossible to read *Henderson* as trumping *Kyllo*.

b. This Court's Recent Decision In *Wilson* Is An Example Of A Case Where The Invited Error Doctrine Did Not Preclude Review Of The Instruction Because Trial Counsel's Act Of Proposing The Instruction Was An Act Of Ineffective Assistance Which Caused The Instructional Error.

Recently, this Court rejected precisely the same argument that the State raises here. In *In Re Restraint of Wilson*, ___ P.3d ___, 2012 WL 2511190 (July 2, 2012), this Court "conclude[d] that trial counsel was

¹⁴ Apparently this is why the State never makes any response to Mockovak's due process *Boyde* claim. See *Boyde v. California*, 494 U.S. 370 (1990), *Sandstrom v. Montana*, 442

ineffective for proposing an accomplice liability instruction with ‘a crime’ terminology instead of ‘the crime’ terminology.” *Id.* at ¶ 1. “More than two years after Wilson’s trial, the Supreme Court declared” the accomplice liability instruction which trial counsel proposed, to be erroneous. *Id.* at ¶ 14.¹⁵ Raising the exact same argument which the State makes in this case, the State argued that the invited error doctrine precluded any review of the instructional error, and maintained that the only claim that could be considered was an IAC claim. *Rejecting* this contention, this Court held that the IAC claim was *not* a distinct claim from the instructional error claim:

Wilson’s supplemental brief, written by an attorney, addresses the issue under the heading “The Accomplice Liability Instruction Impermissibly Lowered the State’s Burden of Proof,” but it then reframes the issue as whether defense counsel was ineffective by proposing the defective instruction. The State suggests ineffective assistance is a new claim, distinct from the instructional issue raised in Wilson’s timely original petition, and is therefore time-barred because it does not fall under any of the exceptions to the one year time limit. [Citations].

Wilson responds that the issue of ineffective assistance is “part and parcel” of the *Cronin* and *Roberts* issue, not a freestanding claim. ***We agree.*** Where defense counsel proposes an erroneous instruction, review will often be precluded because the error is invited. But if the instructional error is the result of ineffective assistance of counsel, “the invited error doctrine does not preclude review.” *State v. Kylo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009).

U.S. 510 (1979), and *Brief of Appellant*, at 86-88.

¹⁵ See *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 717 (2000).

Seeing the accomplice liability instruction through the lens of ineffective assistance does not transform it into a different claim; the claim remains one of instructional error.

Wilson, at ¶¶ 15-16 (emphasis added).

c. ***Wilson Holds That Counsel’s Proposal Of The Defective Instruction Was Deficient Conduct, Even Though Cronin and Roberts Had Not Yet Been Decided, Because The Instruction Was Inconsistent With The Accomplice Liability Statute.***

Like the entrapment instruction in this case, the erroneous instruction in *Cronin* was modeled on a WPIC “pattern” instruction, but the Court held this was immaterial. *Cronin*, 142 Wn.2d at 579.

Like the Supreme Court in *Cronin*, in *Wilson* this Court also noted that the instruction proposed by trial counsel was a standard WPIC instruction, but this Court nevertheless unanimously held that counsel’s act of proposing it (two years before the *Cronin* and *Roberts* decisions) constituted ineffective assistance.

When counsel’s conduct can be characterized as legitimate strategy, performance is not deficient. *Kyllo*, 166 Wn.2d at 863. Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Kyllo*, 166 Wn.2d at 861.

Proposing a pattern instruction does not ensure performance was reasonable. *Kyllo*, 166 Wn.2d at 865-69 (holding a lawyer’s performance was deficient because there were several cases that should have indicated to counsel that the pattern instruction was flawed.)

The instruction in this case was inconsistent with the statutory definition in RCW 9A.28.020. The statute had not been amended in almost 30 years, and therefore the argument that the pattern

instruction was wrong was always available. [Citation]. Wilson's trial attorney should have seen the inconsistency between the pattern instruction and the statute and should have recognized that the pattern instruction wrongly allowed an accomplice to be held strictly liable for any and all crimes the principal committed. [Citation]. There is no legitimate strategic reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof. Kylo, 166 Wn.2d at 869. Therefore, we conclude Wilson's counsel was deficient.

Wilson, at ¶¶ 22-24 (emphasis added).

d. Similarly, The Entrapment Instruction Proposed by Mockovak's Trial Counsel Was Inconsistent With The Statute Defining The Entrapment Defense And With *State v. Lively*, *State v. Smith*, and *State v. Keller*.

For exactly the same reasons, the conduct of Mockovak's trial counsel was deficient. As stated in *State v. Smith*, 101 Wn.2d at 43, "both by statute and court decision the [entrapment] defense requires proof of two distinct elements." And yet trial counsel proposed a pattern instruction that seemed to require the defendant to establish *three* elements in order to prove entrapment. Moreover, the prosecutor explicitly told the jury in closing argument, "There are essentially three elements, if you will, to entrapment, and you must believe – the defendant must convince you of each and every one of these elements before you can find entrapment." RP XII, 93-94.

The WPIC instruction defense counsel submitted was also inconsistent with *State v. Lively, supra*. *Lively* explicitly states that "[w]hether the

State has engaged in outrageous conduct is a matter of law; not a question for juries.” 130 Wn.2d at 19. It also states that in deciding a claim of outrageous conduct “we focus on the State’s behavior and not the defendant’s predisposition.” *Id.* at 22. To make the point even clearer, the Court said that “government conduct may be so extensive that even a predisposed defendant may not be prosecuted based on the ground of deprivation of due process.” *Id.* All of these statements should have put Mockovak’s trial counsel on notice that the sentence in the WPIC entrapment instruction regarding “the use of a reasonable amount of persuasion to overcome reluctance” did not belong there. *Lively* repeatedly states that the whole subject of the use of an excessive amount of persuasion is related to a due process outrageous conduct claim, which is a legal issue to be decided by a judge. Since *Lively* states this issue is “*not a question for juries,*” trial counsel should have realized that *it should not have been a part of any jury instruction.*

Finally, the impropriety of instructing a jury about the use of a reasonable amount of persuasion should have been evident to trial counsel from even the most cursory reading of the passage in *State v. Keller*, 30 Wn. App. 644, 647, 637 P.2d 985 (1981), which states that while “it is true . . . that use by police officials of a normal amount of persuasion . . . does not constitute entrapment,” evidence that only a “normal amount” of

persuasion was used “is relevant only if it is contended the [police] conduct violated due process.” Thus *Keller* held that such evidence was completely irrelevant to a defense of entrapment. Similarly, a second *Smith* decision contained language stating “It has never been supposed that the jury must be instructed to weigh public policy or good faith [of the police] in reaching its decision on whether the defense of entrapment has been made out.”¹⁶ Despite the language in *Lively*, *Keller*, the two *Smith* cases, and the statutory definition of entrapment, trial counsel proposed an instruction that contained language relevant only to a due process claim. This was deficient conduct.

As for the second prong of *Strickland*, the State makes no attempt to argue that the instruction was not prejudicial to the defendant. Indeed, it was precisely because the “third element” of entrapment argument made the defendant’s burden to establish entrapment so much more difficult that the trial prosecutor explicitly argued to the jury that the defendant had to establish the “third element” of entrapment.

e. The State’s Puzzling Assertion That Instruction No. 29 Was a “Correct Statement of the Law” Appears to Be Another Semantic Dodge.

The State contends that instruction No. 29 was “a correct statement of the law.” *BOR*, at 39. A few pages later, focusing in on the challenged

¹⁶ *State v. Smith*, 93 Wn.2d 329, 350, 610 P.2d 869 (1980).

sentence contained within it, the State asserts that “[t]he Washington Supreme Court has held that the use of a normal amount of persuasion to overcome reluctance to enter into a criminal transaction does not constitute entrapment.” *BOR*, at 41.

So the prosecution is simply saying, “The challenged sentence is a true statement.” But it is not a true statement of what constitutes the defense of entrapment. The amount of persuasion used by the police is relevant only to judges deciding due process claims. It is wholly irrelevant to juries deciding entrapment defenses. Despite the statement’s irrelevance to the jury’s task, it’s *in* the jury instruction, so jurors are misled into thinking it *must* be relevant to what they have been asked to decide. It is not only susceptible to being *misread* as stating that a third “element” of entrapment must be established by the defendant, but that is precisely how the prosecutor told the jurors to read it.¹⁷

3. THE STATE ATTEMPTS TO RECAST MOCKOVAK’S SECOND CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AS IF IT WERE A CLAIM OF PROSECUTORIAL MISCONDUCT.

In its brief the State asserts that “The Prosecutor Did Not Err In

¹⁷ Indeed, in its appellate brief, the prosecution is *still* misreading the sentence. The following sentence on page 42 of its appellate brief, continues to misread the challenged sentence in the WPIC entrapment: “Thus, the statement that ‘a reasonable amount of persuasion to overcome reluctance does not constitute entrapment’ sets out a definition of inducement that the defendant must prove.” This sentence illogically asserts that since X

Closing Argument” when she relied on the trial court’s jury instruction stating the law of entrapment. *BOR*, at 45. This is nonsense. Nowhere in Instruction No. 29 does it state that the defendant must prove three “elements” of entrapment. Nowhere does it state that the defendant must prove that law enforcement used “more than a reasonable amount of persuasion” to establish entrapment. And yet the prosecutor told the jury this is what the instruction meant. Clearly the prosecutor *did* “err”; she misstated the law and defense counsel did not object when she did. There is no “invited error” bar to review of this claim of ineffective assistance.

Rather than confront Mockovak’s ineffective assistance of counsel claim, the State seeks to re-label it so it can treat it as a claim of prosecutorial misconduct. The State agrees, as it must, that trial counsel never made any objection to the prosecutor’s argument, and then states the rule that governs waiver of claims of prosecutorial misconduct:

A defendant who does not make a timely objection at trial *waives any claim of prosecutorial misconduct* unless the misconduct in question is ‘so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ that could not have been neutralized by a curative instruction to the jury.

BOR, at 45, citing *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201

does *not* constitute entrapment that necessarily means that a defendant is required to prove *more than X* to establish entrapment.

(2006)) (emphasis added).

Similarly, the State points out that defense counsel cannot refrain from making an objection to prosecutorial misconduct and then, when the verdict is adverse, “use the *misconduct* as a life preserver . . . on appeal.” *BOR*, at 47, citing *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (emphasis added). But it is precisely because the prosecutor’s misstatement of the law *could* have been corrected if a timely objection had been made, that Mockovak has not raised a prosecutorial misconduct claim. Instead, he has raised an IAC claim premised upon defense counsel’s failure to object to improper closing argument.¹⁸

4. SOLICITATION OF MURDER MERGES INTO ATTEMPTED MURDER WHEN A VERBAL OFFER TO COMPENSATE ANOTHER TO COMMIT THE CRIME IS FOLLOWED BY DELIVERY OF A PAYMENT FOR FUTURE PERFORMANCE OF THAT SERVICE.

The State’s brief lumps together Mockovak’s merger and double jeopardy claims under one heading and then proceeds to ignore the merger claim. *BOR*, at 57. To further complicate matters, the State ignores the fact that solicitation is a continuing offense which did *not* cease when, on November 7, 2009, Mockovak gave Kultin money to pay the (fictional) hit

¹⁸ See, e.g., *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000); *Combs v. Coyle*, 205 F.3d 269, (6th Cir.), cert. denied, 531 U.S. 1935 (2000); *Commonwealth v. Egardo*, 426 Mass. 48, 686 N.E.2d 432, 434-36 (1997); *McFadden v. State*, 342 S.C. 637, 539 S.E.2d

men. By bringing two charges, the State split up one continuous course of conduct into two pieces as follows:

The solicitation to commit murder charge alleged that from October 14 through November 6, 2009, Mockovak offered to give money or other things of value to another in order to accomplish the murder of Dr. Joseph King. CP 413, 580. The attempted murder charge alleged that on November 7, 2009, Mockovak attempted to cause the death of King.

BOR, at 57-58. The supposedly “new” crime of attempted murder alleged to have occurred on November 7th was based solely on the fact that on that day Mockovak met Kultin and delivered to him the first payment to be delivered to the Russian hit men who were being engaged to kill King.

But the Supreme Court has rejected the attempt to characterize solicitation as an offense which ends the moment the actor voices an offer to pay another to commit a crime. Nor does the crime end the moment payment is actually tendered. As the Court said in *State v. Jensen*, 164 Wn.2d 943, 956-57, 195 P.3d 512 (2008):

“Like the conspiracy statute, *the solicitation statute prohibits a course of conduct, not a single act.* [Citation]. *The prohibited course of conduct is attempting to engage another person to participate in a specific crime.* This is an ‘inherently continuous offense.’ [Citation]. *The crime continues so long as the offer remains open*, exposing another person to the corrupting influence of the enticement.”

(Emphasis added).

391, 393-94 (2000). In all of these cases counsel was found to be ineffective for failing

Ignoring *Jensen*, the State relies on *State v. Schneider*, 36 Wn. App. 237, 673 P.2d 200 (1983). In *Schneider*, as in this case, the defendant argued that she could not be convicted of both the solicitation of murder and attempted murder. This Court rejected her contention on the grounds that the act of offering to pay for her husband's murder was committed a month or two before the act of attempting to kill her husband by booby trapping his car so that it would explode when the engine was started. *Schneider*, 36 Wn. App. at 204 n.3.¹⁹

But in light of the *Jensen* decision rendered 25 years later, *Schneider* is clearly no longer good law. The *Schneider* Court failed to understand that the defendant's crime of solicitation was an inherently continuous crime, which "continue[d] so long as [her] offer to pay remained open" *Jensen*, at 957. So the fact that *Schneider* first made offers to pay months before the attempt was committed is irrelevant, and the fact that Kultin testified that Mockovak allegedly started offering to pay for King's murder long before November 7, 2009, is similarly irrelevant.

In this case, the prosecution would like this Court to believe that the

to object to improper closing argument remarks made by the prosecutor.

¹⁹ "Schneider's offers to pay money to have her husband killed (solicitation) occurred in February and March of 1981. As the State suggests, her accomplice liability [for attempted murder] is based upon her approval of the murder plan several days before the attempt, as well as apparently loaning her car to the principals on the night of the attempt. When a defendant's acts are factually separable, no multiple punishment occurs. [Citations omitted]."

making of an offer to pay was the crime of solicitation, and the actual delivery of payment was a second *distinct* crime of attempt. But when the substantial step used as the predicate for the crime of attempt is the giving of a payment to hire another to commit a crime, then the substantial step is the same thing as the continuing crime of solicitation. Indeed, the legislature has defined the crime of solicitation as *either* the act of offering to pay *or* the act of giving payment. RCW 9A.28.030 (“offers to give *or* gives money . . .”).

When Mockovak delivered the first payment on November 7th, a substantial step towards causing a murder was committed, and thus the greater crime of attempted murder was committed.²⁰ In *State v. Gay*, 4 Wn. App. 834, 486 P.2d 341 (1971), the defendant argued that her attempted murder conviction should be set aside because she “only” committed solicitation of murder. This Court rejected that contention, holding that since the defendant gave money to the intended assassin, she “went beyond the sphere of mere solicitation.” *Id.* at 842.

“Solicitation is properly analyzed as “an attempt to conspire.” *State v. Jensen*, 164 Wn.2d 943, 951, 195 P.3d 512 (2008). It is “the most inchoate of the three anticipatory offenses.” *Id.* at 952. Solicitation can

²⁰ At the same time, the crime of solicitation did not stop. Not only was the first payment still operating as an enticement to commit the murder, but the offer to make the second

“ripen” into an attempt when the solicitor goes beyond simply making an offer, and takes the additional step of consummating a contract with another for commission of the intended crime. *Id.* at 950. When this occurs, the *Jensen* Court said, the defendant “will be criminally liable *for the greater* harm” of attempt. *Id.* (emphasis added). The same analysis applies here. Since Mockovak’s solicitation had “ripened” into an attempt by the delivery of the first part-payment for commission of the murder, it is not permissible to punish Mockovak both for solicitation of murder, as well as for attempted murder. Here there was but one continuous course of conduct, a solicitation which merged into an attempt. Mockovak is thus criminally liable for the greater (the attempt), but not for the merged solicitation offense, which was but “an attempt to conspire.”

The State cites to *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), which it claims supports the conclusion that Mockovak’s solicitation and attempt crimes do not merge because “neither crime requires proof of the other crime.” *BOR*, at 61. But *Freeman* actually supports Mockovak’s position. *Freeman* recognizes that one way that multiple convictions can violate double jeopardy is “if the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction on the other.” *Id.* at 759. In

payment after the murder was performed was also still in effect.

this case, attempted murder was committed by taking the substantial step of delivering the promised first payment to Kultin for him to pass on to the hit men. Since delivery of payment for a contract murder includes the act of “giv[ing] money . . . to another to engage in specific conduct which would constitute such crime” (RCW 9A.28.030), proof of the attempt is sufficient to warrant conviction for solicitation of murder. Therefore, this case satisfies the *Freeman* test for finding a double jeopardy violation.²¹

5. THE STATE IGNORES THE *ORANGE* PLACEHOLDER ANALYSIS. BECAUSE THE SUBSTANTIAL STEP TOWARDS ATTEMPTED MURDER WAS THE SOLICITATION OF MURDER, CONVICTIONS FOR BOTH OFFENSES VIOLATES DOUBLE JEOPARDY.

Attempt requires proof of a “substantial step” towards commission of the intended crime. On page 63 of its brief, the State recites the *Blockburger* same elements test, and then simply asserts that attempted murder and solicitation of murder have different elements:

²¹ The two consolidated cases decided in *Freeman* illustrate the same principle. There the Court found that ordinarily the offense of Assault 2 *does* merge into the offense of Robbery 2. “Under the merger rule, assault committed in furtherance of a robbery merges with robbery, and without contrary legislative intent or application of an exception, these crimes would merge.” *Freeman*, at 778. While the Court did find evidence of legislative intent that defendant Freeman’s Assault 1 should not merge into Robbery 2 (because the Legislature established a much more severe sentencing range for Assault 1 than for Robbery 2), it found no such evidence with respect to defendant Zumwalt’s offenses of Assault 2 and Robbery 2. “Generally, it appears that these two crimes will merge unless they have an independent purpose or effect.” *Id.* at 779. The Court remanded for resentencing because Zumwalt’s Assault 2 and Robbery 2 convictions merged. *Id.* at 778. Similarly, since the solicitation of King’s murder and the attempt to cause King’s murder have no independent purpose or effect, Mockovak’s two offenses should merge, just as Zumwalt’s offenses did.

As making an offer of money is not an element of attempted murder in the first degree, and doing an act that is a substantial step towards committing murder is not an element of solicitation to commit murder, the crimes are not the same.

This is mere sophistry. The State ignores the holding of *In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), that the “substantial step” element of the crime of attempt is merely a placeholder for the specific act which is identified as the substantial step in the case in question. *Id.* at 818. In the present case, that act was the delivery of a money payment to the government’s informant. Therefore, the “substantial step” element of the attempt offense was exactly the same as the “gives money or other thing of value” element of the solicitation offense. The State seeks to silently sidestep this inconvenient truth, but it cannot be avoided. Here the two offenses are the same and they do share the exact same element.

6. THE STATE IGNORES THE PLETHORA OF CASES WHICH CONDEMN THE SPLITTING OF ONE CONTINUOUS CRIME INTO TEMPORAL COMPONENTS AS AN IMPERMISSIBLE MEANS OF EVADING THE PROHIBITION AGAINST MULTIPLE PUNISHMENT.

In his opening brief, Mockovak cited several cases which hold that the prosecution cannot evade the prohibition against multiple punishment by splitting up one continuous offense into smaller segments each of which is charged in a separate count. *See, e.g., In re Snow*, 120 U.S. 274 (1887); *Bell v. United States*, 349 U.S. 81 (1955); *State v. Sutherby*, 165 Wn.2d

870, 204 P.3d 2009); *State v. Thomas*, 158 Wn.2d 797, 243 P.3d 941 (2010). The State has simply chosen to ignore these cases. Similarly, it ignores the inconvenient fact that one of the trial court prosecutors initially told the Superior Court that the crime of Solicitation of Murder 1 – which at that time was the only offense charged with respect to the intent to have King killed -- “has been ongoing since August 4, 2009.” CP 15. It was not until one year later that the State decided to amend the information and to split one offense into two.

7. BECAUSE ALL OF THE ELEMENTS OF ATTEMPTED THEFT 1 ARE CONTAINED WITHIN CONSPIRACY TO COMMIT THEFT, THE ENTRY OF CONVICTIONS FOR BOTH CRIMES VIOLATES DOUBLE JEOPARDY.

The State asserts that conspiracy to commit theft does *not* contain all the elements of attempted theft. The State acknowledges that the elements of attempted theft “do include doing an act that is a substantial step toward commission of the crime . . .” *BOR*, at 67. But the State baldly asserts that conspiracy to commit theft does not include this element:

Conspiracy does not require commission of any act that is a step towards commission of the crime, although it does require that one of the conspirators act in pursuance of the agreement. RCW 9A.28.040. As making an agreement with another is not an element of attempted theft, and *doing an act that is a substantial step toward committing theft is not an element of conspiracy to commit theft*, the crimes are not the same.

BOR, at 67 (emphasis added).

The only authority that the State cites in support of its contention is the conspiracy statute, RCW 9A.28.040. And yet, the statute *explicitly* states that a substantial step *is* an element of the crime of conspiracy:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes *a substantial step* in pursuance of such agreement.

RCW 9A.28.040(1) (emphasis added). In at least two cases the Supreme Court has explicitly recognized that “a substantial step” *is* an element of conspiracy. *State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998) (essential elements of a conspiracy are “an agreement to commit a crime and taking a ‘substantial step’ toward the completion of that agreement.”); *State v. Bobic*, 140 Wn.2d 250, 265, 996 P.2d 610 (2000), citing *Moavenzadeh*. Thus, the State’s position that conspiracy does not include a “substantial step” element is mystifying, to say the least.

The State seems to try to make something of the fact that for purposes of the crime of conspiracy a substantial step can be a smaller step than a substantial step for purposes of an attempt crime. *BOR*, at 67-68, citing to *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994). But this does nothing to advance the State’s argument. Since the substantial step required for commission of attempt must be a greater step towards commission of the crime than the substantial step required for a conspiracy, the former

includes the latter, and therefore every element of attempt is included within the crime of conspiracy.

Ultimately, the State retreats to using its splitting of a continuous time period into two pieces as proof that there was no double jeopardy violation. The State argues that we “know” that the jury did not base the conspiracy and the attempt convictions on the same facts, because “the conspiracy to commit theft was alleged to have occurred between August 5 and November 6,” and “[t]he attempted theft was alleged to have occurred on November 7th” *BOR*, at 68. According to the State, since the jury convicted Mockovak of both offenses, this conclusively demonstrates that the two offenses were not the same in fact, and therefore there was no double jeopardy violation: “[I]n any event, the jury did not rely on Mockovak’s actions on November 7 to convict him of conspiracy, because those acts were outside the time period of the conspiracy.” *Id.*

But they were only “outside the time period of the conspiracy” because that’s the way the State divided the whole time period into separate pieces, packaging them in separate counts, and utterly ignoring the fact that the conspiracy was a continuing offense. Mockovak and Kultin did not *stop* or *end* their criminal agreement on November 6th (the end point of the conspiracy charge). Assuming, *arguendo*, that prior to November 7th Kultin had agreed to cause a theft from an insurance

company (see Argument Section 11, *infra*), he did not suddenly withdraw his agreement to cause that offense the next day. The State’s attempt to justify the prosecution of “separate” crimes by separating them into two time periods is every bit as artificial – and improper – as the same maneuver employed by the prosecution in *Snow* where the prosecution separated the continuous offense of cohabitation into three separate time periods in order to charge three crimes. *Snow*, 120 U.S. at 285.²²

In *Jeffers v. United States*, 432 U.S. 137 (1977), the Supreme Court prohibited multiple convictions because one offense was subsumed within another. Jeffers was tried separately on two indictments. The first indictment charged a conspiracy to distribute heroin in violation of 21 U.S.C. § 846. The second indictment charged him with violating 21 U.S.C. § 848 by conducting a continuing criminal enterprise (“CCE”) to violate the drug laws. The § 848 crime was also a conspiracy charge, because one of the elements of an § 848 offense is that the defendant “acted in concert with five or more persons.” Thus a § 848 conviction required proof of a bigger conspiracy than § 846 required, because § 846 required only an agreement between two or more people. The § 846

²² *There can be but one offense between such earliest day and the end of the continuous time embraced by all of the indictments. . . .* [T]he court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions . . .” (Emphasis added).

conspiracy and the § 848 CCE conspiracy were based on the same drug distribution business. The Court agreed with the defendant that the § 846 conspiracy was a lesser included offense of the greater continuing CCE crime. *Id.* 150. Applying the *Blockburger* test, the Court held that Jeffers could be punished only for the greater offense, because there was no evidence that Congress intended to allow cumulative punishments for violations of both the lesser and the greater offenses. *Id.* at 155.

The *Jeffers* principle controls this case. Mockovak cannot be punished for both the greater inchoate offense (conspiracy to commit theft) *and* for the lesser inchoate offense (attempted theft). The remedy is to vacate the judgment for the lesser offense and to remand for resentencing.

8. UNLIKE THE WORD “ATTEMPT,” THE PHRASE “OVERT ACT” DOES NOT CONVEY THE ELEMENT OF A “SUBSTANTIAL STEP.” THEREFORE, THE INFORMATION FAILED TO ALLEGE ALL THE ESSENTIAL ELEMENTS OF THE CRIME OF CONSPIRACY TO COMMIT THEFT.

Although the information upon which Mockovak was tried charged the offense of Conspiracy to Commit Theft 1, it failed to include the element of taking “a substantial step” in pursuance of an agreement to commit a crime. RCW 9A.28.040(1). But it did include the phrase “overt act.”

Under the liberal *Kjorsvik*²³ standard of review applicable to challenges to the information which are raised for the first time on appeal, the issue in this case is whether the missing element appears in any form in the information. The case law demonstrates that it does not, and therefore the charge must be dismissed.

The State relies on two cases which hold that the word “attempt” does convey the gist of the element of a “substantial step.” *State v. Rhode*, 63 Wn. App. 630, 821 P.2d 492 (1991); *State v. Borrero*, 147 Wn.2d 353, 58 P.3d 245 (2002). In both cases the courts looked to the ordinary dictionary definition of the word “attempt” to discern its plain meaning:

[W]e must determine whether the word “attempt,” as commonly understood, conveys the element of “substantial step.” The Court of Appeals properly seeks the plain meaning of “attempt” in dictionary definitions. [Citation]. The term is defined as “to make an effort to do, accomplish, solve or effect.” *Webster’s Third New International Dictionary* 140 (1993). Synonyms of “attempt” include “try”, “endeavor,” and “strive.” *Merriam Webster’s Collegiate Dictionary* 74 (1998).

Borrero, 147 Wn.2d at 363.

“A ‘substantial step’ is a step strongly corroborative of the actor’s criminal purpose.” *In re Restraint of Borrero*, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007). In *State v. Moavenzadeh*, 135 Wn.2d 359, 956 P.2d 1097 (1998), the Court applied the liberal *Kjorsvik* standard to an

²³ *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

information which charged the same offense as the one Mockovak was charged with: Conspiracy to Commit Theft. The exact same challenge to the information was made: It did not allege the element of substantial step. The prosecution argued that because the information alleged that the defendant “did conspire with another or others” to commit theft, that the substantial step element “did appear” by “fair implication” in the information. The Supreme Court rejected this contention and reversed and dismissed the conspiracy charge. Significantly, the Court distinguished the case from the *Rhode* case, noting that the word “conspiracy” was not like the word “attempt”:

The conspiracy charge is also deficient. The essential elements of that offense are an agreement to commit a crime and taking a “substantial step” toward the completion of that agreement. RCW 9A.28.040. The word “conspiracy” is commonly understood to include the first of these elements. Unlike the term “attempt,” however, “conspiracy” does not, by itself, suggest that there must be conduct which would constitute a substantial step toward the completion of the crime. [Citation]. Nor can this essential element be found by fair implication in any of the remaining language.

Moavenzadeh, 135 Wn.2d at 364, citing *Rhode*, 63 Wn. App. at 636.

The present case is controlled by *Moavenzadeh* and the outcome should be the same. The question is whether the plain meaning of the phrase “overt act” includes the concept of a substantial step, i.e., whether that phrase suggests or implies an act which is “strongly corroborative of the actor’s criminal purpose.” The answer depends upon what meaning a

layman would attribute to the word “overt.” Dictionaries define “overt” as an adjective meaning “open to view.” *Webster’s Ninth New Collegiate Dictionary* 843 (1983). Legal dictionaries define “overt” in the same way as meaning: “Open and observable; not concealed or secret.” *Black’s Law Dictionary* 1214 (9th ed.2009). Thus, although the word “overt” conveys the idea that the act must be visible, it utterly fails to convey the point that the act must be strongly corroborative of the actor’s purpose. In this respect, this case is nothing like *Borrero* or *Rhode*. The word “attempt” does convey the notion of an act which manifests the actor’s purpose. An “attempt” is, by definition, a purposeful act. But plenty of “observable” acts are utterly unconnected to any criminal purpose. Every “attempt” conveys a trying or a striving act. But the mere commission of an “overt” or visible act conveys nothing at all as to whether the act was purposeful. Thus, the word “overt” does not convey the meaning of the essential element of a “substantial step” in any form, so prejudice is presumed, and the information must be dismissed. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).²⁴

²⁴ Moreover, even assuming, *arguendo*, that the word “overt” did convey the meaning of the term “substantial step” in some vague way, dismissal would still be required because Mockovak can and has shown prejudice from the vague wording of the information. “[E]ven if a court can discern the presence of the essential elements by such liberal canons of construction, if the accused can nevertheless show that he or she actually lacked the requisite notice to prepare an adequate defense, the conviction should be dismissed.” *State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995) (reversing

9. WITHDRAWAL OF THE CLAIM THAT THE FAILURE OF THE INFORMATION TO NAME MOCKOVAK'S CO-CONSPIRATOR WAS A VIOLATION OF THE ESSENTIAL ELEMENTS RULE.

In his opening brief, appellant advanced the claim that the information was defective insofar as it failed to name his co-conspirator for the crime of Conspiracy to Commit Theft 1. Appellant's counsel misread *State v. Stark*, 158 Wn. App. 952, 244 P.3d 433 (2010) as providing support for this claim. But upon reading the portion of the State's brief which responds to this claim, and rereading the *Stark* opinion, appellant now realizes that under Washington law it is not necessary to name the defendant's co-conspirators in the information. Accordingly, he withdraws this claim.

10. THE CONSPIRACY TO COMMIT THEFT CONVICTION MUST BE VACATED BECAUSE IT VIOLATES DUE PROCESS TO MAKE IT A CRIME TO CONSPIRE WITH ONESELF.

For the reasons previously stated in his opening brief (pp. 139-144), and in this reply brief (on pp. 14-16), Mockovak adheres to his contention that it violates due process for the Legislature to define and punish a "unilateral" conspiracy where the defendant did not truly enter into an agreement with anyone else. To criminalize such an "agreement" is to

conviction and dismissing charge of welfare fraud). In the present case, as previously noted, Mockovak was hindered, in his ability to prepare a defense to the charge of

make it a crime to entertain *thoughts* of committing a crime. See *Girouard v. United States*, 328 U.S. 61, 68 (1946), overruling *Schwimmer v. United States*, 279 U.S. 644 (1929), and quoting Justice Holmes' dissent in that case.²⁵

The prosecution contends that Mockovak cited no authority for his due process argument. *BOR*, at 75-76. But in fact Mockovak cited to, and quoted at length from, the decision in *State v. Pacheco*, 125 Wn.2d 150, 882 P.2d 183 (1994). The *Pacheco* Court posed the question of whether the Legislature could make bad thoughts (“criminal intentions”) a criminal offense by defining a conspiracy in such a way as to include cases where the defendant “conspired” with no one but himself: “Indeed, it is questionable whether the unilateral conspiracy punishes criminal activity or merely criminal intentions.” *Id.* at 157. The Court explicitly recognized that in such a situation the defendant “is in fact not conspiring with anyone. Although the deluded party has the requisite criminal intent, ***there has been no criminal act.***” *Id.* (Emphasis added).

Thus, the Supreme Court has recognized that it is “questionable” whether the State can punish “criminal intentions” where there has been

conspiracy to commit theft.

²⁵ “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those

no criminal act. Many cases recognize that the First Amendment protects both freedom of speech and freedom of thought. As stated in *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969), the State may make the assertion that it “has the right to control the moral content of a person's thoughts,” and “[t]o some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.” “[N]either liberty nor justice would exist if [freedom of thought and speech] were sacrificed. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

[A] pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include *liberty of the mind* as well as liberty of action.

Palko, 302 U.S. at 327 (emphasis added).

Suppose a man named Smith was convicted of conspiracy to commit robbery based solely on evidence that he – and he alone -- devoted hours to thinking up a plan for robbing a bank. Appellant submits that such a conviction would violate the First and Fourteenth Amendments. Now suppose law enforcement supplied Smith with a fake accomplice – a stooge who simply acted as a conversation partner – a second person who *said* that he agreed to take part in the planned robbery, but who actually

who agree with us but freedom for the thought that we hate.” 279 U.S. at 654-55 (Holmes, J., dissenting).

was working for the government and never intended to do anything at all to perpetrate a robbery. Appellant submits that it would *still* violate the First and Fourteenth Amendments to convict Smith of conspiracy to commit robbery, because there still would be no *actus reus* – no *criminal act* – there would only be *thoughts of crime*, or as the *Pacheco* Court put it, “criminal intentions.” The same is true in this case. The injection of Kultin as a discussion partner – a government plant who could get the defendant to talk about defrauding the insurance company that insured King’s life – did not cause any *criminal act* to be committed. The conviction for conspiracy to commit theft cannot stand, because there was no agreement, no conspiracy, and thus no *criminal act*.

11. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR CONSPIRACY TO COMMIT THEFT.

Even if it were legally possible to convict a person of a crime of conspiracy for making an “agreement” with a law enforcement official who was simply feigning agreement, Mockovak’s Conspiracy to Commit Theft 1 conviction *still* cannot stand. That is because there still must be evidence of an agreement to commit the intended crime that is the subject of the charged conspiracy.

“Washington implicitly recognizes that the subject crime of the conspiracy is an element” of the crime of conspiracy. *State v. Stark*, 158

Wn. App. 952, 962, 244 P.3d 433 (2010). It is not enough to prove that there was an agreement to cause some unspecified crime to be committed. Nor is it enough to have evidence that Kultin faked his agreement with Mockovak to see to it that a first degree murder was committed.²⁶ There must be evidence that Kultin “agreed” to cause a first degree theft to be committed, because that is the conspiracy which was charged.

There is no such evidence. The State argues that under the facts of this case, in order to commit theft from the insurance company, it was necessary to first cause King’s murder. But while there was evidence of a (fake) agreement to commit this murder, there was no evidence of any *agreement* between Kultin and Mockovak *to commit theft* from the insurance company. There was evidence that Mockovak made statements indicating that *he* intended to do that, and evidence which could be viewed as expressing Kultin’s belief that Mockovak was going to do that. But there was no evidence that Kultin ever agreed to cause that theft to occur.

²⁶ That would be sufficient for conviction of the crime of conspiracy to commit murder, provided there was also a substantial step taken in pursuance of that agreement. But that was not the subject crime of the conspiracy with which Mockovak was charged.

C. CONCLUSION

Given the government's outrageous conduct of creating criminal activity where none existed, and, in addition, of impelling him to stick to the plan by frightening him with threats of violence if he did not follow through, this Court should vacate all of the appellant's convictions and direct that the prosecution of all charges is barred by due process.

In the alternative, given the failure of appellant's trial counsel to object to the prosecutor's misstatement of the law, which improperly increased the defendant's burden of proof to establish entrapment, this Court should reverse and remand appellant's convictions for solicitation of murder and attempted murder, so that those offenses can be retried. Similarly, the same relief is warranted by virtue of trial counsel's failure to recognize that the pattern WPIC instruction on entrapment was flawed. Because that instruction was likely to be misread and misapplied by jurors (even if the prosecutor had never instructed them to misread it), there was a *Boyd* due process error which necessitates reversal and retrial of those offenses.

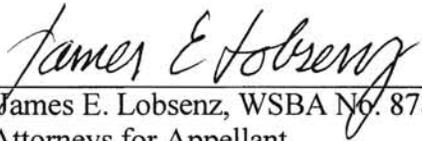
In addition, the Fifth Amendment Double Jeopardy Clause prohibition against multiple punishments for the same offense, and due process principles prohibiting the punishment of a "unilateral conspiracy," require vacation of the Appellant's convictions for Solicitation of Murder 1 (Count II), Conspiracy to Commit Theft 1 (Count IV), and Attempted

Theft 1 (Count V).

Finally, because there is no evidence of any agreement to commit first degree theft, the appellant's conviction for Conspiracy to Commit Theft should be vacated and the charge dismissed.

DATED this 16th day of July, 2012.

CARNEY BADLEY SPELLMAN, P.S.

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

NO. 66924-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL EMERIC
MOCKOVAK,
Appellant.

CERTIFICATE OF SERVICE

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

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

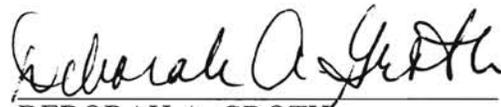
2. I am employed by the law firm of Carney Badley Spellman P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On July 17, 2012, I caused to be served *VIA US MAIL* and *E-MAIL* one copy of the following document on:

DONNA WISE
Deputy Prosecuting Attorney
516 Third Avenue W554
Seattle, WA 98104
Donna.Wise@kingcounty.gov

REPLY BRIEF OF APPELLANT

**APPELLANT'S MOTION FOR LEAVE TO FILE OVERLENGTH
REPLY BRIEF**


DEBORAH A. GROTH
Legal Assistant

2012 JUL 17 PM 4:32
COURT OF APPEALS
STATE OF WASHINGTON