

NO. ~~6909~~ 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Personal Restraint of  
MICHAEL EMERIC MOCKOVAK,  
*Petitioner.*

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PERSONAL RESTRAINT PETITION AND BRIEF IN SUPPORT OF  
PETITION

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**AFFIRMATION**

**VERIFICATION**

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**A. STATUS OF PETITIONER**

**1. RESTRAINT**

Dr. Michael E. Mockovak is currently incarcerated at the Washington State Penitentiary pursuant to a judgment entered on March 17, 2011 in King County Superior Court, by the Honorable Palmer Robinson. He is serving four concurrent sentences of 240 months, 240 months, 4 months, and 4 months on Counts II, III, IV, and V. (Appendix A).

**2. PENDING DIRECT APPEAL**

Petitioner's direct appeal to this court (COA No. 66924-9-I) is currently pending. In that appeal Petitioner has raised two claims of ineffective assistance of counsel ("IAC").<sup>1</sup> In this personal restraint petition ("PRP"), in Ground for Relief ("GR") No. 2, Petitioner presents additional evidence in support of his direct appeal claim that he received ineffective assistance of counsel when his attorneys (i) submitted a proposed jury instruction on entrapment which incorrectly defined that defense and (ii) failed to object to the prosecutor's misstatement of the elements of entrapment during closing argument.

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<sup>1</sup> These are Issue Nos. 3 & 4 in the opening brief on appeal.

In addition, in this PRP Mockovak presents two additional IAC claims (GR Nos. 1 & 5), one due process claim (GR No. 3), and one Tenth Amendment claim (GR No. 4).

### **3. EVIDENCE RELIED UPON**

In addition to the trial transcript and the clerk's papers on file in the direct appeal,<sup>2</sup> Petitioner relies upon the declarations of the following people: the declarations of Timothy K. Ford, James E. Lobsenz, Ronald L. Marmer, Michael E. Mockovak, Jeffrey P. Robinson, Joseph A. Campagna, Laura Doyle, and William Foote, Ph.D.

### **4. FIRST PETITION**

No previous personal restraint petition has ever been filed.

## **B. JURISDICTION**

Petitioner's restraint is unlawful pursuant to RAP 16.4(c)(2). His conviction was obtained in violation of the federal and state constitutions.

## **C. SUMMARY OF THE ARGUMENT**

As the trial judge pointed out at a pretrial hearing, even "a person with very little experience in criminal law need only read [the charging documents]" to know that this was an entrapment case.<sup>3</sup>

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<sup>2</sup> All CP cites in this petition are to the Clerk's Papers designated in the direct appeal.

<sup>3</sup> RP 12/6/10, at 71. *Id.* at 72 "THE COURT: . . . you know, nobody could read this cert and come away from it without thinking that . . . who put whom up to what is, if not at the heart of the case, pretty close to it."

The FBI agent and the Seattle Police detective handling the investigation recognized that the path they were pursuing – a sting operation against a doctor with no criminal record<sup>4</sup> whatsoever – almost certainly would raise the issue of entrapment. Petitioner’s trial counsel also focused on entrapment from the very start by requesting discovery pertinent to that defense within a month of Petitioner’s arrest.<sup>5</sup>

Initially, FBI Agent Carr instructed Daniel Kultin, the confidential informant – a Russian émigré who had been the subject of some kind of INS investigation<sup>6</sup> – “never ever to bring up the subject [of hiring a hit man] with the doctor, [and] that the doctor would have to bring the subject up.”<sup>7</sup> Carr told Kultin, “it’s called entrapment, and if he did initiate this activity with the doctor it could ruin the case.”<sup>8</sup>

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<sup>4</sup> CP 731.

<sup>5</sup> On December 6, 2010, after noting that “this case involves the defense of entrapment,” defense counsel stated that he had asked the FBI for discovery materials bearing on that defense “more than a year ago.” RP 12/6/10, 11 & 13

<sup>6</sup> Petitioner’s attorneys asked the State prosecutors to disclose any information “regarding preferential treatment or other inducements made to” Kultin, including “assisting [him] in helping the witness obtain Naturalization, any contacts with INS on behalf of the cooperating witness . . . .” CP 172. The State prosecutors responded that “Mr. Kultin was apparently the subject to [sic] an INS investigation, which was quickly resolved. The FBI has denied our requests for further investigation.” CP 183. Later, Petitioner’s attorneys wrote directly to the FBI and requested disclosure of “any records relating to . . . any offers of or discussion about assistance with Daniel Kultin’s immigration status.” CP 189. The FBI responded that it would consent to the production of “a portion of the documents and materials you requested” but never said whether or not federal agents had ever provided Kultin with any assistance in immigration matters. CP 192.

<sup>7</sup> RP 1/20/11, 70.

<sup>8</sup> *Id.* (“You can’t – you can’t entice someone to commit a crime that they would not otherwise do, and so essentially I was passing that information on to Mr. Kultin.”).

But when Agent Carr next met with Kultin and confirmed that “nothing else had occurred,” Carr realized that those instructions failed to get any results. Carr then reversed course and instructed Kultin to raise the topic of his connection to people in the Russian Mafia in order to “spark some type of conversation.”<sup>9</sup> But Kultin reported that this tactic also failed. Although Kultin had mentioned this to Mockovak, “it had elicited no talk of any murder.”<sup>10</sup> In July of 2009, Carr had concluded that “this case isn’t going anywhere.”<sup>11</sup> As late as August 22, 2009, Carr thought that perhaps Mockovak was just “venting or blowing off some smoke.”<sup>12</sup> Even as late as November 4, 2009, just eight days before Mockovak’s arrest, because Agent Carr still didn’t know what Mockovak’s “true intentions” were, he sought judicial authorization to tape record a series of conversations between Kultin and Mockovak because he knew that evidence of exactly what was said would be “critical to sorting out” whether Mockovak was “being encouraged in any way to commit crimes that he would not otherwise commit . . . .”<sup>13</sup>

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<sup>9</sup> *Id.* at 72-73.

<sup>10</sup> *Id.* at 76.

<sup>11</sup> RP 1/24/11, at 56-57.

<sup>12</sup> *Id.* at 71.

<sup>13</sup> *Id.* at 69-70.

It was the informant – not Petitioner – who first raised the possibility of killing Petitioner’s business partner.<sup>14</sup> More than two months later, it was the informant who egged Petitioner on by raising the possibility that the business partner might be plotting to kill Petitioner.<sup>15</sup> With these facts, anyone looking at the case would realize that entrapment was going to be the central focus of the trial.

Anyone looking at the case would also realize that the taped conversations would be the critical evidence upon which the prosecution would have to rely. Law enforcement acknowledged recording three conversations without obtaining a court order. That was permissible under federal law, but it was a crime under Washington’s Privacy Act. Law enforcement then belatedly sought court authorization to make additional recordings of more conversations. Mockovak’s trial counsel recognized that all of the recordings could have been suppressed in state court – the first three because they had been obtained without a court order, and the later recordings under the “fruit of the poisonous tree” doctrine because

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<sup>14</sup> Tr. 8/11/09, at 69-70.

<sup>15</sup> Tr. 10/20/09, at 52: “Is he going to have you killed? You know? That would be ideal for him . . . .”

they were derived from the first three.<sup>16</sup> Experienced Seattle attorney Timothy K. Ford agrees they all could have been suppressed.<sup>17</sup>

In a case that had everything to do with entrapment, and where the State had to rely upon recorded conversations to prove its case, trial counsel failed to render effective assistance because he misunderstood (i) when a motion to suppress could be filed, (ii) the basic elements of the defense of entrapment, and (iii) established Washington State law that would have permitted Petitioner to challenge the *mens rea* element of the State's case while also presenting the defense of entrapment. (GR, No. 1).

First, trial counsel based a critical strategic judgment upon an incorrect understanding of when he could present a motion to suppress. He failed to make a suppression motion because he thought it was too late to do so, when in fact the motion would have been timely made. Had trial counsel properly understood the timing for suppression motions, he could have moved the case from state court to federal court – a forum that was enormously more favorable to the defense. Under federal law, the burden of proof is on the prosecution to prove *beyond a reasonable doubt* that the defendant was *not* entrapped. This is far more favorable to a defendant than Washington State's rule that the defendant must prove by a

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<sup>16</sup> *Decl. Robinson*, ¶ 9.

<sup>17</sup> *Decl. Ford*, ¶ 5.2.1.

*preponderance of the evidence* that he was entrapped. Federal law also offered a substantial sentencing advantage for the defendant. In federal court Mockovak would likely have faced, if convicted, a five year sentence, compared to a fifteen to twenty year sentence under Washington State law.<sup>18</sup> Attorney Ford has concluded that there were no sound strategic or tactical reasons for trial counsel's conduct, and that he failed to provide representation consistent with prevailing professional norms in Washington State.<sup>19</sup>

Second, trial counsel did not know the elements of the defense of entrapment, even though that was the only defense he intended to present, and the only defense he did present. Unfortunately, the lead trial attorney entrusted a relatively inexperienced associate with the job of conducting virtually all legal research<sup>20</sup> and that young lawyer got it wrong.<sup>21</sup> Relying upon flawed legal research, the associate prepared a flawed jury instruction on entrapment. The instruction improperly included an irrelevant statement which conflicted with the statutory definition of the

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<sup>18</sup> See *Decl. Robinson*, ¶¶ 14-16; RP 12/6/10, at 14-15.

<sup>19</sup> *Decl. Ford*, ¶¶ 5.2.3, 4.2.4 & 5.2.5 & 6.1.

<sup>20</sup> *Decl. Campagna*, ¶ 4; *Decl. Lobsenz*, ¶ 45.

<sup>21</sup> Even though the associate found the case of *State v. Keller*, 30 Wn. App. 644, 637 P.2d 985 (1981), and even though that case contains language that should have alerted the defense team to the defect in the WPIC standard instruction on the defense of entrapment, that case was not brought to the attention of lead counsel. *Decl. Campagna*, ¶ 8.

entrapment defense,<sup>22</sup> and thereby erroneously increased the defendant's burden to prove the entrapment defense. Lead counsel acknowledges that he was ultimately responsible for making sure correct jury instructions were proposed.<sup>23</sup> But instead of catching the associate's error, lead counsel proposed the flawed instruction. He also failed to object to prejudicial closing argument by the prosecutor, who stated that the entrapment defense has three elements, even though Washington Supreme Court precedent states that the defense has only two elements.<sup>24</sup>

Third, lead trial counsel mistakenly believed that Petitioner could not put the prosecution to its burden of proof on the *mens rea* element of the crimes charged while simultaneously raising the defense of entrapment. He mistakenly believed that the defendant was required to admit commission of the charged offense in order to present an entrapment defense.<sup>25</sup> In fact, Washington law does *not* require such an admission.<sup>26</sup> Laboring under his mistaken belief that Mockovak could not present a diminished capacity defense and an entrapment defense at the same time,

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<sup>22</sup> The associate and lead counsel both agree that the WPIC instruction on entrapment contains language that is not contained in the statute which defines the entrapment defense. *Decl. Campagna*, ¶ 7; *Decl. Robinson*, ¶ 4.

<sup>23</sup> *Decl. Robinson*, ¶¶ 4-5.

<sup>24</sup> See RP 1/31/11, 94; *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).

<sup>25</sup> RP 12/6/11, at 15; *Decl. Marmer*, ¶ 14.

<sup>26</sup> See, e.g., *State v. Galisia*, 63 Wn. App. 833, 822 P.2d 303 (1992).

trial counsel failed to present evidence of Petitioner’s diminished capacity to resist entrapment, due to the long-term adverse psychological effects of having repeatedly been raped for many years by his uncle when he was a child.<sup>27</sup> Had counsel understood that Washington law allows a defendant to present evidence negating the *mens rea* of an offense while also offering an entrapment defense, trial counsel could have presented compelling evidence to the jury to explain how the consequences of childhood sexual abuse, including “learned helplessness” and “suggestibility,” render the adult survivor of such abuse more vulnerable to the influence of other adults seeking to manipulate them, and thus makes him more susceptible to entrapment.

Fourth, trial counsel also misunderstood yet another key feature of the law of entrapment. He believed, incorrectly, that Washington uses an objective test for determining entrapment – that is, whether law enforcement acted “reasonably.”<sup>28</sup> But Washington law is clear that the proper test is subjective,<sup>29</sup> and the “reasonableness” of the conduct of law enforcement is utterly irrelevant to the entrapment defense. Instead, the

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<sup>27</sup> *Decl. Foote*, ¶¶ 4-8.

<sup>28</sup> *Decl. Marmer*, ¶ 16.

<sup>29</sup> *See* RCW 9A.16.070; *State v. Ziegler*, 19 Wn. App. 119, 121, 575 P.2d 723 (1978) (“[T]he statutory definition of entrapment contained in RCW 9A.16.070 is but a legislative reiteration of the ‘subjective test’ for that defense, as it is applied in both the federal courts, and in our State Supreme Court.”).

jury must consider what went on in the mind of the individual defendant, and must decide whether he was lured or induced to commit a crime he was not otherwise inclined to commit.<sup>30</sup> Had trial counsel understood the proper test for entrapment, he would have realized that the long-lasting impacts of Petitioner's childhood sexual abuse were directly relevant to the defense of entrapment.<sup>31</sup>

Trial counsel's failings infected virtually every aspect of the defense. And even so, the jury acquitted Petitioner of the charges involving the original purported plot that supposedly motivated the informant to contact the FBI to begin with. Had trial counsel understood when motions to suppress could be filed, and had he understood the basis of doctrines governing the defense of entrapment, it is reasonable to conclude that Petitioner would have been acquitted of the remaining charges as well. In fact, at the state court sentencing hearing Petitioner's trial counsel told the sentencing judge that he believed that Mockovak probably would have been acquitted had he been tried in federal court.<sup>32</sup> Petitioner's defense was gravely prejudiced by trial counsel's deficient conduct, and thus he was denied his Sixth Amendment right to effective representation. (GR, No. 1).

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<sup>30</sup> *State v. Lively*, 130 Wn.2d 1, 10, 921 P.3d 1035 (1996).

<sup>31</sup> *Decl. Foote*, ¶¶ 10-11.

In addition to his Sixth Amendment IAC claim premised on the failure to make a suppression motion, the conduct of law enforcement officers also deprived Petitioner of his state and federal constitutional rights (i) to Due Process under the Fourteenth Amendment and article I, § 3; (ii) to be free from disturbance of his private affairs without authority of law, a right guaranteed by article I, § 7 of the *Washington Constitution*; and (iii) the right under the Tenth Amendment to be free from federal intrusion into an area of the law reserved to the States. (GR, Nos. 3, 4, 5).

The evidence shows that a state law enforcement officer, a Seattle Police Detective, deliberately violated the Washington Privacy Act, when together with an FBI agent he sought and obtained permission from FBI officials to engage in “Otherwise Illegal Activity.”<sup>33</sup> Even though they knew that the recording of Petitioner’s private conversation with their informant was a crime under Washington law, these law enforcement officers went ahead and committed that crime because although it was a crime under state law, it was not a crime under federal law.<sup>34</sup> Then, even though they had originally planned to have their case prosecuted in federal court, at the urging of federal prosecutors, law enforcement brought their

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<sup>32</sup> RP 3/17/11, at 114.

<sup>33</sup> *Trial Exhibit No. 63* (Appendix B); RP VII, 99-100.

<sup>34</sup> RP 1/24/11, 100.

case, and their tainted evidence, in state court.<sup>35</sup> Because state court offered the prosecutorial advantages of harsher sentencing guidelines, and a much more favorable burden of proof rule on the defense of entrapment, law enforcement brought their case in state court instead of federal court, even though they had deliberately violated state law<sup>36</sup> when they collected the evidence upon which their case was based. By zigging and zagging between federal law, when it suited them, and Washington State law, when it appeared more advantageous to them, law enforcement engaged in bad faith conduct which violated Petitioner's rights under the Due Process Clause. (GR No. 3).<sup>37</sup>

Furthermore, by deliberately ignoring Petitioner's privacy rights guaranteed under Washington State law, law enforcement violated article I, § 7 of the *Washington Constitution*. (GR No. 4).

Law enforcement also deliberately engaged in criminal conduct prohibited by state law. They ignored the constitutional boundary between the general police power of the states to make and enforce criminal laws, and the limited enumerated powers of the federal government to do other

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<sup>35</sup> *Second Decl. Lobsenz*, ¶ 5 & Appendix A (*Unclassified Memorandum*, at pp. 5-6).

<sup>36</sup> The Washington Supreme Court has expressly rejected the contention that the Washington Privacy Act does not apply to federal law enforcement officers. *See State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980).

<sup>37</sup> In his direct appeal, Petitioner presented a substantial factual basis for his contention that the Government's actions amounted to outrageous conduct requiring reversal of his

things, such as regulate commerce. Petitioner submits that this criminal conduct violated the Tenth Amendment, by exploiting the differences between state and federal law, and ignoring the primary role of the States in the area of criminal law. (GR, No. 5).

Lastly, by failing to present evidence that Petitioner's ability to resist entrapment was substantially reduced by the long-term adverse effects of years of having been subjected to childhood sexual abuse, trial counsel deprived Petitioner of his Sixth Amendment right to effective assistance of counsel. (GR, No. 6).

**D. STATEMENT OF THE CASE**

Petitioner hereby incorporates by reference the Statement of the Case set forth in his opening brief in his direct appeal currently pending under *State v. Mockovak*, COA No. 66924-9-I.

In addition to those facts, petitioner sets forth the following facts attested to in the accompanying declarations of the following people: (1) Timothy K. Ford; (2) Michael E. Mockovak; (3) Ronald L. Marmer; (4) James E. Lobsenz; (5) Laura Doyle; (6) Jeffery P. Robinson; (7) Joseph Campagna, and documented in the transcripts of the pre-trial, trial and post-trial hearings in this case.

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conviction. The Government's additional bad faith conduct described in this PRP also

**1. AN FBI AGENT AND A SEATTLE POLICE DETECTIVE ENGAGED IN THE WARRANTLESS RECORDING OF PRIVATE CONVERSATIONS OCCURRING ENTIRELY WITHIN WASHINGTON STATE BETWEEN KULTIN AND MOCKOVAK ON AUGUST 11, OCTOBER 20, AND OCTOBER 22 OF 2009.**

The FBI maintains that Mockovak's conversations of August 3 and 5 of 2009 with informant Daniel Kultin were not recorded. RP 1/24/11, 22, 131. But after August 5, FBI Agent Larry Carr decided to record all of Kultin's future meetings with Mockovak. RP 1/20/11, 85, 94. On August 10, Carr applied to his FBI superiors for their approval to tape record Mockovak's private conversations with Kultin. Exhibit No. 63. Carr explained to them:

*[I]t would be advantageous in gathering the strongest possible evidence to have the meeting recorded.* AUSA Vince Lombardi was briefed on this case and investigative plan and he concurred with the effort.

Exhibit No. 63, at p.4 (emphasis added).

Carr's FBI superiors granted permission to secretly tape record Mockovak's conversation with Kultin. Exhibit No. 63, at p. 4 (Appendix B). The FBI acknowledged recording a total of five meetings and two phone conversations; these conversations occurred on August 11, October 20 & 22, and November 6, 7, & 11, 2009. RP VII, 145; RP VIII, 34 & 61; RP IX, 17 & 37. All the conversations took place entirely within

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supports his direct appeal contention that the Government's conduct was outrageous.

Washington State.<sup>38</sup>

**2. ON NOVEMBER 4, 2009, DETECTIVE CARVER SOUGHT JUDICIAL AUTHORITY FROM THE KING COUNTY SUPERIOR COURT TO RECORD MOCKOVAK'S PRIVATE CONVERSATIONS.**

On November 4<sup>th</sup>, for the first time law enforcement applied to a state court for judicial authority to record conversations taking place between Kultin and Mockovak. RP 1/24/11, 68-69. Law enforcement discussed the defense of entrapment and told the state court that they needed more evidence to “determine Mockovak’s true intentions,” and to figure out whether Kultin was encouraging Mockovak to commit crimes. *Id.*, 69. Agent Carr later acknowledged that he was worried that Mockovak would later claim entrapment and he felt that a tape recording “will provide evidence . . . that will be critical to sorting out who planned or is planning crimes and whether that person is being encouraged in any way to commit crimes that he would not otherwise commit.” RP 1/24/11, 70.

Seattle Police Detective Len Carver described his role in the criminal

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<sup>38</sup> The August 11 conversation took place at a teriyaki restaurant in Renton. RP 1/20/11, 93, RP 1/24/11, 145. The October 20 conversation took place at the office of Clearly Lasik in Renton. RP 1/25/11, 34. The October 22 conversation took place at the Bellevue Athletic Club in Bellevue, Washington. *Id.*, 60. The November 6 conversation took place at Maggiano’s restaurant in Bellevue. 1/24/11, 6; RP 1/26/11, 17. There were two conversations recorded on November 7. The first was a telephone conversation that occurred while Kultin was at FBI headquarters in Seattle and the recording equipment was attached to Kultin’s cell phone. *Id.*, 36. The second was a face-to-face conversation between Mockovak and Kultin that took place at the Starfire Soccer Complex in Tukwila. *Id.*, 37; RP 1/24/11, 9. The November 11 telephone conversation was recorded while Kultin was in his car in downtown Seattle. RP 1/26/11, 45.

investigation of Mockovak in his sworn application for judicial authority to record private conversations that he submitted to the Superior Court:

***I am a commissioned and sworn law enforcement officer of the Seattle Police Department assigned as a detective with FBI – Safe Streets Task Force. In this capacity, I am sworn as a Special Deputy United States Marshal. Since February, 2008, my full-time official duties have been devoted to the investigation of federal crimes for the purpose of federal prosecution, to the degree that prosecution is warranted. My partner in this investigation is Agent Carr; we have worked closely on this investigation, and I am familiar with all the files and records to this investigation.***

*Carver's Application for Authority to Intercept and Record*, at 1-2 (attached to Lobsenz Declaration, ¶ 2) (Appendix C).<sup>39</sup>

Carver informed the Court that there was probable cause to believe that Mockovak had conspired to commit murder and had solicited the commission of murder, in violation of both federal and state statutes (18 U.S.C. §§ 1111 & 1117; RCW 9A.28.030, RCW 9A.28.040, and RCW 9A.32.030). *Application for Authority*, at 2-3 (App. C, *Decl. Lobsenz*).

In his application, Carver described his own participation in the Mockovak investigation and disclosed that he had met with informant Kultin on four separate occasions (June 11, August 4, August 6, and October 29 of 2009). *Application for Authority*, at 7-8, 10 (emphasis

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<sup>39</sup> In his application Carver stated that he had “been a police officer for more than nineteen years,” had “used a variety of recording equipment,” and had been authorized by an FBI agent to make the application for authority to record Mockovak’s conversations. *Application for Authority*, at 2 (Appendix C).

added).<sup>40</sup>

Carver also offered an explanation as to why he had decided to come to a Washington State court to ask for authority to intercept and record Mockovak's conversations with Kultin, when he had failed to do that for the earlier conversations of August 11, October 20, and October 22, which he had recorded *without* seeking any judicial authority to do so.

Investigators did not initially consider any prosecution of crimes in State court. ***It was not until October 29, 2009, that investigators identified state crimes as additional possible crimes being committed in this investigation. At that time, investigators determined to focus their investigation on the above-listed state crimes, in addition to the above-listed federal crimes.*** Once the possibility of a state prosecution came to investigators['] attention, in an abundance of caution, investigators determined to seek authority pursuant to Washington state law to record all subsequent conversations between KULTIN and MOCKOVAK in which there is probable cause to believe any of the above-listed crimes will be discussed. Thus, ***the following summarized conversations between KULTIN and MOCKOVAK were recorded pursuant to federal authority, for the sole purpose of prosecution, if warranted, of federal crimes in federal court.***

***To date, through federal process, there have been three recorded conversations between KULTIN and MOCKOVAK: August 11, 2009, October 20, 2009, and October 22, 2009. . . .***

*Application for Authority*, at 11 (emphasis added).

Carver did not explain why it was not until October 29, 2009 that he started considering the possibility of a state court prosecution for the crime

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<sup>40</sup> Carver did *not* inform the Superior Court of the fact that he and Agent Carr also met with the informant on September 16, 2009 and gave him \$1,600 as payment for the work

of Conspiracy to Commit Murder when he acknowledged that prior to that time he had been considering the possibility of a federal court prosecution for the same crime, Conspiracy to Commit Murder, under the parallel federal statute, 18 U.S.C. §§ 1111, 1117.

On November 4, 2009, acknowledging her review of a “sworn application” from Detective Carver, “a commissioned law enforcement officer of the Seattle Police Department,” the Honorable Julie Spector granted Carver’s application for authority. She entered an order which authorized Carver, Carr, the FBI Criminal Squad, and members of the Seattle Police Force to intercept and record conversations between Kultin and Mockovak. *Order Authorizing Interception and Recording of Communications or Conversations*, at 1-2. (Appendix D). The Order was effective starting at 5 p.m. on November 4<sup>th</sup> and lasted until November 11<sup>th</sup> at 5 p.m. *Id.* at 3. Pursuant to this order Carver and Carr recorded more conversations on November 6<sup>th</sup> and November 7<sup>th</sup>. RP 1/24/11, 6, 9.

**3. TWO DAYS BEFORE MOCKOVAK’S ARREST, LAW ENFORCEMENT SWITCHED THEIR PROSECUTORIAL FORUM FROM FEDERAL TO STATE COURT BECAUSE THEY WANTED TO TAKE ADVANTAGE OF THE STATE’S HARSHER SENTENCING GUIDELINES.**

In pretrial discovery Mockovak’s attorneys obtained a copy of an *Unclassified FBI Memorandum* written by Agent Carr on November 17,

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he had done for them up to that point, but testimony regarding this meeting and payment

2009, five days after Mockovak was arrested. (PRP, Appendix E). In the memo Carr explained to the Assistant Special Agent in Charge of the Seattle FBI office why he and Detective Carver had concluded that it would be better to prosecute Mockovak in state court, and sought FBI “approval for continued investigative efforts” even though the case was now going to be handled by state prosecutors in state court. *Id.*, at p. 1.

The memo explained how the investigation had begun when Kultin contacted the Portland office of the FBI, and how the investigation was referred to the FBI’s Seattle office. *Id.* at 1-2. The memo described the course of the investigation from May 8 through November 12, 2009. *Id.* at 3-5. It also described Agent Carr’s contact with AUSA Vince Lombardi and acknowledged that the FBI had always thought that the case would ultimately be prosecuted in federal court:

*Beginning in August, SA Carr briefed AUSA Vince LOMBARDI with regard to the case and investigation to date. SA CARR utilized federal process for approval of recorded conversations, per FBI/DOJ guidelines. SA CARR fully believed from conversations with AUSA LOMBARDI (although nexus was never discussed) that this case would end in a federal prosecution.*

*Id.* at 5 (PRP, Appendix E).

Carr’s memo documented the discussions that he had with federal prosecutors regarding the proof of a federal “nexus” that would permit the case to be prosecuted in federal court, and the fact that ultimately

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was later given at Mockovak’s trial. RP 1/20/11, 99; RP 1/24/11, 38.

everyone agreed that there was sound evidentiary proof of such a nexus:

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

*Unclassified FBI Memorandum*, at 5-6 (emphasis added) (PRP, Appendix E). Carr's memo concludes by documenting the fact that his superiors approved continued FBI involvement with the state court prosecution on November 10, two days before Mockovak's arrest. *Id.* at 6.

**4. TRIAL COUNSEL'S DECISION NOT TO MOVE TO SUPPRESS THE RECORDED CONVERSATIONS, EVEN THOUGH HE THOUGHT HE WOULD WIN SUCH A MOTION, AND WOULD THEREBY FORCE A CHANGE OF VENUE FROM STATE COURT TO FEDERAL COURT.**

Mockovak was represented in the trial court by three attorneys from the firm of Schroeter Goldmark Bender ("SGB"): Jeffery P. Robinson, Colette Tvedt, and Joe Campagna. Robinson, the lead trial counsel, has stated that he considered bringing a suppression motion, and "although [he] felt that there was a very good possibility that [he] could get these conversations suppressed if [he] made such a motion, [he] made a deliberate strategic choice not to do that." *Decl. Robinson*, ¶ 6.<sup>41</sup>

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<sup>41</sup> He maintains that Mockovak was aware of this strategic choice. *Id.* There are no writings to reflect that Robinson advised Mockovak of this strategic choice. *Decl. Lobsenz*, ¶¶ 8-13. Mockovak denies that Robinson advised him about any of this. *Decl.*

Robinson states: “I knew that if he moved to suppress the first group of recorded private conversations [those recorded without having sought any state court judicial authority to record] pursuant to RCW 9.73.050, there was a very good possibility that I would win such a motion and these conversations would all be suppressed.” *Id.*, ¶ 7. As to the second group of recorded conversations, those recorded after Judge Spector granted authority to record Mockovak’s private conversations, Robinson states, “I believe that there was a reasonable probability that I could get these recordings suppressed as well[,]” on the ground the second group of recordings was a “‘fruit of the poisonous tree’ because it was derived from the earlier set of recordings for which there was no judicial authority.” *Id.*, ¶ 9. “I believed that if I moved to suppress the second group of recordings that I probably would win that motion as well.” *Id.*

Robinson says he believes that if he had moved for suppression and won that motion, “the State court prosecutors would have had to dismiss the state court prosecution because it would have been impossible for them to proceed with their case in state court.” *Id.*, ¶ 11.

I knew that under cases like *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990), if the recordings were suppressed then the State would not only be precluded from presenting the recordings in evidence, it would also be precluded from having any witness

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*Mockovak*, ¶¶ 3-4. The written documents reflect Mockovak’s understanding that his attorneys were attempting to move the case to federal court, a strategy that Mockovak fully supported. *Decl. Lobsenz*, ¶ 16-21, 24, 2-28.

testify as to his recollection of the conversations or to his visual observations made during the time the recordings were being made. Thus, *I knew that a successful motion to suppress all the recordings would put an end to the prosecution of Dr. Mockovak in state court.*

*Id.*, ¶ 11 (emphasis added). Robinson believed that this would have lead to a *federal* court prosecution for the same criminal acts. *Id.*, ¶ 12.

a. **Trial And Sentencing Advantages For The Prosecution If The Case Is Tried In State Court.**

Robinson acknowledges that there were two important advantages to Mockovak to having the case tried in federal court rather than state court. First, there was the advantage of a far more favorable burden of proof rule on entrapment (which Robinson erroneously believed was the only defense available to Mockovak).<sup>42</sup> In state court the defendant has the burden to prove the existence of entrapment by a preponderance of the evidence, whereas in federal court the prosecution has the burden of proving the absence of entrapment beyond a reasonable doubt. *Id.*, ¶ 15. Second, Robinson acknowledges that “in federal court the presumptive sentencing guidelines would provide for considerably more lenient sentences than he would receive if he were convicted of the same offenses in Washington State court.” *Id.*, ¶ 16. *See also Doyle Declaration*, ¶¶ 6-7.

These acknowledgments reaffirm statements that attorney Robinson made to the trial judge. At the sentencing hearing, Robinson told the

judge that given the burden of proof difference, if Mockovak had been tried in federal court, he quite likely would have been acquitted. RP 3/17/11, at 114. At a much earlier hearing, Robinson told the court that the federal sentencing guidelines called for a much shorter sentence than that required for murder under Washington State law. RP 12/6/10, at 15.

**b. State Court Discovery Advantages For The Defense.**

Notwithstanding these large advantages to having the case tried in federal court, Robinson concluded it was better *not* to move to suppress and thus *not* force the case into federal court, because “a defendant’s right to discovery is much broader in state court than in federal court.” *Decl. Robinson*, ¶ 13. Robinson notes that in state court defense counsel has the right to interview all of the prosecution’s witnesses prior to trial, but in federal court a defendant has no such right. *Id.*

**c. Assertion That It Was “Too Late” To Make A Suppression Motion, Which, If Granted, Would Have Resulted In The Case Being Tried In Federal Court.**

Robinson was asked why he did not *first* interview all of the prosecution witnesses and secure all of the discovery he was entitled to under the state court discovery rules, and *then* make a motion to suppress, which would lead to suppression, dismissal of the charges in state court, and the filing of parallel charges in federal court. *Decl. Doyle*, ¶ 8; *Decl.*

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<sup>42</sup> See Argument section (6)(e), *infra*.

*Lobsenz*, ¶ 50. Doing things in this order would seemingly allow Mockovak to take the prosecutors' attempt to get the best of both worlds and turn that to an advantage for the defense – liberal discovery in state court before going to federal court where he'd benefit from a far more favorable burden of proof rule; and in the event that he lost in federal court, far more favorable sentencing guidelines. Robinson said that he didn't attempt to pursue such a two-step course (discovery first and then a suppression motion) because by the time he had finished interviewing all the prosecution witnesses, it was "too late" to make a motion to suppress the recordings. *Decl. Robinson*, ¶ 9. Asked why it would be too late, "Robinson said that by the time he had received all the discovery the defense was entitled to, motions were already supposed to have been filed. He said the state court trial judge would not have entertained a motion to suppress at that point in time." *Id.*, ¶ 10; *Decl. Lobsenz*, ¶ 51.

In addition to broader discovery rights in state court, Robinson said he considered the fact that "federal prosecutors have significantly lower caseloads and try many fewer cases than state court prosecutors." *Id.*, ¶ 14. Finally, Robinson states that Mockovak "wanted a trial as quickly as possible, as long as we were prepared to deal with the witnesses and evidence." *Id.*, ¶ 17. Ultimately, weighing all of these factors, Robinson says that he concluded that Mockovak would be better off in state court,

and that therefore he made the strategic decision not to make any motions for suppression of the recorded conversations in state court. *Id.*, ¶ 18.

**5. IN THE EXPERT OPINION OF SEATTLE ATTORNEY TIMOTHY K. FORD, ROBINSON’S FAILURE TO MOVE FOR SUPPRESSION OF THE RECORDINGS CONSTITUTED INEFFECTIVE ASSISTANCE.**

**a. Attorney Robinson Chose Not to Bring a Suppression Motion Even Though He Believes He Would Have Won It and Even Though He Thinks It Would Have Terminated The State Court Prosecution. Attorney Ford Agrees That Robinson Would Have Won The Motion, And Faults Robinson For Not Bringing the Motion.**

Petitioner asked Seattle attorney Timothy K. Ford<sup>43</sup> to consider the question of whether Robinson’s representation of Mockovak constituted ineffective assistance of counsel, and Ford came to the conclusion that it was. He concluded that Robinson’s decision not to file a motion to suppress the recorded conversations was both objectively unreasonable and prejudicial to Mockovak.<sup>44</sup>

Ford “agree[s] with Mr. Robinson that if a motion to suppress these recordings and conversations had been filed, *it likely would have been*

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<sup>43</sup> Ford’s qualifications are set forth in ¶¶ 2, 2.1, 2.2., 2.3, 2.4, 2.5, & 2.6 of his declaration.

<sup>44</sup> In Ford’s opinion, Washington’s “two party consent rule” for the recording of private conversation “is or should be known to any Washington criminal trial lawyer,” and any such lawyer would know that the protections of RCW 9.73.030 “are very strict and place stringent limits on the admission of private conversations recorded without the consent of all parties . . . .” *Id.*, ¶ 5.1.1. Citing to *State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980), Ford points out that “[e]ven minimal legal research would show that the statute applies to recordings made by federal government agents and it prohibits testimony about the recorded transaction as well as the recording itself.” *Id.*, ¶ 5.1.2.

*granted* with respect to all five recorded conversations.” *Id.*, ¶ 5.2.1 (emphasis added).<sup>45</sup> In addition, Ford believes that “a successful motion to suppress would have been devastating to the prosecution,” and he agrees with Robinson that the grant of such a motion would have resulted in dismissal of the state charges. *Id.*, ¶ 5.2.2.

But Ford parts company with Robinson when it comes to the objective reasonableness of Robinson’s decision not to file a suppression motion:

In my opinion, *a lawyer practicing in a manner consistent with prevailing professional norms would have filed a motion to suppress* these recordings and these conversations in this case, *and the information and materials I have reviewed reveal no sound strategic reason not to do so in this case.*

*Decl. Ford*, ¶ 5.2.5 (emphasis added).

Ford acknowledges that in some cases there may be a sound tactical reason not to file a suppression motion, but no such reason existed in this case where a successful motion would have led to a dismissal of the charges:

Although there may be legitimate tactical or strategic reasons for deciding not to file a motion to suppress in a criminal case in some circumstances [citations omitted], based on the information available to me *I do not believe there was any sound strategic reason not to do so in this case.*

Where a suppression motion has a reasonable chance of resulting in the exclusion of a substantial portion of the prosecution’s case

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<sup>45</sup> Moreover, even if the trial court had denied it, Ford believes there is at least a reasonable probability that this ruling, and consequently Mockovak’s convictions, would have been reversed on appeal because such a ruling would be erroneous. *Id.*

or dismissal of the prosecution, *counsel practicing in a manner consistent with prevailing professional norms in the State of Washington would make such a motion unless there are extremely strong strategic reasons not to do so.*

*Decl. Ford*, ¶¶ 5.2.3 & 5.2.4 (emphasis added).

Ford opines that “it is almost always to a criminal defendant’s advantage to interrupt or terminate any ongoing criminal prosecution for a serious felony offense.” *Id.*, ¶ 5.2.6. Accepting as accurate the prediction that a state court dismissal would have led immediately to a federal court prosecution of the same charges, Ford concludes that Robinson’s decision not to make any motion to suppress the recorded conversations in Dr. Mockovak’s case “could *only* be a sound tactical or strategic decision if *the likelihood was very high that . . . a federal prosecution would have been significantly more likely to result in a conviction and/or a much harsher sentence.*” *Id.*, ¶ 5.2.6 (emphasis added).

A conviction in federal court was significantly *less* likely due to the placement of the burden of proof on the Government to disprove entrapment beyond a reasonable doubt, *id.*, ¶ 5.2.7.<sup>46</sup> Similarly, since a federal sentence was likely to result in a significantly more *lenient*

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<sup>46</sup> “In this concrete respect, at least, federal law would be significantly *more* favorable to Dr. Mockovak than state law with regard to his defense of entrapment.” *Id.*

sentence,<sup>47</sup> “sentencing considerations would have militated in favor of a federal prosecution as well, and cannot have provided a sound strategic reason for declining to file a suppression motion that could have terminated the ongoing state prosecution.” *Id.*, ¶ 5.2.9.

Moreover, Ford categorically rejects Robinson’s contention that by the time he had obtained all available state court discovery, it was “too late” to make a suppression motion:

***I do not agree with Mr. Robinson’s contention that such a suppression motion could not have been brought in this case after the defense completed its investigation and discovery utilizing Washington State’s investigation and discovery rules. According to the chronology set forth in the Declaration of James Lobsenz, the defense discovery and investigation was completed the day of, or the day after, the omnibus hearing in Dr. Mockovak’s case. I know of no legal basis on which the trial court could have disallowed such a motion noted at the time of the omnibus hearing. The Omnibus Order attached to Mr. Lobsenz’ Declaration includes a line that could have been checked by defense counsel to give notice of such a motion. No provision of Washington or King County court rules precludes the noting of such a motion at an omnibus hearing. Had the trial court refused to allow Dr. Mockovak’s defense counsel to note a motion to suppress at the omnibus hearing in this case, or to pursue such a motion thereafter, I believe that decision almost certainly would have been reversed on appeal.***

*Decl. Ford*, ¶ 5.2.5 (emphasis added).

Finally, Ford rejects the notion that “the caliber” of the prosecutors or Mockovak’s desire to have a speedy trial could possibly provide a sound

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<sup>47</sup> Ford says he has no reason to disagree with Robinson’s assessment “that the federal sentencing guidelines would have called for a substantially shorter sentence than state

strategic basis for Robinson's decision *not* to file a suppression motion:

I see no indication in Mr. Robinson's declaration, or in the record, that the state prosecutors in this case lacked the time or resources to effectively prosecute this case. Therefore, I do not believe that a sound strategic decision could be made to refrain from filing this suppression motion on that basis.

*Decl. Ford*, ¶ 5.2.8.

It is difficult to gauge the strength or significance of Dr. Mockovak's desire to have "a trial as quickly as possible" . . . . However, I cannot conceive of circumstances in which such a desire on the part of a client could provide a sound strategic reason to refrain from filing a motion that could result in the dismissal of an ongoing prosecution where the client is not being held in pretrial custody and has already waived speedy trial rights.

*Decl. Ford*, ¶ 5.2.10. In conclusion, attorney Ford finds a complete absence of any basis for making an objectively reasonable decision to refrain from filing a suppression motion:

*Nothing* in the records I have reviewed *suggests* there were any other disadvantages that Dr. Mockovak's defense counsel would suffer in federal court that could have provided *a sound strategic reason for failing to suppress under RCW 9.73.030*.

*Decl. Ford*, ¶ 5.2.11 (emphasis added).

b. **Ford Also Faults Robinson For Not Documenting The Disclosure of His Decision Not to File a Suppression Motion.**

Ford also concludes that Robinson's conduct was deficient because he failed to document the fact (which Mockovak strenuously disputes) that he told Mockovak of the possibility of making a suppression motion:

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law . . . ." *Id.*, ¶ 5.2.9.

In my opinion, any criminal defense lawyer practicing in a manner consistent with prevailing professional norms in the State of Washington would have informed his client of the possibility of filing a motion to suppress these recordings and testimony about the conversations they contained in these circumstances. . . . *I do not believe there could be any sound tactical or strategic reason for not informing the client of the possibility of bringing such a motion.*

*Because this motion had such potential significance, any decision not to file it would be extremely unusual and risky to the case and to the lawyer.* Because of that, I believe that *a lawyer practicing in a manner consistent with prevailing professional norms in the state of Washington not only would have consulted the client about the decision but also would have memorialized the fact that he or she had done so – particularly if the client disagreed with it.* See ABA Defense Function Standard 4-5.2(c).

*Decl. Ford*, ¶¶ 5.1.4, 5.1.5, & 5.2 (emphasis added).

**6. MOCKOVAK ASSERTS THAT ROBINSON NEVER TOLD HIM ANYTHING ABOUT THE POSSIBILITY OF BRINGING A SUPPRESSION MOTION, AND THAT HAD HE KNOWN THIS WAS POSSIBLE HE WOULD HAVE INSISTED THAT A SUPPRESSION MOTION BE MADE BECAUSE HE STRONGLY PREFERRED TO BE TRIED IN FEDERAL COURT RATHER THAN STATE COURT.**

Attorney Robinson has stated that he made a strategic choice not to file a suppression motion and that “Dr. Mockovak was aware of this strategic choice,” but he has not explained how Dr. Mockovak was made “aware” of this strategic decision, or who made him aware of it. *Decl. Robinson*,

¶ 6. Mockovak, on the other hand, flatly denies that anyone ever made him aware of the possibility of a suppression motion:

Throughout the entire time that I was represented by Robinson, Tvedt and Campagna, no one ever told me that it was possible to

move to suppress the tape recorded conversations that I had with Daniel Kultin.

. . . no one ever told me that there was such a thing as the Washington State Privacy Act, or that there were laws restricting the taping of a person's private conversation without his consent. No one ever told me that in Washington private conversations could not be taped without the consent of all the participants, unless there was a judicial order authorizing such taping.

*Decl. Mockovak*, ¶¶ 3-4.

All of the retained e-mail correspondence between Mockovak and his trial attorneys was searched to see if any email could be found which made any reference to the possibility of making a motion to suppress.

*Decl. Lobsenz*, ¶¶ 8-9. All of the emails preserved in the electronic files of the trial attorneys were searched, and in addition, the email file on Mockovak's laptop computer, which he used to correspond with his trial attorneys, was also searched. *Id.*, ¶¶ 7, 11. No such e-mail was found. *Id.*, ¶¶ 10, 12. Since none of the emails make any reference to the possibility of making a suppression motion, *id.*, ¶¶ 10, 13, there is nothing to substantiate trial counsel's claim that he realized that there were grounds for bringing a strong suppression motion.

Mockovak's trial attorneys also turned over their legal research files. *Id.*, ¶ 14. These were searched as well to see if there was any record of any legal research done on the general subject of the Washington Privacy Act. *Id.* Again, nothing was found; there were no cases on this subject,

no copies of the statutes which comprise the Washington Privacy Act, no memoranda analyzing the possibility of making a suppression motion, and no attorney notes on this subject. *Id.*

Mockovak states that he first learned about the possibility of making a suppression motion from his appellate lawyer. *Decl. Mockovak*, ¶ 5. When Mockovak learned that his trial lawyer had stated that he thought there was a very good chance that he would have won such a motion if he had brought it, Mockovak was “stunned.” *Id.*, ¶ 10. This news caused him to wonder why his attorney failed to make the motion if he thought he would win it, and why his attorney failed to tell him about the option of making such a motion. *Id.*, ¶ 11.

Mockovak does acknowledge that his trial lawyers did tell him that initially the plan was to prosecute him in federal court, but that law enforcement had changed its mind after federal prosecutors pointed out that the sentencing ranges for the crimes he was accused of were much higher in state court than in federal court. *Id.*, ¶¶ 13-14. He also declares that attorney Robinson told him that “if [he] were tried and convicted in federal court [he] would face a sentence of about five years” and that if he were convicted in state court [he’d] be looking at a sentence of something like 20 years.” *Id.*, ¶ 15.

Mockovak also knew about the large difference between the state and

federal burden of proof rules for entrapment. *Id.*, ¶¶ 17-18. He states that “[s]ince everyone agreed that entrapment was the key to my defense, everyone agreed that it would be much harder for me to prevail on an entrapment defense in state court than it would be in federal court.” *Id.*, ¶ 18.

Both because of the more lenient sentencing guidelines and the more favorable burden of proof rule, Mockovak had a strong preference for having his case tried in federal court, rather than state court. *Id.*, ¶¶ 16, 18. Therefore, Mockovak states that if he had known about the option of bringing a suppression motion which, if successful, would have led to state court dismissal and a federal court prosecution in its place, he would have insisted that a suppression motion be brought. *Id.*, ¶¶ 12, 41.

**7. MOCKOVAK’S TRIAL COUNSEL TOLD MOCKOVAK’S ATTORNEY FRIEND RONALD MARMER THAT THE DEFENSE STRATEGY WAS TO GET THE CASE MOVED TO FEDERAL COURT.**

Chicago attorney Ronald Marmer is Michael Mockovak’s long time friend. *Decl. Marmer*, ¶ 5. Mockovak’s father contacted Marmer after Mockovak was arrested, and eventually Marmer helped Mockovak post his bail. *Id.* Marmer also agreed to help Mockovak pay his legal fees and thus Marmer wound up paying for the services of attorneys Robinson, Tvedt, and Campagna. *Id.*, ¶ 6.

Although Marmer has occasionally represented clients accused of

crimes on a pro bono basis, he has no special expertise in criminal law. He is the immediate past Chair of the Litigation Section of the American Bar Association, and a very experienced litigator. *Id.*, ¶¶ 4-5. He asked if he could associate with Robinson and Tvedt as co-counsel and thereby participate in the trial. *Id.*, ¶ 8. He was told that because he had posted Mockovak's bail, he could not also act as one of Mockovak's trial counsel. *Id.*, ¶ 9. But attorney Robinson agreed to consult with Marmer, and told Marmer such consultations would remain privileged. *Id.*, ¶ 10. Thereafter both "before and at trial, Ms. Tvedt and Mr. Robinson talked to [Marmer] about the strategic defense decisions that they were making." *Id.*, ¶ 11.

Marmer learned about the difference between state court and federal court on the burden of proof for entrapment from attorney Tvedt. *Id.*, ¶ 18. Tvedt told Marmer that "due to this difference in the burden of proof, Dr. Mockovak would have a much better chance of winning an acquittal on entrapment grounds if he were tried in federal court" and Marmer agreed with her. *Id.*, ¶ 19.

Either Tvedt or Robinson informed Marmer that the federal sentencing guidelines were much more favorable to Mockovak than the state sentencing guidelines. *Id.*, ¶ 20. One of them told him that in federal court, if convicted, Mockovak would be facing an "advisory" sentence of about five years in prison, whereas the state sentencing guidelines called

for a sentence of 20 years in prison for murder 1, which would be reduced for solicitation of murder or attempted murder to 15 years. *Id.* Marmer reports that based on these two considerations,

Ms. Tvedt told me that it was the defense strategy to try and get the case moved to federal court. I agreed wholeheartedly with that strategy.

*Decl. Marmer*, ¶ 21.

**8. ATTORNEY ROBINSON WAS KEENLY AWARE OF THE ADVANTAGES FOR MOCKOVAK OF BEING TRIED IN FEDERAL COURT, AND ALTHOUGH HE DID NOT FILE A SUPPRESSION MOTION, HE DID TRY TO GET THE CASE MOVED FROM STATE COURT TO FEDERAL COURT USING A DIFFERENT MOTION.**

Attorney Robinson never filed a suppression motion, and thus never sought to use this type of motion as a means of getting the case redirected from state court to federal court. But he did file a *different* motion and he *did* argue that the state court prosecution should be dismissed in favor a federal court prosecution because the federal government was refusing to provide the defense with requested discovery. Mockovak's attorneys did discuss *this* motion with Mockovak, and Mockovak heartily approved of it precisely because he *wanted* to cause the trial venue to change from state court to federal court:

My attorneys did explain to me that they were having difficulty getting all the discovery materials that they wanted to get because the federal authorities were reluctant to provide it. Mr. Robinson explained to me that the discovery rules in state court were more favorable to defendants than the discovery rules in federal court.

He also explained to me that a state court judge could not order federal law enforcement agencies to turn over discovery materials to the defense, because a state court judge did not have the legal power to tell federal officers what to do.

He further explained, however, that a state court judge did have the legal authority to dismiss the criminal charges against me if the state court judge felt that the refusal to provide the defense with discovery would prevent me from getting a fair trial. Mr. Robinson explained that he was going to file a motion to dismiss and ask the state court judge, Judge Palmer Robinson, to dismiss the charges against me if the federal authorities did not provide the discovery materials that we wanted to obtain, and which we would normally have had a right to under state law if the materials had been in the hands of state agents instead of federal agents.

***I approved of this strategy*** because I very much wanted to get the discovery materials that the federal authorities had been unwilling to provide, and also ***because I very much preferred to be tried in federal court.*** So I viewed it as a win-win situation. Either (a) the motion for a dismissal of the charges would succeed in persuading the federal authorities to give my attorneys the discovery materials that we wanted, or (b) if the federal authorities still declined to provide the materials we wanted, then Judge Robinson might very well grant the dismissal motion, and ***then I would wind up being charged and tried in federal court, which is where I greatly preferred to be tried.***

*Decl. Mockovak*, ¶¶ 19-21 (emphasis added).

The trial court record discloses that attorney Robinson did file such a dismissal motion. An e-mail from Mockovak to attorney Joseph Campagna, an associate attorney working with Mr. Robinson, shows that Mockovak reviewed a draft of the dismissal motion before it was filed, and he told his attorneys that he liked the brief very much. *Decl. Lobsenz*, ¶ 16 & attached Appendix C. A November 22, 2010 email from

Mockovak to his trial attorneys shows that he understood that if the motion were granted, then he would be charged in federal court. In that email he asks questions about when and how the federal court would set the conditions that would govern his being out-of-custody pending the trial of the matter in federal court. *Id.*, ¶ 17 & attached Appendix D.<sup>48</sup>

In support of the defense motion for state court dismissal, in open court attorney Robinson argued that if the federal government did not produce the discovery that it was refusing to provide, then Judge Robinson should dismiss the state court charges, leaving the federal government sufficient time to file criminal charges in federal court. Robinson argued that would be fair because in federal court there would be a consistent application of *federal* law. There the case would be governed by *federal* burden of proof rules, *federal* sentencing guidelines, and *federal* discovery rules. Since the federal authorities had made a tactical decision to prosecute in *state* court, because of more favorable state court laws on sentencing and the entrapment burden of proof, Robinson argued that they should comply with *state* court discovery rules:

I want to be clear, I have no problem with this decision – but ***it was a tactical decision to file this case in King County Superior Court***, and that decision is completely within the purview of the King County Prosecutor’s office and federal law enforcement.

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<sup>48</sup> See also *Decl. Lobsenz*, ¶ 18 & attached Appendix E.

And they made that decision, your Honor, because the sentencing guidelines in state court provide for a harsher penalty than the guidelines in federal court . . . .

In the State of Washington, Dr. Mockovak has to admit to the offense before he can even plead the defense of entrapment.<sup>[49]</sup> ***In federal court, the government must prove the absence of defense of entrapment beyond a reasonable doubt.***

***The legal standards are significantly different, the penalties are significantly different, and so one can understand the tactical choice to charge the case in state courts.***

RP 12/6/10, at 14-15 (emphasis added).

Attorney Robinson argued that if the United States persisted in refusing to comply with state court discovery rules, then Judge Robinson should dismiss the state court prosecution, but she should give the United States time to file substitute federal charges in federal court:

***The appropriate remedy is dismissal of this case, and dismissal at a point – I am asking you to dismiss this case a week from today, . . . to ensure that federal authorities have more than adequate time to address the issue of seeking an indictment against Dr. Mockovak, in federal court,*** for virtually the exact same charges, so that conditions of release can be set in federal court before they expire in King County Superior Court, and so that there is zero risk to the public or to any litigant that Dr. Mockovak will be unsupervised, even for a second.

***Then if the case is going to go forward in federal court, because they want to play by the federal rules of discovery, then the case can go forward in federal court . . . .***

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<sup>49</sup> As noted in argument section F(6)(e), *infra*, this was an incorrect statement of the law; a defendant does *not* have to admit committing the crime in order to plead entrapment. He need only admit commission of the act charged, but he need not admit the *mens rea* elements of the crime.

RP 12/6/10, at 18-19 (emphasis added).<sup>50</sup>

Judge Robinson deferred ruling on the motion to see whether the federal government would voluntarily provide more discovery to the defense, particularly the requested discovery regarding the FBI informant Daniel Kultin, which was critical to the defense of entrapment. RP 12/6/10, at 74.

After the December 6<sup>th</sup> hearing on the defense motion to dismiss, Mockovak telephoned Marmer and told him that although the state court judge had deferred making any ruling, the judge seemed to be unhappy with the federal government. *Decl. Marmer*, ¶ 28. Mockovak said “he was very optimistic that the case would end up in federal court.” *Id.*

Judge Robinson continued the hearing on the dismissal motion for one week, to December 13<sup>th</sup>, to see what the federal government would do. During that interim week, on December 11<sup>th</sup> Mockovak sent his attorneys an email which confirms that his attorneys had told him he’d be much better off if his case were tried in federal court:

Hi Jeff and Joe,

Prior to filing the motion to dismiss, we weighed the pro’s [sic] and cons of being in Federal vs. State court. ***We decided there is a big advantage in being in Federal court and I still think that advantage applies . . . .***

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<sup>50</sup> See also RP 12/6/10, at 67-68 (set forth in *Decl. Mockovak*, ¶ 28) (asking state court judge “to make the order of dismissal effective in a week,” because that “gives the U.S. Attorney’s Office plenty of time to seek an indictment.”).

*Decl. Lobsenz*, ¶ 19 & attached Appendix F (emphasis added). In this email Mockovak explains that he doesn't believe the federal government can be trusted to fairly provide all the relevant discovery. *Id.*, ¶ 20. He asserts that "If the case remains in State court, the [federal] government has demonstrated that it will to the full extent possible continue to impede justice . . . ." *Id.* In a second December 11<sup>th</sup> email, Mockovak reiterates that he doesn't want to give up on their discovery demand to be provided a copy of the FBI manual on how to manage its informants. *Id.*

A search of both the attorneys' email records and Mockovak's emails stored on his laptop, failed to reveal any attorney reply to either of Mockovak's December 11, 2010 emails. *Id.*, ¶ 23. Thus, there is no record of any expression of disagreement with Mockovak's statement that "we" agreed that there was a big advantage to being in federal court. *Id.*

Ultimately, the United States did provide some additional discovery to Mockovak's trial defense lawyers, but they did not provide everything that the defense requested. A dispute between Mockovak and his attorney Jeffery Robinson then developed, because Robinson wanted to accept a compromise and Mockovak adamantly opposed any compromise:

. . . I told Mr. Robinson repeatedly that I did not want to make any compromise deal with the federal government about the discovery we had requested. In particular, we had requested and were seeking to obtain a copy of an FBI manual which instructs FBI agents on how to supervise and manage their confidential

informants. . . . I told Jeff that I did not want to compromise on this point and that we should insist on getting a copy of the manual.

*Decl. Mockovak*, ¶ 34.

Without informing Mockovak that he was going to do so, attorney Robinson made a compromise proposal. In order to give the federal government time to consider it, attorney Robinson requested that Judge Robinson further delay issuing any ruling on the defense motion for dismissal. *Id.*, ¶ 36. Mockovak was upset with attorney Robinson for doing this. He told Robinson that he wanted him to insist on getting a copy of the FBI manual, and if they couldn't get a copy then he "wanted to go ahead with [the] motion to dismiss to see if [the defense] could get the case dismissed in state court." *Id.*, ¶ 37.

Nevertheless, attorney Robinson went ahead and accepted a compromise agreement with the federal government; he did not insist on getting a copy of the FBI manual on the management of confidential informants. *Id.*, ¶¶ 35-38. Eventually, attorney Robinson told Judge Robinson that the defense and the FBI had reached a compromise agreement. RP 12/16/10, at 3. Consequently, attorney Robinson told Judge Robinson that the defense motion for dismissal of the state court prosecution was moot, because there no longer was any discovery dispute, and thus Judge Robinson never had to rule on the motion. *Id.*, ¶ 38.

Mockovak was surprised and upset because he had wanted a ruling on the motion to dismiss, since success on the motion would have produced the result that he wanted: a change of trial venue from state court to federal court:

I was furious about what had happened and after the December 16<sup>th</sup> hearing I told Mr. Robinson how upset I was that he had caved in and not insisted on getting a copy of the FBI manual. ***I told him that I had wanted to get a ruling on the motion for dismissal because I wanted very much to have my case tried in federal court.***

He responded angrily, saying, “Your case is going to be tried in state court. Period. End of story.” Up until the time he said this to me, ***I had been led to believe that it was our strategy to try and get the case moved to federal court. I understood that was why we had made the motion to dismiss.*** My other attorney, Ms. Tvedt, had told me that I’d be much better off in federal court, and Mr. Robinson had argued at length that I was much worse off in state court, which is why the FBI chose to have state court prosecutors charge the case.

*Decl. Mockovak, ¶ 40* (emphasis added).

Mockovak’s attorney friend Ronald Marmer was also surprised to learn that attorney Robinson had made a compromise agreement with the federal government and had withdrawn his motion to dismiss the state court charges. *Decl. Marmer, ¶ 31.* Marmer reports that if he had known in advance that this is what Robinson was planning on doing, he would have strongly opposed it. *Id.*

Even after the defense motion for state court dismissal had been rendered moot, Mockovak continued to press his attorneys to continue to

make discovery requests for materials in the hands of the FBI, and continued to argue that if the FBI declined to produce such material, that they should re-assert the defense motion for dismissal so that the case could get shifted to federal court. *Decl. Lobsenz*, ¶¶ 25-26 & attached Appendix H. In a December 31, 2010 email, Mockovak pointed out that since all the defense interviews of the federal agents had now been completed, they had all the discovery they were ever going to get under the state court discovery rules and so it was even clearer that they should try and get the case shifted to federal court:

I understand that prior to the FBI interviews, if we had asked for a ruling on the motion to dismiss, we would have lost the opportunity to interview the agents. That time has passed. ***We have already interviewed the agents and we have received all we were going to get from the FBI.*** Asking for more information doesn't hurt us. If the FBI refuses to give us the information, we ask Judge Palmer Robinson to rule on the motion to dismiss.

*Id.*, ¶ 27 & Appendix H (emphasis added).

Later that day Mockovak sent Robinson a second email, again stressing that re-asserting the motion to dismiss was a no-lose situation because everyone on the defense agreed that dismissal would lead to federal court prosecution with “the advantages” they all had previously identified. Mockovak told Robinson: “If you were to tell me that my chances are better in state court, that would influence my thinking.” *Id.*, ¶ 28 & Appendix I. But absent such a change, Mockovak remained

committed to the goal of trying to get to federal court:

I'm left comparing the maximum sentences – 15 years in State prison versus five years in Federal. I'm also left looking at the burden of proof on me in state court to prove entrapment by a preponderance of the evidence, versus federal court where the government has to prove beyond a reasonable doubt that entrapment did not occur. *The advantages of Federal court seem large.*

*Decl. Lobsenz*, ¶ 28 & attached Appendix I (emphasis added). Once again, a search of all the preserved emails supplied by the trial attorneys and the emails on Mockovak's laptop failed to disclose any reply email in which Robinson, or either of his two co-counsel, expressed any disagreement with Mockovak's assertion that the "advantages of Federal court seem large." *Id.*, ¶ 29.<sup>51</sup>

On the contrary, after the trial was over and Mockovak had been acquitted of plotting to kill Klock but convicted of plotting to kill King, at the sentencing hearing Robinson told the state court trial judge that he believed the huge difference between the state and federal burden of proof rules had meant the difference between "going home" – i.e., *getting acquitted of everything* – "if you get tried at 7<sup>th</sup> and . . . Stewart, and going to prison if you get tried at Third and James . . . ." RP 3/17/11, at 114.

After reviewing every document in the trial attorneys' files,

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<sup>51</sup> Even after the state court trial had started, Mockovak continued to ask his attorneys to press for more discovery, and to use any FBI refusal to provide it as grounds for a motion to dismiss the state court proceedings. *Id.*, ¶ 31-35 & attached Appendices J, K, L, & M.

Mockovak's PRP counsel was unable to locate: (1) any document that supports the contention that attorney Robinson told Mockovak that it was possible to make a motion to suppress the recorded conversations; (2) any document that suggests that Robinson felt it was "too late" to make a suppression motion; or (3) any document that suggests that Robinson thought Mockovak would be better off being tried in state court rather than federal court.

**9. THE TIME-ENTRY BILLING RECORDS KEPT BY MOCKOVAK'S TRIAL ATTORNEYS DO NOT SHOW THAT ANY RESEARCH FOR A POSSIBLE SUPPRESSION MOTION WAS EVER DONE, OR THAT ANY COMMUNICATION REGARDING SUCH A POSSIBLE MOTION WAS EVER SENT.**

PRP counsel also reviewed the trial attorneys' time-entry billing records to see if they contained any indication that any one of the three attorneys had ever told Mockovak anything about the possibility of making a motion to suppress the recorded conversations, or that any legal research for such a possible motion was ever done. *Decl. Lobsenz*, ¶¶ 37, 44. But nothing was found. *Id.*, ¶¶ 46-47.

The time-entry records do demonstrate that prior to the start of trial: (a) attorney Campagna, the least experienced of the three attorneys working on the case, spent the most time (71.1 hours) communicating with Mockovak (*Id.*, ¶ 38); (b) attorney Tvedt had the next most pretrial contact with Mockovak (41.9 hours) (*Id.*, ¶ 39); and (c) attorney Robinson had the

least amount of pretrial contact with Mockovak (20.6 hours). *Id.*, ¶ 40.<sup>52</sup>

When one looks to see how much time each attorney spent doing legal research, so far as the time-entry records show, attorney Robinson did not do any legal research on any subject. *Id.*, ¶ 47.<sup>53</sup> Attorney Campagna did virtually all the legal research. *Id.*, ¶ 45.<sup>54</sup> Mr. Campagna devoted a very large amount of time to researching the law of entrapment, including both Washington state law and federal law. *Id.*, ¶ 46; *Decl. Campagna*, ¶ 4. But there are no time entries which indicate that any research was ever done on any possible motion to suppress the recorded private conversations. *Id.* There is simply no mention anywhere in the time entries of any research regarding the Washington Privacy Act or the recording of private conversations. *Id.*

Finally, although Robinson promised to consult with attorney Marmer regarding his strategic decisions, Robinson never told Marmer that there was a suppression motion that he could make in state court to suppress all the recorded conversations. Attorney Marmer reports:

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<sup>52</sup> This same pattern holds when one looks simply at how many total hours each attorney spent working on the case: Campagna, 789.3 hours; Tvedt, 620.2 hours; Robinson, 377.0 hours. *Id.*, ¶ 41.

<sup>53</sup> Although there are time entries showing that he edited pleadings drafted by other attorneys in support of the defense motion to dismiss, and that he “read cases cited in the brief in support of that motion in preparation for the oral argument of that motion (see time entry for December 3, 2010), there is no indication that he ever did any original legal research. *Id.*

<sup>54</sup> See also *Decl. Robinson*, ¶ 5 (“Campagna was the attorney to whom many legal research tasks were delegated . . . .”); and *Decl. Campagna*, ¶ 4.

At no time did attorney Jeff Robinson ever inform me of any of the following things:

- (a) that there was a possibility of making a suppression motion of any kind; or that he was considering making a suppression motion of some kind;
- (b) that he believed there was a good chance that he could win a suppression motion;
- (c) that it might be possible to get the state trial judge to suppress the tape recorded conversations which occurred between Kultin, the government's informant, and Dr. Mockovak;
- (d) that there was any other way (besides the motion he made and argued in December of 2010 regarding federal refusal to provide discovery materials) of getting the case dismissed in state court, so that it would be tried in federal court.

*Decl. Marmer*, ¶ 33. Nor did either attorney Tvedt nor Campagna inform him of any of these things. *Id.*, ¶ 34.

Attorney Marmer states that he found out from Mockovak's appellate counsel that there were grounds for a suppression motion. *Id.*, ¶ 35. When Marmer found out that attorney Robinson says he thinks he would have won the motion if he had made it, he was "shocked." *Id.*, ¶ 36.

Since a central defense strategy had been to get the case moved from state court to federal court, it is difficult to conceive of a reason why Mr. Robinson never told me anything at all about the possibility of making such a suppression motion. (Attorneys Tvedt and Campagna never mentioned this possibility to me either.)

*Decl. Marmer*, ¶ 38.

In sum, after examining all of the records kept by the trial attorneys, there is nothing to support the contention that Mockovak "was aware" of

the possibility of making a motion to suppress, and nothing to contradict Mockovak's assertion that he was *not* aware of this, and learned of it for the first time from his appellate attorney. Mockovak's assertion that he was ignorant of this possibility is reinforced by the fact that attorney Marmer did not know about it either. Marmer reports that Mockovak discussed the differences between state and federal court with him, and "talked about his strong preference for being tried in federal court":

He told me that his preference for federal court was based on the more favorable burden of proof rule applicable to the entrapment defense in federal court. I completely agreed with Dr. Mockovak that he'd be much better off if his case was tried in federal court.

It is inconceivable to me that Dr. Mockovak was aware that his attorney, Jeff Robinson, had made a choice not to bring a suppression motion which he (Robinson) believed he had a good chance of winning. If Dr. Mockovak had been aware of such a possibility, I am certain that he would have asked me what I thought about the wisdom of deciding *not* to bring such a suppression motion. Not only am I a close friend of his, and not only was I loaning him the funds to pay his legal expenses, but I am an experienced and respected trial lawyer. In 2006, for example, I was named by *Lawdragon* Magazine as one of the 500 Leading Lawyers in America. And in every year from 2006 to the present I have been selected as an Illinois "Superlawyer."

If Dr. Mockovak had known of the possibility of making a motion to suppress the conversations he had with Kultin, Dr. Mockovak would have discussed this possibility with me. Since he never discussed it with me, I do not believe he was aware of it. . . .

*Decl. Marmer*, ¶¶ 40-42.

**10. ALTHOUGH TRIAL ATTORNEYS WERE AWARE OF MOCKOVAK'S CHILDHOOD SEXUAL ABUSE, AND OF ITS LONG TERM EFFECTS, THEY FAILED TO PRESENT EVIDENCE OF THESE THINGS AT HIS TRIAL.**

As set forth in more detail in argument section F(5)(a), *infra*, Mockovak's attorneys were well aware of the fact that Mockovak had been the victim of years of repeated sexual abuse. They knew that starting from when he was about eight years old, and continuing until he left home to attend college, Michael Mockovak was repeatedly abused and raped by his uncle. CP 626. Prior to sentencing they told the trial court judge that the abuse was eventually disclosed by one of Mockovak's brothers, whom the uncle also abused and raped for years, and that the uncle ultimately plead guilty to a child molestation offense. CP 677. They also informed the sentencing judge that it was well known that childhood sexual assault has profoundly negative long-term effects on its victims continuing into their adult life. CP 681. Attorney Robinson also cited the sentencing judge to a reported opinion (later withdrawn) which recognizes the devastating long-term effects of childhood sexual abuse. CP 683.

On this basis they argued that the "significant childhood sexual abuse" that Mockovak suffered justified a reduction of the standard range sentence by at least four years. CP 703.<sup>55</sup> However, they did not inform the trial judge of these facts until just prior to the sentencing hearing.

They made no effort to present evidence of Mockovak's childhood sexual abuse at his trial. They never attempted to argue that as a result of this abuse Mockovak was particularly susceptible to entrapment, or that his capacity to resist entrapment was substantially diminished as a result of the long-term adverse psychological effects of childhood sexual abuse.

**E. GROUNDS FOR RELIEF**

1. Petitioner was denied his Sixth Amendment right to effective representation of counsel by his attorney's failure to move to suppress the recordings of his private conversations with FBI informant Daniel Kultin.

2. Petitioner was denied his Sixth Amendment right to effective representation by his counsel's (i) submission of a proposed jury instruction on entrapment which misstated the law by erroneously increasing the defendant's burden of proving entrapment; and by (ii) his failure to object to the prosecutor's closing argument which also misstated the law by increasing the defendant's burden of proving entrapment.

3. The forum shopping conducted by a state agent and a federal agent working together as partners, violated Petitioner's Due Process rights under both the Fourteenth Amendment and Wash. Constitution, article I, § 3. The agents played by federal rules during the investigation stage, so as to avoid the Washington Privacy Act which made it a criminal offense

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<sup>55</sup> See also CP 684 and the cases cited there.

to record private conversation without judicial approval. Later, at the prosecution stage, the agents eschewed federal court in order to obtain the advantage of more favorable state sentencing guidelines and a burden of proof rule that favored the prosecution.

4. In this case a state law enforcement officer worked as a full partner with an FBI agent in a joint state/federal investigation, and the state officer fully participated in the warrantless seizure of Petitioner's private conversations. The admission into evidence of the recordings of these private conversations violated Petitioner's right, under Washington Constitution, article I, § 7, not to be disturbed in his private affairs without the authority of law.

5. By purporting to authorize a state agent and a federal agent working together, to repeatedly commit an act which is defined as a criminal offense under Washington State law, the FBI violated Petitioner's rights under the Tenth Amendment.

6. Petitioner was denied his Sixth Amendment right to effective representation of counsel by his trial counsel's failure to present evidence that adults, such as Petitioner, who were sexually abused as a child for many years, suffer from "learned helplessness" and suggestibility, which substantially reduces their ability to resist entrapment by making them more vulnerable to pressure to engage in behavior that they were not

disposed to engage in and more susceptible to the suggestions of others.

**F. ARGUMENT IN SUPPORT OF PETITION**

**1. PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL BY HIS TRIAL COUNSEL'S FAILURE TO MAKE A MOTION TO SUPPRESS MOCKOVAK'S PRIVATE CONVERSATIONS WITH DANIEL KULTIN.**

**a. Trial Counsel And Attorney Ford Agree On All But One Point.**

Petitioner's trial counsel and attorney Ford agree on a great many points: (i) that if the defense had moved to suppress all of the recordings, the trial court would have been obligated to grant the motion because Washington law on that subject is clear; (ii) that Washington law is also clear that all testimony concerning those recordings would have been excluded; (iii) that the net result of such a ruling would have been that the state prosecutors would have had to abandon their case, and that federal prosecutors would have filed essentially the same charges under federal law in U.S. District Court; (iv) that a federal prosecution offered two enormous advantages to the defendant; first, under federal law the burden of proof is on the Government to prove beyond a reasonable doubt that the defendant was not entrapped, which is, of course, much more favorable to the defendant than Washington State's requirement that the defendant prove by a preponderance of the evidence that he was entrapped; and second, if he were to be convicted, federal law offered the defendant a

substantial advantage at sentencing because in federal court he likely would have faced a five year sentence, compared to a fifteen to twenty year sentence under Washington law. *Decl. Robinson*, ¶¶ 6, 7, 9, 11, 112, 15, & 16; *Decl. Ford*, ¶¶ 5.2.1, 5.2.2, 5.2.9.

Why, then, did trial counsel fail to move to suppress and have the case moved to federal court? The answer is that trial counsel believed that if the case moved to federal court, he would not be able to obtain discovery that was available to him under Washington State's criminal discovery rules. *Decl. Robinson*, ¶ 13. But trial counsel's view was based on the mistaken belief that he could not first obtain the discovery he sought in state court, and *then* file a suppression motion. Law enforcement's tactics of shifting from a federal prosecution to a state prosecution – where law enforcement hoped to get the best of both worlds – provided the defense with an opportunity to obtain the benefits of Washington State's discovery rules and also the benefit of suppression of the recordings obtained in violation of Washington State law. To put it simply, the defense could have obtained the discovery it sought, and *then* moved to suppress. Trial counsel was under the mistaken belief – disastrously so – that once he had obtained the discovery he had been seeking, it was too late to file the suppression motion. *Decl. Doyle*, ¶¶ 8-10. As Ford explains, that was not the case. Both standard procedure in Washington State courts and the

standard Omnibus Order forms in use in King County Superior Court confirm that trial counsel could easily have filed a timely motion to suppress after he had obtained discovery. Indeed, trial counsel could have simply checked a box on the printed Omnibus Order form. *Decl. Ford*, ¶ 5.2.5; *Decl. Lobsenz*, ¶ 55.

As set forth below, trial counsel's failure to understand that *after* he obtained discovery, he could *then* have moved to suppress the recordings, and thereby moved the case to federal court, deprived Petitioner of trial in a venue that was far more favorable to a defendant, like Petitioner, who was asserting the entrapment defense, both because he was far more likely to be acquitted in federal court, and because even if convicted he was likely to receive a much more lenient sentence. By squandering the opportunity to be tried in federal court, trial counsel deprived Petitioner of his Sixth Amendment right to effective assistance of counsel.

**b. The Washington Privacy Act Prohibits The Tape Recording Of Private Conversations Unless Both Parties Consent To The Recording.**

Under federal law, it is generally permissible to record a private conversation without first obtaining judicial authorization so long as one party to the conversation consents to the recording. 18 U.S.C. § 2511(2)(c). *State v. O'Neill*, 103 Wn.2d 853, 865, 700 P.2d 711 (1985). But under Washington law, unless an exception applies, it is unlawful to

tape record a private conversation with only one party's consent. *State v. Fowler*, 157 Wn.2d 387, 388, 139 P.3d 342 (2006); *O'Neill*, 103 Wn.2d at 862. Under the Privacy Act, RCW 9.73.030(1), *all* parties must consent to a recording.<sup>56</sup> If a law enforcement agent wishes to record a suspect's private conversation *without* his consent, normally the agent must seek and obtain a judicial warrant authorizing him to make such a recording. When private conversation is recorded without such a warrant, in violation of RCW 9.73.030, the recording is inadmissible in Washington state courts. RCW 9.73.050;<sup>57</sup> *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990); *State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993).

c. **In the Williams Case In 1980, The Washington Supreme Court Held That When Federal Agents Record Private Conversation Taking Place In Washington State Without Any Prior Judicial Authorization From A State Court, Such Recordings Are Not Admissible In Any Washington State Court, Even If No Washington State Agent Is Involved In The Recording.**

Because the state and federal legal requirements for the recording of

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<sup>56</sup> "Except as provided in this chapter, it shall be unlawful . . . to intercept or record any:

"(a) Private communication . . . between two or more individuals . . . *without first obtaining the consent of all the participants* in the communication;

"(b) Private conversation . . . *without first obtaining the consent of all the persons* engaged in the conversation." (Emphasis added).

<sup>57</sup> "Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security."

private conversation differ, Washington courts have had occasion to consider whether recordings made by agents of a non-Washingtonian law enforcement agency are admissible in Washington state trial courts when they are obtained without complying with the Washington Privacy Act. As attorney Ford has noted,<sup>58</sup> the seminal case is *State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980).

In that case, without securing any judicial order authorizing them to do so, federal ATF agents tape recorded conversations between their informant and defendant Williams. *Id.* at 534. The recordings were first used in a *federal* criminal trial against Williams. *Id.* at 535. After the federal trial concluded, the State of Washington charged Williams with attempted murder, conspiracy to commit murder, arson, and conspiracy to commit arson. *Id.* The state prosecutors then sought “to introduce the tape recordings as well as testimony by the federal agents and civilian informant Valentine concerning the circumstances and content of all the recorded conversations.” *Id.* Williams and his codefendant moved for suppression of both the recordings and the testimony, and the trial court granted their suppression motions. The Washington Supreme Court granted discretionary review and then *affirmed* the trial court’s ruling, holding that when federal agents fail to comply with the Washington

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<sup>58</sup> *Decl. Ford*, ¶ 5.1.2.

Privacy Act while recording private conversations within Washington, those recordings must be suppressed.

The prosecution argued that the language of RCW 9.73.030 implicitly excluded federal agents from coverage of the statute, but the Supreme Court *rejected* this argument holding that “the legislature intended the statute to apply to all individuals, including federal agents.” *Id.* at 537. The State argued that the federal wiretap statute (which required only one party consent) preempted the Washington Privacy Act, and the Supreme Court rejected that argument as well. *Id.* at 538-41. The *Williams* Court concluded that the tape recordings were not admissible in state court:

*Since the Washington privacy act applies to the evidence gathered in this case and since the federal agents failed to comply with the state statutory requirement of obtaining judicial approval prior to intercepting or recording private telephone communications or private conversations with the consent of only one of the parties to the conversation (RCW 9.73.030), the tape recordings are inadmissible in these state court proceedings.* RCW 9.73.050.

*Williams*, 94 Wn.2d at 541 (emphasis added).<sup>59</sup>

**d. A Washington Law Enforcement Officer Cannot Evade Compliance With The Washington Privacy Act By Partnering With A Federal Agent.**

It is not unusual for law enforcement agents from more than one

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<sup>59</sup> As noted previously, there is nothing in trial counsel’s research files (or in any other file) to indicate that any of the three trial attorneys was aware of the *Williams* case, and none of the preserved attorney emails make any reference to the possibility of bringing a suppression motion for violation of RCW 9A.73.050. *Decl. Lobsenz*, ¶¶ 10, 12, & 14.

agency to work together on the same case, as they did in this case, as members of a joint task force. Detective Carver acknowledged that although he was a Seattle police detective, starting in February of 2008 he was “assigned as a detective with FBI – Safe Streets Task Force”; he was “sworn as a Special Deputy United States Marshal”; and his “full-time official duties” involved the investigation of federal crimes. *Application for Authority*, at 1-2). (Appendix C).

In cases where Washington law enforcement officials were involved with federal officials in a joint investigation, Washington courts have not hesitated to hold that evidence obtained in Washington in violation of Washington law must be suppressed even if the evidence was obtained by federal agents whose conduct was lawful under federal law. *See, e.g., State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994);<sup>60</sup> *Cf. State v. Sweeney*, 56 Wn. App. 42, 49, 782 P.2d 562 (1989).<sup>61</sup> RCW 9.73.030 makes it unlawful for persons who are “acting as agents on behalf of someone in Washington” to record private conversation without either the

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<sup>60</sup> In *Johnson* this Court held that while ordinarily the Washington State Constitution does not apply to federal law enforcement officers, it *does* apply if those federal officers are working together with state law enforcement officers. In *Johnson*, because a state law enforcement official *was* working jointly with federal DEA agents, the federal agents were found to be acting as agents of the State of Washington, and therefore the strictures of the Washington Constitution applied to them. This Court held the search was unlawful under art. 1, § 7 and that the seized evidence should have been suppressed.

<sup>61</sup> In *Sweeney*, 56 Wn. App. 42, 49, 782 P.2d 562 (1989), the Court suppressed evidence found in a warrantless search by federal officials working together with state officers.

consent of all parties or judicial authorization. *Id.* Thus, a Seattle Police officer such as Detective Carver cannot evade RCW 9.73.050 by having his federal partner, an FBI Agent Carr, make recordings of private conversations without prior judicial authorization.<sup>62</sup>

**e. A Claim That Trial Counsel Was Ineffective Because He Failed To Make A Suppression Motion May Be Raised In A Personal Restraint Petition.**

In *State v. McFarland*, 127 Wn.2d 322, 334 n.2, 899 P.2d 1251 (1995), the Supreme Court held that in a PRP, a convicted defendant may raise a claim of ineffective assistance of counsel based upon trial counsel's failure to make a suppression motion. "A personal restraint petition is the appropriate vehicle for bringing these matters before the court." *Id.* at 338.

In some cases, such as this one, a defendant pursuing a direct appeal also files a PRP at the same time that his direct appeal is pending, and the two proceedings are consolidated. This was the procedure which the defendant followed in *State v. Reichenbach*, 153 Wn.2d 126, 129, 101 P.3d 80 (2004). After the Court of Appeals denied Reichenbach's claim,

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The "State cannot circumvent this constitutional requirement by allowing Job Corps officials to conduct a warrantless search for evidence to be used in a state action."

<sup>62</sup> See *Fowler*, 157 Wn.2d at ¶ 18 (even recordings made outside the State of Washington in a jurisdiction where prior judicial authorization is not required by the law of that jurisdiction, such recordings must still be suppressed if they were made at the request of, or with the involvement of, a Washington State law enforcement officer, with the intent to use them in a Washington State court proceeding. See *Fowler*, 157 Wn.2d at ¶ 18.

the Supreme Court granted review and reversed, holding that “counsel rendered ineffective assistance of counsel when he failed to move for suppression of the methamphetamine.” *Id.* at 128.<sup>63</sup>

f. **Because There Was No Conceivable Legitimate Tactic Which Explains Counsel’s Failure to Move to Suppress, Trial Counsel’s Conduct Was Deficient.**

*Reichenbach* holds that “where there is no conceivable legitimate tactic explaining defense counsel’s performance” the presumption that trial counsel’s performance is not deficient is rebutted. *Reichenbach*, at 130. The facts in *Reichenbach* are remarkably similar to the facts of this case. *Reichenbach* was charged with possession of a baggie of methamphetamine which was found during a search conducted pursuant to a search warrant. Without the evidence that the police found the baggie, the prosecution had no ability to prosecute the case. A compelling argument that the search warrant was invalid “was available to [trial] counsel,” and yet counsel failed to move for suppression. *Id.* at 131. The Supreme Court concluded that his failure “cannot be explained as a legitimate tactic,” and affirmed the trial court’s conclusion that “counsel’s

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<sup>63</sup> “In order to show that he received ineffective assistance of counsel [the defendant] must show (1) that defense counsel’s conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have differed.” *Reichenbach*, 153 Wn.2d. at 130, citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). *See also Strickland v. Washington*, 446 U.S. 668, 687 (1984).

conduct was deficient.” *Id.* at 131.<sup>64</sup> The same conclusion is inescapable here.

Mockovak’s trial counsel concedes that if he had made a motion to suppress, he thinks there was “a very good possibility” that he would have won the motion. *Decl. Robinson*, ¶ 6. Attorney Ford agrees with this assessment. He concludes that “if a motion to suppress these recordings and conversations had been filed, it likely would have been granted with respect to all five recorded conversations.” *Decl. Ford*, ¶ 5.2.1.

Robinson and Ford agree that since the first three recordings were never authorized by any court order, the Superior Court would have been compelled to suppress them pursuant to *Williams*. “[S]ince the federal agents failed to comply with the state statutory requirement of obtaining judicial approval prior to intercepting or recording . . . private conversations with the consent of only one of the parties to the

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<sup>64</sup> In that case, in a reference hearing ordered by the Court of Appeals, the trial court determined that the defendant suffered no prejudice from his attorney’s deficient conduct because the defendant consented to the search of his car, and that consent provided an alternate justification, independent of the invalid search warrant, for searching and finding the baggie. 153 Wn.2d at 129-30. The Supreme Court, however, held that the defendant’s consent was tainted by the prior unlawful seizure of his person, held that trial counsel’s deficient conduct was prejudicial, and held the defendant was denied effective representation of counsel.

In the present case, there is no independent basis for presentation of the critical evidence (the recordings) and the Privacy Act requires suppression not only of the recordings themselves, but also of all witness testimony describing those conversations. So trial counsel’s deficient conduct caused prejudice to the defendant, because the evidence was not suppressed, as it clearly would have been if a suppression motion had been made.

conversation (RCW 9.73.030), *the tape recordings are inadmissible in these state court proceedings.*” *Williams*, 94 Wn.2d at 541 (emphasis added).

In fact, the law enforcement agents themselves were well aware that they were violating Washington state law. Nevertheless they chose to deliberately violate Washington state law because at that time they thought that their case would end up being prosecuted in federal court, where a violation of state law would not matter. Agent Carr admitted that when he and Carver decided to have Kultin tape record his conversations with Mockovak, they filled out an “OIA” form – for Otherwise Illegal Activity – that explicitly acknowledged that the recordings they were going to have Kultin make were illegal under Washington law:

Q. Agent Carr, I’m handing you what’s been marked exhibit 63. Just to refresh everybody’s memory, what is that you’re looking at?

A. It’s the that OIA we talked about earlier. *It’s the form we use for otherwise illegal activity.*

Q. Is this a form on which you have options of things to choose or not choose?

A. No. It’s just a – I mean you check boxes, but whatever is in this box is what’s in the box. It doesn’t change.

Q. With whom is this form typically used?

A. Well, it is used for all CHSs [Confidential Human Sources] in states where it’s illegal to record a conversation. *For example, in the State of Washington both people have to agree to have*

*their conversation recorded. If only one person agrees, then it's illegal, and so we have to have this form completed or you have to get a State court order to do it. If in this State it wasn't illegal for that to happen, we would not have completed this form.*

Q, *Illegal under state law or federal law?*

A. *State law.*

RP VII, 99-100 (emphasis added). Thus, Agent Carr and Detective Carver explicitly documented the fact that they were intentionally violating Washington State law.

A copy of this form was admitted in evidence at Mockovak's trial as Exhibit No. 63 (Appendix B). RP VII, 67. On the form, the following box was checked as applicable:

Some states, by law, do not authorize one party consensual recording of conversations nor provide for a law enforcement exception to this prohibition. Under the AGG-Dom, one party consensual recording of communications to, from, or within such states is Otherwise Illegal Activity. ***By signature below, the SAC, or a designee, approves the consenting party's Otherwise Illegal Activity in conducting one party consensual recording of communications*** when one or both parties are in a state requiring two party consent.

Exhibit No. 63, at p. 4 (emphasis added) (Appendix B).<sup>65</sup>

Robinson and Ford also agree that the second set of recordings (those

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<sup>65</sup> Detective Carver later was present when Kultin was given "Otherwise Illegal Activity" Admonishments. Exhibit No. 59 (Appendix F). Kultin was specifically told that he was "only authorized to engage in the illegal activity" that the FBI instructed him he could perform – in this case tape recording – and "not in any other illegal activity." *Id.* Detective Carver's signature appears as a witness to the fact that Kultin was so admonished. *Id.*

made in November) would have been suppressed if Robinson had made a suppression motion. *Decl. Robinson*, ¶ 9; *Decl. Ford*, ¶ 5.2.1. Suppression would have been required under the fruit of the poisonous tree doctrine. *Decl. Robinson*, ¶ 9. As stated in *State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996), when police obtain evidence by using the knowledge of facts gained from a prior violation of the Washington Privacy Act, the subsequently obtained evidence must also be suppressed. To permit the State to use evidence directly flowing from a privacy act violation “would render any privacy protection illusory and meaningless.” *Id.* at 489.

There was also “available to counsel” a second, wholly independent ground for suppressing the second set of recorded conversations. Every application for judicial authority to record private conversation must contain “[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.” RCW 9.73.090(3(f)). Detective Carver’s application does not satisfy this requirement.

Carver’s application stated that law enforcement “anticipated entrapment may be a defense to any criminal charges that result from this investigation.” *Application for Authority*, at 17 (Appendix C). Carver told the Superior Court that a recording of the conversation between Kultin and

Mockovak would provide law enforcement with “the opportunity to hear the emotion and determination in the voice” of Mockovak, and would therefore “best allow” the prosecution to combat the anticipated entrapment defense. *Id.* at 16. But this rationale clearly does not satisfy the statutory requirement of demonstrating that other investigative techniques will not succeed. This Court rejected this same argument in *State v. Manning*, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996).<sup>66</sup> Given that *Manning* is binding precedent in Division One, it seems clear that a suppression motion arguing this separate ground would *also* have succeeded in getting the later conversations suppressed.

The only point of disagreement between Robinson and Ford is whether Robinson had an objectively reasonable basis for his “strategic” decision not to make a suppression motion. Robinson’s decision was driven by his desire to make use of the state court’s favorable discovery rules which gave the defense the right to interview all of the prosecution’s witnesses, a right which did not exist in federal court. But Robinson’s decision was the product of his erroneous belief that he had to make a choice, when in fact there was no need to make such a choice. He believed that he had to

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<sup>66</sup> The State argued that “[t]he [defendant’s] spoken words are themselves the best evidence of intent. No other investigative method is capable of capturing these words in such clear and admissible evidentiary form.” This Court rejected this rationale: “Such justifications merely support the truism that having a recording to play at trial is advantageous to the State in obtaining a conviction. They do not inform the judge of

choose between exercising the favorable discovery rights afforded by the state court, and obtaining the federal court benefits of the more favorable burden of proof rule and the far more lenient sentencing guidelines.

But no such choice was necessary. Because the prosecutors had shifted their case from federal court to state court, defense counsel could seek to utilize the strategic advantages of both. The path was open to securing both the discovery advantages of state court and the additional benefits of the federal court rules and sentencing guidelines. Defense counsel should have conducted and completed all discovery first, *before* bringing a suppression motion. Simply by waiting until after discovery had been completed, before taking the next step – bringing a motion to suppress that all agree would surely have led to state court dismissal and a federal court prosecution of the case – the defense attorneys could have secured the advantages of both state and federal court.

Robinson mistakenly believed that this was not possible because, by the time discovery had been completed, it was “too late” to bring a suppression motion in state court. But as attorney Ford has noted, this belief was wholly unfounded. *Decl. Ford*, ¶ 5.2.5. After considering the Superior Court record, Ford concluded that there was “*no legal basis* on which the trial court could have disallowed such a motion” if Robinson

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reasons why, in this particular case, other procedures will not successfully resolve the

had “noted [it] at the time of the omnibus hearing.” *Id.*

In federal court it is common for the trial judge to set a deadline for the filing of any pretrial motions. *Decl. Lobsenz*, ¶ 51. But in Washington State, Superior Court trial judges ordinarily do *not* set such deadlines because the practice is to enter an order at the Omnibus Hearing which sets dates for the consideration of pretrial motions. In the present case, the Superior Court trial judge followed the normal state court procedure. She never set any cut-off date for the filing of pretrial motions. *Id.* The omnibus hearing was initially set for December 16, 2010; however, because the compromise agreement for the provision of additional discovery by the federal government was not reached until December 16<sup>th</sup>, the trial judge entered an order continuing the omnibus hearing to January 3, 2011, to give defense counsel the opportunity to review that discovery before the omnibus hearing was held. *Id.*, ¶ 52 & attached Appendix O; RP 12/16/10, at 3. The time-entry billing records for Mockovak’s trial attorneys show that the last defense counsel interviews of the FBI agents were conducted on December 29, 2010. *Id.*, ¶ 54 & attached Appendix P. The omnibus hearing was then held on January 3, 2011. *Id.*, ¶ 54.

The order entered at the omnibus hearing has preprinted boxes which may be checked to indicate whether or not there will be any defense

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investigation.”

motion to suppress. *Id.*, ¶ 55 & attached Appendix R. The language attached to the second box states:

Defendant will move to suppress evidence. Moving party shall comply with CrR 3.6, 8.1 and CR 6. The motion shall be heard, immediately before trial, by the trial judge.

*Id.* This box was not checked. Instead, Mockovak's trial counsel checked the box that states: "No motion to suppress evidence pursuant to CrR 3.6 shall be made." *Id.*

Thus, as attorney Ford has said, the omnibus hearing order itself "includes a line that could have been checked by defense counsel to give notice of such a motion. No provision of Washington or King County court rules precludes the noting of such a motion at an omnibus hearing."

*Decl. Ford*, ¶ 5.25. On the contrary, Washington's Superior Court Criminal Rules contemplate that hearings on pretrial motions will occur *after* the omnibus hearing occurs:

At the arraignment ***the court will usually set a time for the omnibus hearing*** which is ***far enough away*** to allow sufficient time for counsel to initiate and ***complete discovery***, conduct further investigation of the case, ***but which still provides enough time to schedule and hear evidentiary motions sometime after the omnibus hearing but prior to trial.***

***Evidentiary and constitutional motions which typically require argument at a later date are motions to suppress*** the fruits of an unlawful arrest or unlawful search or seizure, and motions to suppress an unlawfully obtained confession or identification.

Ferguson, 12 *Washington Criminal Practice & Procedure*, § 1404 (2004)

(emphasis added).

Therefore, according to the omnibus order entered in this case and the provisions of CR 6 (requiring five days notice of a hearing on a motion), Mockovak's trial counsel had until January 7 (five days before trial start) to serve a written suppression motion on the prosecution. Had he done so, the trial judge would have been *obligated* to hear and decide that motion on the trial date of January 12, 2012. And yet he failed to do so.

For these reasons, attorney Ford states:

*I do not agree with Mr. Robinson's contention* that such a suppression motion could not have been brought in this case after the defense completed its investigation and discovery utilizing Washington State's investigation and discovery rules.

*Decl. Ford*, ¶ 5.2.5 (emphasis added).

In sum, Robinson's reason for not making a motion to suppress, which he agrees he probably would have won, and which would have ended the state court prosecution, was premised upon an erroneous belief that by the time he got the discovery from the federal government and had interviewed the federal agents, it was too late to bring such a motion. As attorney Ford has stated, since Robinson's decision was predicated upon this completely erroneous belief, it provides no "sound strategic reason" for failing to bring the suppression motion.

In my opinion, a lawyer practicing in a manner consistent with prevailing professional norms would have filed a motion to suppress these recordings and these conversations in this case, and

*the information and materials I have reviewed reveal no sound strategic reason not to do so in this case.*

*Decl. Ford*, ¶ 5.2.5 (emphasis added). Here, as in *Reichenbach*, the “argument was available” to trial counsel which very likely would have terminated the state court case in Mockovak’s favor; the failure of Mockovak’s attorney to make this argument “cannot be explained as a legitimate tactic,” and therefore “counsel’s conduct was deficient.” *Reichenbach*, 153 Wn.2d at 131.

**g. Trial Counsel’s Conduct Was Highly Prejudicial. Had A Suppression Motion Been Made, The State Court Case Would Have Been Dismissed Because The State Would Have Been Unable To Proceed.**

In this case, satisfaction of the *Strickland* prejudice prong is clear and undisputed, since it is agreed (by trial counsel Robinson and by Ford, Mockovak’s expert witness) that had the motion been brought, it would have been granted, and thus the state court prosecutors would have been unable to proceed with the case in state court.

Suppression would not only have meant that the prosecution could not use the recordings. Under Washington law it would also have meant that *no witness could have testified to anything that they heard or saw during these conversations.*

It is settled law in Washington that when the Privacy Act is violated by an unlawful recording, *all* information about the recorded conversation

must be suppressed. In *Williams* the Court examined the language of RCW 9.73.050 which directs that “[a]ny information obtained in violation [of the act] . . . shall be inadmissible in any civil or criminal case . . . .” The Court held that this language not only compelled suppression of the recordings of the conversations, but also of any witness testimony about those conversations:

[T]he federal agents and informant who participated in the conversations in the present case knew of, and took part in the illegal recordings of the conversations, and therefore obtained the information from the conversations in an unlawful manner. See RCW 9.73.030. Since the “legislature’s primary purpose . . . was the protection of the privacy of individuals from public dissemination, even in the course of a public trial, of illegally obtained information” (italics ours) (Citation omitted), ***the privacy act precludes the dissemination of this illegally obtained information*** – whether it is disseminated by introducing the tape recordings o[r]<sup>67</sup> the testimony of the officer or civilian informant who participated in the conversation. Accordingly, ***the federal agents and informant cannot testify to the contents of the illegally recorded conversations.***

*Williams*, 99 Wn.2d at 543 (emphasis added). *Accord State v. Fjermestad*, 114 Wn.2d 828, 834, 791 P.2d 897 (1990); *State v. Salinas*, 121 Wn.2d at 693.<sup>68</sup> The exclusion of testimony extends even to the visual observations made by law enforcement agents during the time the recordings were being made. *Fjermestad*, 114 Wn.2d at 836.

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<sup>67</sup> The reported opinion has a typo here. The opinion uses the word “of,” but the context clearly demonstrates that the intended word was “or.”

<sup>68</sup> Evidence obtained in violation of the act is excluded for any purpose, including impeachment. *State v. Henderson*, 16 Wn. App. 526, 530, 557 P.2d 346 (1976).

Without the recorded conversations, the state prosecutors would have been unable to present even a *prima facie* case. Without evidence of what Mockovak said to Kultin, there was nothing to support the accusation that he solicited Kultin to arrange for the murder of his business colleague, or that he conspired with Kultin to accomplish this end.

Accordingly, Petitioner Mockovak has satisfied both prongs of the *Strickland* test and has established a meritorious claim of ineffective assistance of counsel based on the failure of his trial counsel to move to suppress these recordings and testimony about these conversations.

**2. THE SUBMISSION OF A WPIC JURY INSTRUCTION ON ENTRAPMENT (WPIC 18.05), AND THE FAILURE TO ARGUE INSTEAD FOR A MODIFIED INSTRUCTION WHICH DID NOT CONTAIN THE SENTENCE REFERRING TO A “REASONABLE AMOUNT OF PERSUASION TO OVERCOME RELUCTANCE,” CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.**

- a. **Attorney Ford and Mockovak’s Trial Lawyers Agree That There Was An Obvious Argument to be Made That the WPIC Contained a Sentence That Misstated The Law; That This Sentence Was Inherently Disadvantageous to the Defendant; and That There Was No Strategic Reason To Refrain From Challenging The Inclusion of That Sentence in the Instruction.**

In his direct appeal, Mockovak contends that he was denied his Sixth Amendment right to effective assistance because his trial counsel proposed an erroneous instruction defining the defense of entrapment, which incorrectly suggested that a defendant had to prove that law

enforcement used an “unreasonable” amount of persuasion. *Brief of Appellant*, at 60-79, *State v. Mockovak*, COA No. 66924-9-I. Mockovak maintains that in his case, as in the recently decided case of *In re Wilson*, \_\_\_, Wn. App. \_\_\_, 279 P.3d 990 (2012), trial counsel’s act of proposing a defective instruction constituted ineffective assistance of counsel which removes the error from the purview of the invited error rule. *Reply Brief of Appellant*, at 22-27, *State v. Mockovak*, COA No. 66924-9-I.

A defendant is permitted to raise a claim of ineffective assistance of counsel on direct appeal. *See, e.g., State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (counsel held ineffective for failing to propose a *Sherman* instruction thereby failing to adequately present the defense of voluntary intoxication); *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) (“There is nothing intrinsic about a claim of ineffective assistance of counsel that requires it to be considered only in a collateral proceeding such as a personal restraint petition.”). But in a direct appeal the defendant is not permitted to refer to facts outside the record. When a defendant “wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court.” *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

When a defendant raises a claim of ineffective assistance of counsel, it

is common for him to present new evidence in the form of declarations from experienced criminal defense attorneys setting forth their opinions as to whether the performance of the defendant's trial counsel was consistent with prevailing professional norms, or, on the other hand, whether trial counsel's conduct was deficient. In the present PRP, Mockovak has presented additional facts outside the record in support of the IAC claim that he raised on direct appeal. As the petitioner did in *In re Brett*, 142 Wn.2d 868, 878-880, 16 P.3d 601 (2001), Mockovak has presented the expert opinion of an experienced criminal litigator.

Attorney Ford supports Mockovak's claim that his trial counsel rendered ineffective assistance when he proposed a jury instruction, which the trial court gave, that erroneously *increased* Mockovak's burden of proving the defense of entrapment, thus making it exceptionally hard for Mockovak to prove this defense. Ford begins with the straightforward proposition that any competent lawyer "handling a criminal case involving an entrapment defense, should be familiar with the language of the governing statute, RCW 9A.16.070, and the case law interpreting it." *Decl. Ford*, ¶ 6.1. Ford then notes that any competent lawyer would realize that the WPIC instruction on entrapment, which Mockovak's trial counsel proposed, conflicts with the statute because it requires more than the statute requires to prove the defense:

*Any lawyer familiar with that statutory language* who read or copied WPIC 18.05 *should recognize that the WPIC contains an additional sentence that is not in the statute:* a sentence reading “The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.” This language obviously is not part of the statute.

*Decl. Ford*, ¶ 6.1 (emphasis added).

Further, Ford also opines that the additional language contained in the WPIC instruction is very prejudicial to the defense, and that competent counsel would not have proposed it:

It effectively imposes an additional burden on the defendant that is not contained in the governing statute, a burden of proving that the amount of persuasion used was more than “reasonable.” *The WPIC language is therefore inherently disadvantageous to the defendant.*

Because of that disadvantage, *I do not believe that a lawyer practicing in a manner consistent with prevailing professional norms in the State of Washington would affirmatively propose the WPIC language, and there could be no sound strategic reason to do so.*

*Decl. Ford*, ¶ 6.1 (emphasis added).

Although Robinson was lead defense counsel, Joseph Campagna “was primarily responsible for doing the initial legal research on the defense of entrapment and the initial preparation of the defendant’s proposed jury instructions.” *Decl. Campagna*, ¶ 4. Campagna acknowledges that he is the one who “prepared the defense proposed jury instruction on entrapment which the trial judge ultimately gave to the jury.” *Id.*, ¶ 5.

Campagna further acknowledges that he used WPIC 18.05, the model

jury instruction on entrapment, which contains the sentence stating that “use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.” *Id.* He admits that in the course of his research he read the opinion in *State v. Keller*, 30 Wn. App. 644, 637 P.2d 985 (1981). *Id.*, ¶ 8. He agrees that he highlighted a passage in the *Keller* opinion which states that the amount of persuasion used by police “is relevant only if it is contended the [police] conduct violated due process” (as opposed to contending that the defendant was entrapped). *Id.* Campagna agrees with Ford that the language of the entrapment statute, RCW 9A.16.070(1), “makes no mention whatsoever of any requirement that the defendant prove that the police or their agents used more than a reasonable amount of persuasion to overcome the defendant’s reluctance to commit the crime.” *Id.*, ¶ 7.

Campagna admits that he “was not aware that there was an argument that” the sentence in WPIC 18.05 referring to a reasonable amount of persuasion “should not have been included in the instruction.” *Id.*, ¶ 5. He also admits that he never alerted either of his co-counsel that such an argument could be made, and he agrees with attorney Ford that there was no sound strategic reason for failing to make this argument:

I did not discuss with Ms. Tvedt or Mr. Robinson the appropriateness of the “reasonable amount of persuasion” language in our entrapment instruction. There was no strategic or tactical reason for not discussing the appropriateness of this sentence.

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

*Decl. Campagna*, ¶¶ 15-16 (emphasis added).

Attorney Robinson has also endorsed attorney Campagna’s assessment of this issue. He states simply:

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

*Decl. Robinson*, ¶ 4 (emphasis added). Robinson further acknowledges that although researching the defense of entrapment was a task delegated to Campagna, “I was lead counsel and therefore it was ultimately my responsibility to see to it that we proposed correct jury instructions and that we objected to erroneous jury instructions.” *Decl. Robinson*, ¶ 5.

In sum, attorneys Ford, Campagna, and Robinson all agree that the WPIC instruction defining entrapment, which defense counsel proposed, differed from the statutory definition of entrapment; in addition there was case law support for the argument that the “reasonable amount of persuasion” sentence should not be included in any entrapment instruction; this sentence was inherently prejudicial to the defendant; and there was no sound strategic reason for failing to make the argument that

this sentence should be omitted from the entrapment instruction to be given to the jury.<sup>69</sup>

As Ford points out, there was no downside to making the argument, and “basic research” that any competent attorney would do would have revealed the existence of the argument:

*The basic research any lawyer handling an entrapment case would do would show that there is a plausible argument that the added WPIC language misstates the law.* It deviates from the statutory language; it is rooted in case law that predates the 1976 revision of the criminal code; it significantly alters what the statute says the defendant is required to prove and effectively adds another element to the affirmative defense.

*I can conceive of no sound strategic reason a lawyer representing Dr. Mockovak could have elected to propose an instruction using this WPIC language,* thereby waiving any objection to its deviation from its statutory language. Nothing in the records I have reviewed suggests that there was any possibility that the prosecution would have submitted, or the court would have given, an instruction on entrapment *less* favorable to the defense than WPIC 18.05. Submission of the WPIC language therefore gained Dr. Mockovak no advantage and deprived him of the opportunity to challenge the statutory language on appeal.<sup>70</sup>

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<sup>69</sup> It is important to realize that even if this Court concludes that it is not necessarily error to give WPIC 18.05 with the “reasonable amount of persuasion” language, Mockovak still shows prejudice which meets the *Strickland* test if there is a reasonable probability that the trial court would have given a modified WPIC instruction if Mockovak’s trial attorneys had asked for one. Even if this Court decides that a trial judge is not *required* to give a modified WPIC instruction, a trial court still has the *discretion* to give a modified WPIC instruction so long as it accurately states the law. Clearly there is a reasonable probability that any trial judge who compared the entrapment statute to WPIC 18.05 would have exercised his or her discretion to grant a defense request to give a modified WPIC instruction. And such an exercise of discretion would be even more likely if the *Keller* decision is brought to the trial judge’s attention.

<sup>70</sup> Ford goes on to offer the opinion that if this Court concludes that the WPIC instruction is flawed and that it is error to give it, then Petitioner would be prejudiced by his trial counsel’s proposal of that flawed instruction if this court were to conclude that the error could not be reviewed on direct appeal.” *Decl. Ford*, ¶ 6.3.1. *See State v. Kylo*, 166

Decl. Ford, ¶¶ 6.2.2, 6.2.3 (emphasis added).

**b. The Failure To Submit An Entrapment Instruction Without The “Reasonable Amount Of Persuasion” Language Was Prejudicial Because There Is A Reasonable Probability That If That Had Been Done, The Trial Court Would Have Given An Instruction Without This Language, And A Reasonable Probability That The Jury Would Not Have Convicted Mockovak.**

Since trial counsel and attorney Ford agree that there was no sound strategic reason for failing to make the argument that the instruction on entrapment should not include the “reasonable amount of persuasion” language, the sole remaining issue is whether the prejudice prong of the *Strickland* test has been met.

Ford has concluded that such a showing of prejudice has been made:

Based on the legal research and arguments on this issue in the parties’ Briefs, in my opinion there is *at least a reasonable possibility that an appellate court could find the added WPIC language is erroneous*, either generally or as applied to Dr. Mockovak’s case. If the court were to so conclude, Dr. Mockovak would be prejudiced by his trial counsel’s affirmative submission of this WPIC language if it were held to be a meritorious appellate argument.

Based on the descriptions of the evidence and arguments of counsel in the Appellant’s and Respondent’s Briefs in Dr. Mockovak’s case, the closing arguments of the defense and prosecution at trial, the verdict acquitting Dr. Mockovak of the charge of solicitation to murder Mr. Klock, and the juror

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Wn.2d 856, 861, 215 P.3d 177 (2009). *Accord State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *State v. Rodriguez*, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004). *See Brief of Appellant*, at pp. 72-79 in the direct appeal, COA No. 66924-9-1.

interviews described in the Declaration of David Snyder attached to the Defense Sentencing memorandum in Dr. Mockovak's case, *in my opinion there is a reasonable probability that an instruction that adhered to the statutory language would have produced a different verdict.*

*Decl. Ford*, ¶¶ 6.3.1, 6.3.2 (emphasis added).

c. **Trial Counsel's Failure To Object To The Prosecutor's Closing Argument, Which Misstated the Elements Of The Entrapment Defense, Also Constituted Ineffective Assistance of Counsel.**

The inclusion of the "reasonable amount of persuasion" language was what impelled the trial prosecutor to argue to the jury that there were "three" elements to be proved by the defendant before the jury could acquit on entrapment grounds. Had this language been omitted, the prosecutor would have had no basis for such an argument. Thus, not only would the jury instruction on the entrapment defense have been different, but the closing argument of the prosecutor would also have been markedly different. Because trial counsel did not understand the elements of the defense of entrapment, he failed to object to the prosecutor's improper and prejudicial closing argument. As a result, the jury erroneously was told that Petitioner had to prove a third element of entrapment, when in fact no such third element of the entrapment defense exists.

For these reasons, and for the reasons advanced in Mockovak's direct appeal briefing on this issue, Petitioner asks this Court to find that he received ineffective assistance of counsel and to order a new trial.

**INDEPENDENT CONSTITUTIONAL VIOLATIONS  
CAUSED BY LAW ENFORCEMENT'S DELIBERATE  
VIOLATION OF THE WASHINGTON PRIVACY ACT.**

In Argument Section 1, Petitioner explained how he was denied his Sixth Amendment right to effective representation of counsel by his trial counsel's failure to move to suppress his private conversations which were illegally recorded by law enforcement in violation of the Washington Privacy Act. The legal basis for this claim (GR, No. 1) is premised on the argument that the conduct of Petitioner's trial attorney was deficient and prejudicial.

The same facts which provide the basis for this Sixth Amendment IAC claim also provide a basis for three additional constitutional claims involving (i) the due process clauses of the state and federal constitutions; (ii) article I, § 7 of the *Washington Constitution*, and (iii) the Tenth Amendment. (GR, Nos. 3, 4, & 5). The legal focus of these three claims is on the conduct of the law enforcement officials, *not* on the conduct of Petitioner's trial attorney. For purposes of these three claims, this Court's analysis will focus on the contentions that law enforcement (i) acted in bad faith, and engaged in outrageous governmental conduct when it deliberately committed a criminal offense under state law and then invoked the jurisdiction of a Washington State court; (ii) invaded Petitioner's private affairs without authority of law; and (iii) invaded the

powers reserved to the states under our federal system of government.

In the event that this Court agrees with Petitioner on his IAC claim (GR, No. 1), it will not be necessary for the Court to address these three alternate claims for relief.

**3. IN ORDER TO COLLECT INCRIMINATING EVIDENCE, A STATE OFFICER AND A FEDERAL OFFICER, WORKING TOGETHER AS PARTNERS, SOUGHT AND OBTAINED “PERMISSION” TO DELIBERATELY COMMIT A CRIME. THEIR EXCUSE WAS THAT THEY INTENDED TO BRING CHARGES IN FEDERAL COURT, AND ALTHOUGH THEIR ACT WAS A CRIME UNDER STATE LAW, IT WAS NOT A CRIME UNDER FEDERAL LAW. THIS IS BAD FAITH CONDUCT WHICH VIOLATED THE DUE PROCESS CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS.**

**a. Detective Carver And Agent Carr Consciously Sought And Obtained “Permission” To Commit The Criminal Offense Defined By RCW 9.73.030.**

There is no room for any factual dispute as to what the task force officers did in this case, or what motivated them to do it. Documentary evidence written in their own hands convicts them of trying to have it both ways. They sought and obtained permission from federal authorities to engage in “otherwise illegal activity” by deliberately violating Washington State’s two-party consent Privacy Act, and they forthrightly told their superiors that their reason for doing this was that this course of action “would be advantageous in gathering the strongest possible evidence to have the meeting recorded.” *Trial Exhibit No. 63*, at 4. Three

months later, after having collected tape recorded evidence, they candidly admitted that despite the fact that they could bring the case in federal court, they decided that “due to sentencing guidelines,” prosecuting the case in state court would be “the best course of action.” *Unclassified FBI Memorandum*, at 5-6 (PRP, Appendix E).

- b. **Absent A Bad Faith Motive, Law Enforcement Is Free to Choose The Forum It Wishes To Bring Charges In. But It Is Bad Faith To Artificially Split A Criminal Case Into An Initial “Federal Phase” and a Later “State Phase” In Order To First Violate The State Criminal Law That, If Obeyed, Makes Law Enforcement’s Job Harder, and Then Later In The Same Case To Eschew Federal Court In Order To Embrace Those State Court Laws That Make Law Enforcement’s Job Easier.**

So long as they do not base their decision on an improper criterion such as race, prosecutors generally have broad discretion to decide whether, and where, to file criminal charges.

But the freedom to choose the prosecutorial forum is limited by rules against bad faith conduct. As the federal court said in *United States v. Melendez*, 60 F.3d 41, 50 (2<sup>nd</sup> Cir. 1995), “Unless it can be shown that the decision to drop state charges and initiate federal prosecution is based on suspect characteristics of the defendant *or is otherwise done in bad faith*, there is no due process violation.” Similarly, in *United States v. Allen*, 954 F.2d 1160, 1165-66 (6th Cir. 1992), the appellate court recognized that the choice of where to charge the defendant cannot be based upon the “exercise of a statutory or constitutional right.” *United States v. Turpin*,

920 F.2d 1377, 1387-88 (8<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 953 (1991).

If law enforcement selects the forum by acting in bad faith, with an improper motive such as a desire to violate a state criminal law – in this case, the Washington Privacy Act<sup>71</sup> – then there *is* a due process violation. In this case, the decisions made by the task force officers and the federal prosecutors were *not* made in good faith. Instead, they *were* made on the basis of a desire to deliberately violate Mockovak’s statutory rights under RCW 9.73.030. Under Washington law, it is a *crime* to make recordings of private conversations without the consent of both parties and without prior judicial authorization, and such tape recordings are inadmissible in state courts. RCW 9.73.080 and 9.73.050. To avoid these restrictions, the task force officers decided to “utilize[] federal process for approval of recorded conversations, per FBI/DOJ guidelines.” *Unclassified FBI Memorandum*, at p. 5 (PRP, Appendix E). Despite the fact that he was a state law enforcement officer, Detective Carver participated in explicitly authorizing the commission of “otherwise illegal activity” – the commission of a criminal offense under Washington law – because it would be “advantageous” to have stronger incriminating evidence. This course of action was specifically blessed by federal prosecutors: “Vince Lombardi was briefed on this case and investigative plan and *he*

*concluded with the effort.*” Exhibit No. 63, at p.4 (Appendix B).<sup>72</sup>

c. **Because An Improper Motive Prompted Law Enforcement To Prosecute In State Court After Deliberately Violating The State Privacy Act, The Due Process Clause Requires Suppression Of The Recordings. This Remedy Will Prohibit Washington State From Benefiting Unfairly From The Conduct Of Law Enforcement Officers Who Deliberately Engaged In What They Knew To Be Criminal Conduct Under Washington State Law.**

In the present case, law enforcement officers *admit* that they conducted their investigation under federal rules – seeking the permission of a federal supervisor to deliberately commit a crime – so that they could gather incriminating evidence in a manner expressly prohibited by Washington State’s two-party consent rule. They further *admit* that they initially intended to prosecute the case against Mockovak in federal court, and that they switched the prosecutorial forum at the last minute because they realized that there were other Washington State laws that favored the prosecution and offered them trial and sentencing advantages that they would not enjoy in federal court.

This case illustrates the point that the only way to preclude law

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<sup>71</sup> RCW 9.73.080(1) states: “Except as otherwise provided in this chapter, any person who violates RCW 9.73.030 is guilty of a gross misdemeanor.”

<sup>72</sup> The law enforcement officers’ own words belie any contention that they could not have brought a prosecution in federal court. Agent Carr reported that *two* federal prosecutors (Greenberg and Lombardi) agreed with him that there was a federal nexus to support a criminal prosecution under federal law. *Unclassified FBI Memorandum*, at 5-6 (PRP, Appendix E). “However,” both prosecutors “felt that due to the sentencing guidelines” the best course of action was to prosecute in state court. *Id.*

enforcement from benefiting from its “otherwise illegal activity” (which was flatly illegal under Washington law), is to suppress the evidence which was collected in violation of Washington law. The proper remedy in this case is to hold the tape recorded evidence inadmissible, reverse Mockovak’s convictions, and remand for a new trial. At that point, the state and federal prosecutors will be able to decide how next to proceed. The prosecutors can decide to prosecute this case in federal court – with all of the tape recordings and with the federal burden of proof rule for entrapment. If Mockovak is again convicted, then federal sentencing guidelines will apply. By reversing and ordering a new trial this Court would be properly returning law enforcement to the place where the case began, and can once again be pursued.

**4. BECAUSE A STATE LAW ENFORCEMENT OFFICER WAS DEEPLY INVOLVED IN THE ILLEGAL ACTIVITY WHICH INVADED MOCKOVAK’S PRIVATE AFFAIRS WITHOUT AUTHORITY OF LAW, THE USE OF THE ILLEGALLY MADE RECORDINGS VIOLATED ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION.**

**a. In 1960, The Supreme Court Invalidated The Silver Platter Doctrine Because It Tacitly Encouraged State Officers To Violate The Federal Constitution.**

In a different era, when the Fourth Amendment exclusionary rule did not apply to unreasonable searches conducted by state law enforcement

officers,<sup>73</sup> federal prosecutors were permitted to use evidence which had been illegally seized by state law enforcement officers. So long as no federal officers were involved in the illegal seizure, federal prosecutors were allowed to use the evidence because the dirty work had all been done by state officers who had violated federal law. This practice, of allowing state officers to hand off the illegally seized evidence to federal officials who could then present that evidence in federal court, was called the “silver platter doctrine” in *Lustig v. United States*, 358 U.S. 74, 79 (1949).

But eventually the silver platter doctrine was repudiated by the Supreme Court in *Elkins v. United States*, 364 U.S. 206 (1960). The *Elkins* Court recognized that while “[f]ree and open cooperation between state and federal officers is to be commended and encouraged,” nevertheless “that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least *tacitly to encourage state officers in the disregard of constitutionally protected freedom.*” *Elkins*, 364 U.S. at 221-22 (emphasis added). “If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in

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<sup>73</sup> This era lasted from the time of *Weeks v. United States*, 232 U.S. 383 (1914), and through the era of *Wolf v. Colorado*, 338 U.S. 25 (1949), until *Wolf* was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961).

criminal investigations.” *Id.* at 222.

In addition, *Elkins* noted “there is another consideration – the imperative of judicial integrity.” *Id.* Quoting from a prior Justice Brandeis dissent, the Court embraced his view that “to declare that government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.” *Elkins*, at 223, quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).<sup>74</sup> Holding that the courts of one jurisdiction should not “be accomplices in the willful disobedience” of the law by officers of another jurisdiction, the Court overruled the silver platter doctrine, and ended the practice of allowing federal officers to use state officers to violate the law for them:

For these reasons we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant’s immunity from unreasonable searches and seizures under the Fourth Amendment, is inadmissible over the defendant’s timely objection in a federal criminal trial. . . .

*Elkins*, 364 U.S. at 223.

**b. In A “Reverse” Silver Platter Doctrine Case, A State Prosecutor Seeks To Use Evidence That Was Obtained By A Federal Officer In Violation Of State Law.**

While the federal silver platter doctrine is dead, the “reverse” silver

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<sup>74</sup> *Olmstead* itself was overruled in *Katz v. United States*, 389 U.S. 347 (1967).

platter doctrine survives to a limited extent. In the *Lustig* era, the issue was, “When can federal prosecutors use evidence that was seized in violation of the federal constitution, but not in violation of state law?” In the last half century, the “reverse” issue has frequently arisen: “When can state prosecutors make use of evidence that was seized in violation of a provision of a state constitution, but not in violation of federal law?”

Relying upon their state constitutions, many states now impose greater restrictions on law enforcement than those imposed by the federal constitution. Thus, the issue now frequently arises, if federal agents seize evidence in violation of state constitutional provisions, but in compliance with federal law, will the evidence be held admissible in state court proceedings. Several state courts have recognized and categorically rejected a “reverse silver platter” doctrine. They hold that if federal officers fail to comply with state constitutional or statutory requirements, such evidence is inadmissible in state court trials even though the federal officers acted in compliance with federal law. Moreover, many of these States hold that it does not matter whether the federal officers acted alone and independently, or whether they acted in cooperation with, or at the request of state law enforcement officers. *See, e.g., State v. Torres*, 125

Haw. 382, 262 P.3d 1006 (2011);<sup>75</sup> *State v. Rodriguez*, 317 Or. 27, 854 P.2d 399, 403 (1993);<sup>76</sup> *State v. Cardenas-Alvarez*, 130 N.Mex. 386, 25 P.3d 225 (2001).<sup>77</sup> The Washington Supreme Court, however, does not follow such a categorical rule, and takes a more nuanced approach.<sup>78</sup>

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<sup>75</sup> In *Torres* federal military officials conducted searches which fully complied with federal law, but which arguably violated the privacy guarantee of the Hawaii Constitution. The Hawaii Supreme Court held that if federal officers secured evidence while acting in violation of the Hawaii Constitution, such evidence had to be excluded, even if no Hawaii law enforcement officers had any connection to the federal search. *Torres*, 125 Hawai'i at 395. This conclusion was premised on three factors: (1) judicial integrity, (2) individual privacy, and (3) deterrence. *Id.* at 394. “[U]nlike the exclusionary rule on the federal level, Hawai'i's exclusionary rule serves not only to deter illegal police conduct, but to protect the privacy rights of our citizens.” *Torres*, 125 Hawai'i at 396, quoting *State v. Kahoonei*, 83 Hawai'i 124, 131, 925 P.2d 294 (1996).

Our state supreme court has said the same thing about the Washington Constitution: “[T]he language of our state constitutional provision constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). *Accord State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

<sup>76</sup> There the court held that evidence derived from a search conducted by federal INS officers had to be suppressed because it did not comply with the Oregon Constitution: “It does not matter where that evidence was obtained (in-state or out-of-state), or what governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where this is true, the Oregon constitutional protections apply.”

<sup>77</sup> There the search was conducted by a federal border patrol agent. Because the search violated the New Mexico Constitution, the evidence was not admissible in a state trial and should have been excluded, even though the seizure was lawful under federal law. *See also State v. Camargo*, 126 N.H. 766, 498 A.2d 292, 296 (1985) (evidence obtained by Massachusetts officer not admissible because search violated New Hampshire constitution).

<sup>78</sup> Petitioner recognizes that this Court cannot overrule Washington Supreme Court precedent, and thus makes no argument in this Court for the adoption of such a categorical approach. However, Petitioner reserves the right to make that argument to the Washington Supreme Court, should this case eventually end up in that court.

- c. **If A Federal Officer Acts Independently, Without Any Assistance or Encouragement From Any State Officer, Then The State Constitution Does Not Apply To Him. But If A State Officer Is Working With The Federal Officer, Then The Restrictions Imposed By The State Constitution Do Apply To Him, And Evidence Seized In Violation Of The State Constitution Will Not Be Admitted In State Court Trials.**

As noted previously, under RCW 9.73.030 and .050, when federal agents operating in Washington State violate the Privacy Act, the evidence they gather must be suppressed, even though no Washington law enforcement officer had anything to do with the statutory violation:

*[S]ince the federal agents failed to comply with the state statutory requirement of obtaining judicial approval prior to intercepting or recording private telephone communications or private conversations with the consent of only one of the parties to the conversation (RCW 9.73.030), the tape recordings are inadmissible in these state court proceedings.* RCW 9.73.050.

*Williams*, 94 Wn.2d at 541 (emphasis added).<sup>79</sup>

In this case, it is undisputed that the federal agents violated the Privacy Act. Indeed, they deliberately violated it, seeking the permission of a supervising federal agent to engage in “otherwise illegal activity.” Therefore, if Petitioner’s trial attorney had simply made a motion to suppress under that statute, the evidence would have been suppressed for violation of the Privacy Act.

In addition to the statutory basis for suppression, the admission of the recordings also violated the state constitutional guarantee of privacy

protected by article I, § 7 in this case. But when the issue is whether evidence gathered in violation of a state constitutional provision is admissible in state court, the Washington Supreme Court has held that the critical factor is whether any state officer participated in, encouraged, requested, or assisted any federal officer in an evidentiary seizure which violated a provision of the state constitution. In this case, Petitioner easily satisfies that additional requirement to prove a constitutional violation, because it is undisputed that a state officer – Carver – was fully involved in the warrantless recording of private conversation.

This requirement is set forth in *In re Restraint of Teddington*, 116 Wn.2d 761, 808 P.2d 156 (1991). In that case, federal military officers seized evidence in a manner that arguably violated *Washington Constitution*, art. I, § 7. The *Teddington* Court approved of the prior decision in *State v. Gwinner*, 59 Wn. App. 119, 796 P.2d 728 (1990), which held “that evidence which is *independently* and lawfully obtained by federal officers acting pursuant to federal law may be transferred to state authorities for use in a Washington State criminal proceeding.” 116 Wn.2d at 772-73 (italics added). However, the *Teddington* Court stressed that there was “an important caveat” to this rule. *Id.* at 774: “[T]he federal officer must not have been acting as an agent for the state at the time the

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<sup>79</sup> See pp. 55-57, *infra*.

officer acquired the evidence.” *Id.* Relying on its earlier decision in *State v. Bradley*, 105 Wn.2d 761, 808 P.2d 156 (1991), the Court noted that ordinarily – absent participation by state officers – state constitutional provisions did not apply to federal officers. *Teddington*, 116 Wn.2d at 772. Because there was nothing to suggest that the federal authorities were acting as agents for the State of Washington, the *Teddington* Court found that art. 1, § 7 simply did not apply to the seizure of the evidence in that case. The *Teddington* Court expressly noted that a different result would be compelled if federal agents violated the Washington Privacy Act. *Teddington*, 116 Wn.2d at 772, n.16.

In *State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2005), this Court confronted the issue of whether art. I, § 7 applied to the seizure of a cheek swab taken by a Florida law enforcement official. This Court held that the evidence was admissible because Washington State officers “did not act as agents or cooperate or assist the foreign jurisdiction” in seizing the evidence. *Id.* at 133. This Court stated the test as follows:

In analyzing the issue of inappropriate assistance and cooperation, our courts have considered whether there was contact between Washington officials and the forum state’s officers before the evidence was obtained. Courts have also considered whether there was evidence of antecedent planning, joint operations, or other cooperative investigation. See *State v. Johnson*, 75 Wn. App. 692, 700-01, 879 P.2d 984 (1994) (inappropriate level of cooperation existed where Washington officers accompanied Drug Enforcement Administration (DEA) agents to defendant’s property, took aerial photographs at DEA’s request and turned

photographs over to the DEA).

Where the officials of the foreign jurisdiction gathered evidence independently and then contacted Washington police officers, our courts have concluded there is not an inappropriate level of cooperation. . . .

*Mezquia*, 129 Wn. App. at ¶¶ 45-46. Similarly, *State v. Johnson* states:

Division One of this court has indicated that the “silver platter” doctrine is subject to a “vital significant condition: that the federal officers acted without the cooperation or assistance of state officers.” *Gwinner*, 59 Wn. App. at 125, 796 P.2d 728 (quoting *Mollica*, 554 A.2d at 1329-30).

*Johnson*, 75 Wn. App. 692, 699, 879 P.2d 984 (1994).

In this case, Detective Carver, a Seattle Police Detective, fully participated in what he explicitly recognized was a crime under Washington state law. Detective Carver signed the admonishment form which stated that Kultin was authorized to engage in this “otherwise illegal activity.” *Trial Exhibit No. 50*. Several months later Carver stated under oath that while he was a Seattle police officer, he was assigned to work full time with the FBI, and that in connection with the Mockovak case “[m]y partner in this investigation is [FBI] Agent Carr; *we have worked closely on this investigation*, and I am familiar with all the files and records to this investigation.”<sup>80</sup> Every single one of the factors mentioned in *Mezquia* as an indicator of state participation is present in

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<sup>80</sup> *Carver’s Application for Authority to Intercept and Record*, at 1-2 (attached to Lobsenz Declaration, ¶ 2) (PRP, Appendix C).

this case: antecedent planning, joint operations, and a cooperative investigation. Accordingly, the silver platter doctrine does not apply, and the restrictions imposed by article I, § 7 of the *Washington Constitution* do apply to the warrantless recording of Mockovak's private conversation.

**d. Mockovak's Private Conversation Was Seized And Recorded Without Authority Of Law, In Violation of Article I, Section 7. Therefore, This Evidence Was Improperly Admitted At His Trial And His Convictions Must be Reversed.**

Art. 1, § 7 provides that "No person shall be disturbed in his private affairs . . . without authority of law." Private affairs are "those privacy interests which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass." *State v. McKinney*, 148 Wn.2d 20, 27, 60 P.3d 46 (2002). RCW 9.73.030 specifically states that a person's private conversation may not be recorded or intercepted without his consent. Therefore, by definition the statutory right to privacy in one's conversations that is conferred by the Washington Privacy Act, is part of every citizen's private affairs which he is constitutionally entitled to hold safe from government trespass.

When asking whether a citizen has been unconstitutionally disturbed in his private affairs, a court asks whether there was any "authority of law" for the intrusion. Authority of law is supplied by a valid warrant or judicial order. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

It is undisputed that Detective Carver and Agent Carr had no authority

of law for the first three recordings of Mockovak's private conversation with Kultin. The whole point of their application to an FBI supervisor for permission to engage in "otherwise illegal activity" was that they did not want to apply for any judicial authority to record these conversations. Therefore, the recordings of Mockovak's conversations with Kultin were made in violation of article I, § 7 and should never have been admitted into evidence at Mockovak's trial. Due to this constitutional error, Petitioner's convictions should be reversed.

**5. BY AUTHORIZING THE VIOLATION OF WASHINGTON CRIMINAL LAW, THE FBI SUPERVISORS OF DETECTIVE CARVER AND AGENT CARR VIOLATED THE TENTH AMENDMENT.**

The federal government has no general power to repeal state criminal laws, or to license anyone to go and violate them. Nevertheless, that is exactly what the FBI officials did in this case.

**a. Promulgation of the Criminal Law Is The Primary Role of State Governments.**

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The core power to make and enforce the criminal law is traditionally reserved to the states. "Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these

crimes, and establishing procedures for criminal trials rests with the States.” *Payne v. Tennessee*, 501 U.S. 808, 824 (1991).<sup>81</sup>

**b. Not Even The President Can Dictate To The States How They Must Go About Enforcing Their Own Criminal Laws.**

In *Medellin v. Texas*, 552 U.S. 491, (2008), the Court *rejected* the federal government’s contention that the President of the United States, acting pursuant to his power to negotiate treaties, could compel the states to change their laws for the prosecution of criminal offenses and require them to allow criminal defendants to litigate claims that their confessions were elicited in violation of the provisions of an international treaty:

Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.

*Medellin*, 552 U.S. at 532. Brushing aside the Government’s citation to prior cases that held that the President had broad powers in the field of foreign affairs, the Court said that “none of [those cases] remotely involved transforming an international obligation into domestic law and thereby displacing state law.” *Id.* at 528.

If the President has no such power, then certainly neither does the

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<sup>81</sup> *Accord United States v. Lopez*, 514 U.S. 549, 561 n.3, (1995) (“Under our federal system, the States possess primary authority for defining and enforcing the criminal

Deputy Agent in Charge of the Seattle FBI Office. Even when acting as a supervisor, this federal officer lacks the authority to grant others permission to violate a Washington criminal statute, RCW 9.73.080, which makes it a gross misdemeanor to record private conversation without either the consent of all parties or without prior judicial approval.

By authorizing federal officers to violate a state criminal law, the FBI sought to deny Petitioner, a citizen of Washington State, the protection of a duly enacted Washington criminal law. This is a paradigmatic violation of the Tenth Amendment. The proper remedy for this violation is to implement the exclusion sanction of RCW 9.73.050, to reverse Mockovak's convictions, and to remand for a new trial at which the recordings will not be admissible in any state court proceeding.

**6. PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL BY HIS ATTORNEY'S FAILURE TO PRESENT EVIDENCE OF MOCKOVAK'S "LEARNED HELPLESSNESS" AND SUGGESTIBILITY, CAUSED BY PROLONGED CHILDHOOD SEXUAL ABUSE, WHICH MADE HIM FAR MORE VULNERABLE TO ENTRAPMENT.**

**a. Mockovak's Counsel Knew That Mockovak Had Been Raped And Abused Repeatedly For Many Years By His Uncle.**

Jeffery Robinson, Mockovak's trial counsel, was well aware of the fact that Mockovak was the victim of many years of ongoing childhood sexual

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law.") (internal quotation marks omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (same); *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (same).

abuse. Robinson specifically argued that this fact should be taken into account at sentencing. The sentencing memorandum that he submitted to the trial judge contained a detailed discussion of the abuse perpetrated against Michael Mockovak and against his three brothers, Paul, Eric and Neil, by their maternal uncle Bruce Vikre:

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

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

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

CP 676. The sentencing memorandum continued:

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

CP 676.

Robinson's sentencing memorandum explained that the uncle's sexual abuse of the Mockovak boys was eventually disclosed by Paul Mockovak to the boys' parents, then to a therapist, and eventually to a social worker who reported the uncle to law enforcement. CP 677. The uncle was arrested and charged with Criminal Sexual Conduct in the First Degree. CP 677. The uncle plead guilty in 1977. CP 677.

When Minnesota investigated the uncle's conduct, they interviewed the three youngest boys, Paul, Eric, and Neil. Michael by that time was no longer living in the family home. The three brothers provided detailed accounts of the abuse to the Minnesota authorities. Paul, for example, was 17 when he gave his handwritten statement in which he described the abuse. This is an excerpt from Paul's account:

Soon after, during our full sexual contacts over the years, we would masturbate one another to ejaculation, the next step was, with his guidance, was fellatio (Blowjobs) for each other – until ejaculation. Then again with his guidance, we committed anal

sodomy upon each other with the use of hand lotion as lubrication. I recall doing this to him only twice – ejaculating once. I recall him doing this to me several times. He would ejaculate each time.

The above sexual acts between my Uncle Bruce and me took place between the summer of 1974 and the spring of 1976 . . . .

*Second Decl. of Lobsenz*, ¶ 8 (Appendix B).

The two youngest brothers, Eric and Neil, were 14 and 12 when they gave their statements to law enforcement. They also described similar abuse, including anal rape, in graphic language. *Id.* Neil explained that these sex acts would occur “[j]ust about every night.” *Id.*

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

years old and continued until Michael was approximately 16 years old.”

*Second Decl. Lobsenz, Appendix C.*

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

Attorney Robinson did seek out and obtain the expert opinion of Jon R. Conte, Ph.D., regarding the long-term adverse effects of being a victim of childhood sexual abuse. In his sentencing memorandum, Robinson told the sentencing judge that Conte had advised him that the ramifications of childhood sexual abuse continue into adulthood:

Taken as a corpus of research and other evidence, there is simply no question that sexual assault can be a profoundly negative experience for the victim with significant immediate and long term impact on virtually every aspect of life.

CP 681 (quoting “Disclosure of Dr. Conte” attached to the sentencing memorandum as Exhibit D). Robinson also cited the sentencing judge to a reported opinion (later withdrawn) which recognizes the devastating long-term effects of childhood sexual abuse. CP 683.

But despite the fact that Robinson knew about Mockovak’s childhood sexual abuse, and knew that such abuse has devastating long term adverse

effects on the victim which carry over into adulthood, Robinson never presented any evidence of the childhood sexual abuse to Mockovak's jury.

**b. Two Of The Long-Lasting Adverse Psychological Effects Caused By Being The Victim Of Childhood Sexual Abuse Are "Learned Helplessness" And Suggestibility.**

"In almost every case of child sexual abuse, the abuser is older, more powerful, and uses either seductive or coercive techniques to assure the child acquiesces to the abuse and refrains from reporting the assaults." *Decl. William Foote, Ph.D.*, ¶ 4. "These techniques effectively make the child helpless to avoid the abusive situation, and helpless to escape it once it starts. When this happens over and over again, the child learns to be helpless . . . ." *Id.* "This phenomenon has been termed 'learned helplessness' (Peterson & Seligman, 1983)." *Id.* <sup>82</sup>

"Learned helplessness" becomes part of the child's personality. *Id.*, ¶ 5. Research shows that it makes the victim significantly more prone to subsequent victimization. *Id.*, ¶¶ 5, 6. One study of child sex abuse victims shows they exhibit higher levels of learned helplessness than

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<sup>82</sup> That term was coined by the American psychologist Martin Seligman and grew out of his research conducted at the University of Pennsylvania in 1967. Seligman accidentally discovered that the conditioning of an animal repeatedly exposed to a painful stimulus that it cannot escape leads to the development of learned passive behavior. Eventually the animal will stop trying to avoid the painful behavior and will act as if it is utterly helpless to change the situation. But when opportunities are then presented to escape the painful stimulus, this learned helplessness prevents the animal from taking any action to escape. Thus the animal develops a coping mechanism for dealing with discomfort by not expending any energy getting worked up about the painful stimulus. [http://en.wikipedia.org/wiki/Learned\\_helplessness](http://en.wikipedia.org/wiki/Learned_helplessness).

would be expected in a normal population. *Id.*, ¶ 7. “[H]aving ‘learned’ as a child that there is no escape from sexual abuse, adult victims, who may actually have the wherewithal to escape the situation, continue to apply the lesson to other types of victimization.” *Id.*, ¶ 7. Therefore, adult survivors of childhood sexual abuse find it much harder to be assertive in their relationships with other adults. *Id.* Research shows that they are more susceptible to suggestion and influence by others. *Id.*, ¶ 8.

c. **An Adult Who Was Sexually Abused As A Child Is More Vulnerable To Entrapment.**

In later adult life, a sexually abused child is more likely to become a victim of entrapment, because the childhood abuse predisposes him to meet both prongs of the statutory definition (in RCW 9A.16.070) 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 (e.g., Bargai, Ben-Shakhar & Shalev, 2007); Walker & Browne, 1985) indicates that the impact of learned helplessness is to keep a person who is being victimized in that situation, even when the situation becomes life-threatening. *It is this very passivity that would cause a man to stay in a situation in which he is being importuned to commit a crime he might not otherwise commit.* It is the learned helplessness which would prevent a man from leaving a situation which he found counter to his own values and desires.

*The second leg of the test, which focuses on the inducement of defendants to commit crimes they might not otherwise commit*

*relates to the psychological process of suggestibility* (Gudjonsson et al., 2007; Gudjonsson et al., 2008). Suspects' suggestibility has been implicated as a factor in false confessions (Kassin et al., 2010). In the context of custodial interrogations, suspects who falsely confess not only agree to facts which they know[] are untrue, but may even actively enter into the process of writing falsely inculpatory statements. In the same way, *the heightened suggestibility of child sexual abuse survivors would cause them to actively engage in criminal activity that they might not otherwise do*. This is especially true in the context of repeated contacts with a highly influential individual who is suggesting the offense.

*Decl. Foote, ¶¶ 10-11* (emphasis added).

Thus, because of their “learned helplessness” and their suggestibility, an adult who was a victim of childhood sexual abuse is likely to be significantly more prone to being a victim of entrapment.

**d. Mockovak's Attorney Made No Attempt To Present Evidence Of Mockovak's Childhood Sexual Abuse To The Jury, And To Explain Why The Abuse Made Him Exceptionally Vulnerable To Entrapment.**

In the present case, Robinson was aware of the fact that Mockovak felt pressured to go ahead and approve use of the “Russian Mafia” that Kultin had contacted regarding the killing of Dr. King, because Kultin's remarks made Mockovak afraid that the Russian Mafia would “come after your family,” and although they “probably won't kill us, they'll fucking, you know . . .” if he didn't go through with the plan to hire them to kill King.

*Tr.* 8/11/09 at 61; *Tr.* 11/6/09 at 86.<sup>83</sup> Indeed, Robinson specifically argued to the trial judge that the conduct of informant Kultin was outrageous, precisely because he made such a threat regarding what would happen to Mockovak if he didn't go ahead with the plan.

Despite the fact that trial counsel knew that evidence of a diminished capacity to resist entrapment was available, Mockovak's attorney never attempted to present this evidence to the jury. Thus, the jurors – the people who were deciding the merits of the entrapment defense – never heard anything at all about Mockovak's childhood sexual abuse, or about its long-term effects.

- e. **Defense Counsel Mistakenly Believed That Under Washington State Law, In Order To Assert The Defense Of Entrapment The Defendant Had To Admit That He Committed The Offense, And That Mockovak Could Not Simultaneously Present Both A Diminished Capacity And An Entrapment Defense.**

The inevitable question thus arises: Why didn't trial counsel present such evidence to the jury? The answer is twofold. First, Mockovak's attorneys mistakenly believed that it was not possible to present an entrapment defense and a mental illness defense at the same time. Robinson thought that in order to present an entrapment defense, the defendant had to *admit* that he committed the offense. We know this

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<sup>83</sup> Kultin also told Mockovak that if a person falsely claimed to know a Russian Mafia boss when he did not really know him, the boss would come after his family. *Tr.* 8/11/09,

because attorney Robinson *said* this to Judge Robinson in the course of his argument in support of his motion for dismissal of the state court proceedings:

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

RP 12/6/10, at 15, *ll.* 10-12.

Robinson's co-counsel Colette Tvedt *also* was under the mistaken impression that Mockovak could not present two defenses at the same time; she told attorney Ronald Marmer that Mockovak had to choose *between* the defenses of diminished capacity and entrapment.

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

*Decl. Marmer*, ¶ 14.

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

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at 61.

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

*Matson* failed to distinguish circumstances where a defendant admits that the *activity* on which a charge is based took place, from circumstances where a defendant actually admits to committing the crime as charged. In fact, earlier cases refer not to the “crime” charged but to the “act” charged. The distinction between denying that an event occurred and denying that the event resulted in criminal liability is critical . . . . *Matson* and *Draper*<sup>[84]</sup> thus do not require a defendant to admit either the crime itself or all of the elements of the crime before being entitled to an entrapment instruction.

*Galisia*, 63 Wn. App. at 836-37. *Accord Mathews v. United States*, 485 U.S. 58, 62 (1988) (“We hold that even if the defendant denies one or more of the elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.”); *State v. Frost*, 160 Wn.2d 765, 772, 161

P.3d 361 (2007).

Thus, under Washington law (and federal law) it is permissible to assert the entrapment defense *without* admitting that the defendant committed the crime charged. A defendant may, therefore, simultaneously assert both that he had a mental illness or defect which affected his ability to form the mental state necessary to commit the offense, and the defense of entrapment. Robinson's belief that he would not have been allowed to do this is clearly wrong, and thus any so-called strategic decision predicated upon such a belief is objectively unreasonable and constitutes deficient conduct. *Reichenbach*, 153 Wn.2d at 130.

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

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

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

During one of our face-to-face meetings when Ms. Tvedt was discussing the entrapment defense with me, I asked her if entrapment was a subjective or an objective inquiry. ***She told me***

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<sup>84</sup> *State v. Draper*, 10 Wn. App. 802, 521 P.2d 53, *rev. denied*, 84 Wn.2d 1002 (1974).

*that it was a subjective inquiry.* She said that while some states used an objective test, Washington State used a subjective test.

*Decl. Marmer, ¶ 15 (emphasis added).*

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

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

*Decl. Marmer, ¶ 16.*

Ms. Tvedt was correct. In Washington the test for entrapment is a subjective test. “The statute [RCW 9A.16.070] thus constitutes a restatement of the subjective test of entrapment as applied by both the federal and Washington state courts.” *State v. Lively*, 130 Wn.2d 1, 10, 921 P.2d 1035 (1996). “The subjective test focuses on the issue of whether *the defendant* was predisposed to commit the crime.” *Id.*, at 10 n.2 (emphasis added). It is *not* a test of whether a reasonable person would have been entrapped, as attorney Robinson mistakenly believed.

- g. **The Failure To Present Evidence Of A Diminished Capacity To Resist Entrapment Due To “Learned Helplessness” That Is Created When Children Are Subjected To Sexual Abuse Was Both Deficient Conduct And Prejudicial.**

In sum, there was no conceivable tactical reason for failing to present evidence of learned helplessness and Mockovak's experience as a victim of years of childhood sexual abuse – repeated rape and other forced acts of depravity by his uncle. Trial counsel mistakenly believed that they had to choose between entrapment and diminished capacity because they are supposedly inconsistent. They were wrong. *Mathews*, 485 U.S. at 66;<sup>85</sup> *Frost*, 160 Wn.2d at 772.<sup>86</sup>

In this case, the diminished capacity evidence would not have contradicted the other defense of entrapment. On the contrary, the two were entirely consistent. The learned helplessness made Mockovak more vulnerable to entrapment. The failure to present this evidence was deficient conduct, because no criminal defense attorney would choose to refrain from presenting evidence which strongly supported the main defense of entrapment. The attorneys' failure to present the diminished capacity evidence was based on a mistaken understanding of the law, a misunderstanding that basic legal research would have revealed.

Given the strength of the entrapment defense which Mockovak's attorneys did present, the fact that the jury acquitted Mockovak of the

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<sup>85</sup> "We are simply not persuaded by the Government's arguments that we should make the availability of an instruction on entrapment where the evidence justifies it subject to a requirement of consistency to which no other such defense is subject."

<sup>86</sup> "[I]t is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence."

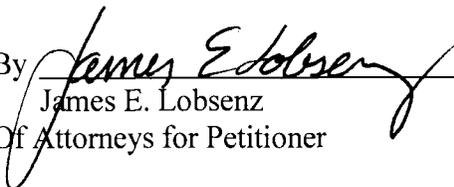
charge of soliciting Klock's murder, and the fact that several jurors were of the view that the informant put considerable pressure on Mockovak to approve the hiring of the (fictional) hit men, it is also clear that had the diminished capacity evidence been presented, there is a reasonable probability that the trial would have had a different outcome.

**G. CONCLUSION**

For the reasons stated above and in the direct appeal, petitioner asks this Court to vacate his convictions and to direct that Petitioner be released from all restraint imposed as a result of those convictions.

DATED this 5<sup>th</sup> day of October, 2012.

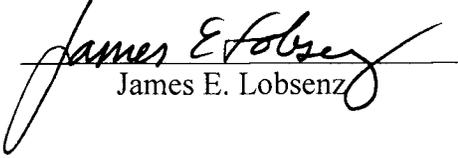
CARNEY BADLEY SPELLMAN, P.S.

By  \_\_\_\_\_  
James E. Lobsenz  
Of Attorneys for Petitioner

**AFFIRMATION**

I, JAMES E. LOBSENZ, hereby affirm that I am counsel for petitioner, that I have read the foregoing petition, know its contents and I believe the petition to be true.

DATED this 5<sup>th</sup> day of October, 2012.

  
James E. Lobsenz

**VERIFICATION**

I declare that I received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

DATED this \_\_\_\_ day of September, 2012.

A handwritten signature in black ink that reads "Michael Mockovak". The signature is written in a cursive style with a horizontal line underneath it.

Michael E. Mockovak

NO. 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

In re the Personal Restraint of,

MICHAEL EMERIC  
MOCKOVAK,

Petitioner.

DECLARATION OF JAMES E.  
LOBSENZ

RECEIVED  
JUL 10 2012  
CLERK OF COURT  
JL

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

1. I have personal knowledge of the facts set forth here.
2. I am petitioner Mockovak's counsel of record in this PRP proceeding and also in his direct appeal.
3. Petitioner was represented at trial by three attorneys from the law firm of Schroeter Goldmark & Bender ("SGB"): Jeffery P. Robinson, Colette Tvedt and Joseph Campagna. I made a request that they provide me with copies of all of their email correspondence with Petitioner Mockovak. (Copy attached as Appendix A). They were very cooperative and agreed to provide me with that correspondence. Ms. Andrea Crabtree,

a paralegal employed by SGB, sent me a computer disk that contained all the requested email correspondence which SGB possessed.

4. As Ms. Crabtree sent me an email on May 11, 2012 (copy attached as Appendix B) in which she said that she will be sending me a disk that “will contain 148 emails from Joe Campagna’s computer and 282 from my computer. These emails are either to or from Michael Mockovak ([mikemock410@gmail.com](mailto:mikemock410@gmail.com)). Colette’s computer crashed and had to be replaced so I still need to search her computer. Jeff reports that he doesn’t have any emails left on his machine.”

5. I have not been given any explanation as to why Mr. Robinson “doesn’t have any emails left on his machine” and can only assume that this means that at some point in time these emails were deleted from his computer.

6. I received the promised computer disk on May 11, 2012.

7. I have reviewed all of the emails on that disk.

8. One of the issues raised in the PRP is whether trial counsel should have made a motion to suppress the recorded conversations between Petitioner and the FBI informant Daniel Kultin on the grounds that they were recorded in violation of Washington’s Privacy Act which governs the recording of private conversations. In his declaration, trial counsel Jeffery P. Robinson has stated that he considered making such a motion, believed

he could win it and achieve suppression of the conversations, and that he made a deliberate tactical decision not to make such a motion. Mr. Robinson says that petitioner was aware of this decision that he made. But in his declaration, Dr. Mockovak says he was not aware of this decision, and that he was not even aware of the fact that a motion to suppress the recorded conversations was even a possibility.

9. Given the existence of this factual dispute, I searched through all of the emails supplied to me by the SGB law firm, to see if I could find any email which made any reference to such a decision made by Mr. Robinson, or to the possibility of making a motion to suppress based upon the Washington Privacy Act, RCW 9.73.010 *et seq.*

10. I found no such email. None of the emails supplied to me by the SGB law firm make any reference to the possibility of making a motion to suppress on this ground. None of the emails make any reference to any strategic decision being made to forego the making of a motion to suppress. None of the emails make any reference to any of the following general subjects: the Washington Privacy Act; the admissibility of recordings of private conversations in Washington State courts; the illegality (under Washington State law) of recording private conversations without prior judicial approval; or the differences between Washington

State law and federal law on the subject of the admissibility of recorded conversations.

11. Dr. Mockovak had a laptop computer which he used during the years 2009-2011 (up until the time he was taken into custody on February 3, 2011 when the jury returned its verdicts finding him guilty of some of the charges against him). This laptop computer was in the possession of Dr. Mockovak's friend Mr. Ron Marmer. Mr. Marmer sent me copies of all of the emails between Dr. Mockovak and any members of the SGB law firm which were on that laptop. I searched through all of those emails as well.

12. As with the emails I obtained from the SGB firm, I searched through all of the emails that were on Dr. Mockovak's computer to see if I could find any email which made any reference to such a decision made by Mr. Robinson, or to the possibility of making a motion to suppress based upon the Washington Privacy Act. Again, I found no such email.

13. None of the emails between Dr. Mockovak and SGB personnel, which were obtained from Dr. Mockovak's laptop computer, make any reference to the possibility of making a motion to suppress the recorded private conversations between Dr. Mockovak and the FBI informant Daniel Kultin. None of these emails make any reference to any strategic decision being made by Mr. Robinson to forego the making of such a

motion to suppress. None of these emails make any reference to any of the following general subjects: the Washington Privacy Act; the admissibility of recordings of private conversations in Washington State courts; the illegality (under Washington State law) of recording private conversations without prior judicial approval; or the differences between Washington State law and federal law on the subject of the admissibility of recorded conversations.

14. I also asked the attorneys at SGB to provide me with their legal research files and Ms. Crabtree provided me with a computer disk which contained those materials. I searched this disk to see if there was any legal research done on the general subject of the Washington Privacy Act. I found that there was nothing in the legal research file on this subject. There were no cases on this subject, no copies of any of the statutes which comprise the Washington Privacy Act, no memoranda analyzing or discussing the possibility of making any motion to suppress pursuant to the Act, and no attorney notes on any of these subjects.

15. However, I did find a few emails that made reference to the general question of whether or not Dr. Mockovak would be better off if the case against him were tried in federal court, rather than in state court.

16. For example, I found an email dated November 20, 2010, sent by Dr. Mockovak to all three of his SGB attorneys, in which he commented

on the draft of the defense motion to dismiss which his attorneys were about to file in state court. That motion, which was eventually argued to Judge Palmer Robinson on December 1, 2010, complained about the federal government's refusal to provide requested records needed by the defense. In that motion the SGB attorneys argued that if the federal authorities did not provide the discovery materials which the defense had requested, that Judge Robinson should enter an order dismissing the charges pending in state court, which would leave law enforcement with the option of seeking an indictment and charging Dr. Mockovak in federal court. In his November 20, 2010 email (copy attached as Appendix C), Dr. Mockovak told his attorneys that he liked the draft of the defense motion and he complimented them on the clarity of the brief.

17. I also found an email from Dr. Mockovak to attorneys Campagna and Tvedt, dated November 22, 2010 (attached as Appendix D). In that email, Dr. Mockovak asks questions regarding what will happen if the state court judge grants their motion to dismiss when it is argued. (It was originally scheduled to be argued on December 1 but the argument was later rescheduled to December 6<sup>th</sup>). This email shows that Dr. Mockovak clearly understood that if the motion was granted, he would be charged in federal court, and he wondered what kind of bail conditions might be set by the federal court. That email states in part:

I have a couple of questions which assume that we receive a favorable outcome on Dec. 1.

The hearing starts at 1:30. If we win and I am arrested again, will I likely spend another night in jail? Longer?

In the event I am arrested by the Feds, I assume there would be a bail hearing in Federal Court. I would [sic] bail conditions to change . . .

*Email of November 22, 2010 (Appendix D).*

18. On December 6, 2010, Dr. Mockovak sent an email to one of his civil attorneys, and sent a copy of it to SGB attorney Joe Campagna. This email (copy attached as Appendix E) describes what happened on December 6, 2010 when the defense motion to dismiss was argued in state court. This email again demonstrates that Dr. Mockovak expected to be charged and tried in federal court if the motion – which, as noted in Appendix C, he liked very much – was granted:

My criminal team filed a motion to dismiss which argues that the FBI's actions force me to decide between proceeding to trial without adequately prepared attorneys or waiving my right to a speedy trial. While the court cannot compel the FBI to turn over evidence, the court can dismiss the case. The motion also laid out what evidence we are requesting and why it is relevant. The motion also stated that ***if the State dismisses the case, the federal government will likely arrest me and the case would shift to federal court.***

*Email of December 6, 2010 (Appendix E) (emphasis added).*

19. The state court judge deferred making any decision on December 6<sup>th</sup> and set another hearing for December 13<sup>th</sup>. At 8:45 a.m. on Saturday, December 11<sup>th</sup>, Dr. Mockovak sent another email to SGB attorneys Jeff Robinson and Joe Campagna. In this email he clearly expressed his continued desire to be tried in federal court and stated that “we” decided it would be better for the case against him to be tried there:

Hi Jeff and Joe,

Prior to filing the motion to dismiss, we weighed the pro’s [sic] and cons of being in Federal vs. State court. ***We decided there is a big advantage in being in Federal court and I still think that advantage applies. . . .***

*Email of December 11, 2010, 8:45 a.m.* (Appendix F) (emphasis added).

20. In this particular email Dr. Mockovak summarizes why he does not trust the federal government to act fairly and honestly as long as the case remains in state court where the state court trial judge is unable to enforce any order against federal law enforcement officials. Dr. Mockovak concludes that unless they get the state court case dismissed and the trial shifted to federal court, the federal government will continue to obstruct justice:

The events between the hearings on December 6<sup>th</sup> and December 13<sup>th</sup> demonstrate bad faith on the part of the Federal government. In court on the 6<sup>th</sup>, AUSA Kipnis argued that the defense had not demonstrated that certain documents existed. This argument was designed to call into question the existence of such documents, when the

government itself knew full well that the documents existed. In court Judge Palmer-Robinson was able to elicit as much from Kipnis regarding the existence of original agent notes. The government then argued that the FBI is a cumbersome Federal organization and it would take time to process the request. Again, when pushed in court the Federal Government suddenly announced that it could have the items in a week. The FBI then turned over some documents three days later. Rather than showing good faith, these events show that the government acted in bad faith by delaying over nine months the turning over of documents to the last possible minute. Only after realizing it may lose a court motion did the government remit material. (One could make a broader argument here. Attorney Kipnis mentioned in court that it has encountered this argument frequently in court, although not presented as eloquently as Jeff did. This statement reveals that the government routinely denies access to documents and only by dismissing this and all similar cases can this prejudicial practice be halted. I don't know whether this would be helpful to me.) ***If the case continues in State court, the government has demonstrated that it will to the full extent possible continue to impede justice because, in the absence of a dismissal there are zero negative repercussions to the Federal Government.***

*Email of December 11, 2010, 8:45 a.m. (Appendix F) (emphasis added).*

21. Dr. Mockovak expressed his desire to press hard by demanding that the federal government produce *all* the documents requested by the defense, including an FBI manual on how agents should manage confidential informants.<sup>1</sup> He explained that he *wanted* the FBI to refuse

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<sup>1</sup> In the first paragraph Dr. Mockovak's email states: "I spoke with Joe briefly on Thursday and he indicated that if all that is withheld from the judge is the manual, we will lose the motion. I don't want to give up so quickly." (Appendix F). Ultimately, attorney Robinson decided, against Dr. Mockovak's wishes, not to insist on obtaining a copy of this manual.

to produce all the relevant documents, because he believed that such a refusal would lead the state court judge to dismiss the state court case, and then he would be tried in federal court *which is where Dr. Mockovak wanted the case to be tried:*

Colette has urged me not to play lawyer and I don't mean to do that. However, I do want to discuss the strategy and reasons behind it, before the last hour on Monday. And I want to weigh in given the importance of this hearing to my entire life. ***I still think that the burden of proof shift in Federal court is an advantage that outweighs the differences in State versus Federal prosecution teams.***

*Email of December 11, 2010, 8:45 a.m. (Appendix F) (emphasis added).*

22. Later that same morning, Dr. Mockovak sent another email to his SGB attorneys, and in it he reiterated that he did not want to make any compromises and wanted to insist on obtaining all the requested documents including the FBI manual:

***I don't want to give up on the motion to dismiss if the FBI has withheld the Manual from the Court*** (see my later email from this morning). ***I don't want to give up even if they did give the Court the Manual.*** The deadline for turning materials over to the court was 4:00 on Friday. Do you know, finally, what the FBI labeled as evidence that exists and that they were not giving to the court for in camera review?

*Email of December 11, 2010, 10:40 a.m. (Appendix G) (emphasis added).*

23. After reviewing all of the emails, I could not find any attorney response to either of Dr. Mockovak's December 11, 2010 emails. In the

first one Dr. Mockovak asserted that “*We decided there is a big advantage in being in Federal court*” (Appendix F), and so far as I have been able to discover, neither attorney Robinson nor attorney Campagna sent him back any email stating that they disagreed with that statement, or that he had changed his mind and now felt that Federal court was not the place to be.

24. This expression of Dr. Mockovak’s emphatic desire to be in federal court, and the failure of SGB attorneys to express any disagreement with this preference for federal court, provides strong circumstantial corroboration for Dr. Mockovak’s assertion that he was never told anything at all about the possibility of making a suppression motion that, if successful, would have resulted in the case being tried in federal court.

25. Furthermore, even after attorney Robinson withdrew the motion requesting that the state court dismiss the charges thereby relegating law enforcement with the alternative of prosecuting in federal court, Dr. Mockovak continued to press his attorneys to continue to make discovery requests for materials in the hands of the FBI.

26. On December 31, 2010, Dr. Mockovak sent his attorneys an email asking them to make a demand to be provided with all internal FBI documents that discuss in general the CHS [Confidential Human Source]

requirement for promotion. I'd also like to see all specific documents, performance reviews, written letters discussing or awarding the promotion, etc." *Email of December 31, 2010, 11:28 a.m.* (Appendix H). He asked his attorneys to ask the trial judge to issue a subpoena to the FBI demanding these documents, and suggested that they "[a]sk for a three day or so turn around *at which point she can rule on the motion to dismiss.*" *Id.* (emphasis added). Dr. Mockovak went on to explain his thinking that "there is no down side. *If we don't ask for this we end up in state court.* If we do ask for it and we are denied, we end up in state court with perhaps a stronger argument for appeal." *Id.*

27. In the same email Dr. Mockovak pointed out that since they had now conducted defense interviews of the FBI agents (they were conducted on December 29, 2010), there was even less reason to hesitate about moving for a dismissal of the case in state court:

I understand that prior to the FBI interviews, if we had asked for a ruling on the motion to dismiss, we would have lost the opportunity to interview the agents. That time has passed. *We have already interviewed the agents and have received all we were going to get from the FBI. Asking for more information doesn't hurt us. If the FBI refuses to give us the information, we ask Judge Palmer Robinson to rule on the motion to dismiss.* I think there is a persuasive argument that I am entitled to this information, and I don't think the judge will be sympathetic to the FBI if they refuse to turn it over.

I'd also like to discuss this with Ron on the phone from your office on Monday morning . . .

*Email of December 31, 2010, 11:28 a.m. (Appendix H).*

28. Later that same day Dr. Mockovak sent a second email, reiterating his desire to demand more documents from the FBI, thereby setting up a motion to dismiss if the FBI refused to produce. Once again, he stressed the fact that it was a “no-lose” situation because if the state trial court judge denied the motion to dismiss, at least he would have an appeal issue for state court, and if it granted the motion, the only option law enforcement would have left would be to indict him, and if it did decide to indict him:

***We are in federal court with the advantages below.***

I just don't see a downside in any of the possibilities. Nor do any of the possibilities negatively affect other preparation and arguments in the case.

***If you were to tell me that my chances are better in state court, that would influence my thinking.*** Yesterday I asked both Colette and Joe to handicap my chances in state court and they (understandably) didn't do that. From my own medical practice I know the difficulty of handicapping. ***I'm left comparing the maximum sentences – 15 years in State prison versus five years in Federal. I'm also left looking at the burden of proof on me in state court to prove entrapment by a preponderance of the evidence, versus federal court where the government has to prove beyond a reasonable doubt that entrapment did not occur. The advantages of Federal court seem large.***

*I welcome discussion on these specific points. . . .*

*Email of December 31, 2010, 4:47 p.m. (Appendix I) (emphasis added).*

29. In my review of all the emails made available to me, I could not find any email which responded to either of Dr. Mockovak's December 31, 2010 emails. Nor could I find any email from any SGB attorney which disagreed with Dr. Mockovak's assessment that he had a better chance of winning at trial if trial were held in federal court.

30. When the state court trial was over, at Dr. Mockovak's sentencing hearing, attorney Robinson forcefully expressed his agreement with Dr. Mockovak's assessment of what probably would have happened had the case been tried in federal court. Mr. Robinson told the sentencing court that the different burden of proof rules meant the difference between "going home [i.e., getting acquitted] if you get tried at 7<sup>th</sup> and James -- excuse me -- at 7<sup>th</sup> and Stewart and going to prison if you get tried at Third and James . . . ." *Transcript of March 17, 2011*, at p. 114.<sup>2</sup>

31. Even while his state court trial was underway, Dr. Mockovak continued to ask his attorneys to press for more material from the federal government (specifically records that would show that in order to obtain a promotion FBI Agent Carr needed to successfully recruit and use Daniel

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<sup>2</sup> Third and James is the address of the King County courthouse where Dr. Mockovak's state court trial was held. Seventh and Stewart is the address of the federal courthouse

Kultin as a confidential human source) so that they could use an FBI refusal as grounds for a new motion for state court dismissal of the charges. On January 21, 2011, he sent his attorneys an email thanking Mr. Robinson for agreeing to ask Judge Palmer Robinson to sign a subpoena instructing the FBI to turn over documentation about Agent Carr's performance and the FBI's criteria for advancement. *Email of January 21, 2011* (Appendix J).

32. On the morning of January 26, 2011, Dr. Mockovak emailed his attorneys as follows:

As I discussed yesterday, I very much want to ask Judge Palmer-Robinson to sign a subpoena requesting the information from the FBI I described in my email dated January 21<sup>st</sup>. We are running out of time. Can this request be made this morning?

*Email of January 26, 2011* (Appendix K).

33. Later that day he again emailed his attorneys, asking: "Any progress on getting the subpoena? We are running out of time." Second *Email of January 26, 2011* (Appendix L).

34. Three days later, he sent his attorneys yet another email on the same subject:

When Jeff, Ron Marmer and I last discussed the issue of requesting that the court sign a subpoena requesting the FBI turn over information related to agent Carr's

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where federal criminal trials are conducted before the United States District Court for the Western District of Washington.

promotion, Jeff said he would do this. This has not yet been done.

*Email of January 29, 2011 (Appendix M).*

35. Moreover, in his January 29<sup>th</sup> email, he suggested that if the FBI failed to turn over the subpoenaed documents by Tuesday, February 1<sup>st</sup>, that the defense should make a motion for dismissal of the case:

I want the judge to be presented with a subpoena for her signature. I don't want Jeff in open court to minimize in any way the potential importance of this information. I don't want any compromise made with the FBI to limit the information I want to see. Jeff can argue that because the FBI has not been forthcoming, he has reason to believe there may be exculpatory information in the items requested. If the judge signs the subpoena, we can request a 24 hour recess in which the FBI can hand over the information and we can resume. If the judge does not sign the subpoena, I will have a basis for appeal. ***If the FBI has not turned over the information by Tuesday morning, we ask the judge to dismiss the case.*** If she refuses to dismiss the case, I have an argument for appeal.

*Email of January 29, 2011 (Appendix M) (emphasis added).*

36. In sum, after reviewing all of the email correspondence that was made available to me by the SGB law firm, and all of the email correspondence that was on Dr. Mockovak's laptop computer, I was unable to find any document that supports the contention that Mr. Robinson told Dr. Mockovak that it was possible to make a suppression motion to suppress the tapes. I was unable to find any document that

supports the contention that Mr. Robinson told Dr. Mockovak that he had decided that he wanted to keep the case in state court.

37. At my request, Dr. Mockovak's trial attorneys sent to me copies of their billing records which itemize the hours they spent and the services they performed while representing Dr. Mockovak. Since Mr. Robinson has stated in his declaration that Dr. Mockovak "was aware" of his strategic decision not to make a motion to suppress the recorded conversations, and since Dr. Mockovak has strenuously denied being aware of this, I decided to look at the billing records to see what they showed regarding the extent of communication between Dr. Mockovak and the three attorneys (Robinson, Tvedt and Campagna) at SGB who represented him in this matter.

38. First, the billing records clearly demonstrate that the attorney who had the most communication and contact with Dr. Mockovak was Mr. Campagna. Over the course of a bit more than a year, from the time of Dr. Mockovak's arrest in November of 2009, through to the end of December 2010, Mr. Campagna met regularly with Dr. Mockovak. In 2009, Mr. Campagna met with Dr. Mockovak in person on November 19, 20, 23 and 30; and he spoke to Dr. Mockovak on the phone on December 1. In the following year, 2010, Mr. Campagna met in person with Dr. Mockovak on March 24; April 15, 30; May 7; June 1; July 2, 20; August 17, 23, 27;

September 2, 3, 13, 14, 15, 16, 28, 29; October 6; November 1; and December 13, 14, 15 and 30. He also spoke to Dr. Mockovak by phone on August 3; and December 8, 27 and 29; and he emailed him on December 31<sup>st</sup>. All told, attorney Campagna spent a total of 71.1 hours communicating with Dr. Mockovak between the time he first hired the SGB law firm and the time his trial started.

39. Attorney Colette Tvedt had the next most contact with Dr. Mockovak. In 2009, she met with him in person on December 1, 8, 16, and 21. She had telephone contact with him in 2009 on December 23 and 31. In 2009 she met Dr. Mockovak in person on January 4, 6, 26, 27 and 29; February 4; March 12; April 15; June 1; July 2 and 14; August 17, 20 and 23; September 13 and 21; October 18 and 20; November 1; and December 15 and 30. She also had telephone contact with Dr. Mockovak in 2009 on December 23 and 31; and in 2010 on January 12, February 5, 11, 16, 23, and 24; March 1; June 1; July 9 and 19; September 27; October 26; and November 2. Counting conservatively, the billing records document the fact that attorney Tvedt spent at least 41.9 hours of time<sup>3</sup> communicating with Dr. Mockovak.

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<sup>3</sup> On some of the dates for which Ms. Tvedt made time entries, she listed only the total time spent on multiple tasks without itemizing how much she spent on each task. The total time for these entries was 32.3 hours. It is not possible to discern exactly how much of these 32.3 hours was spent meeting with or talking to the client. Thus, for purposes of this declaration, I did not include any of this time. But it is certainly

40. Of the three SGB attorneys, Mr. Robinson spent the *least* amount of time meeting with, or speaking by phone with Dr. Mockovak. So far as his billing record time entries show, over the thirteen month time period from November of 2009 through December of 2010, Mr. Robinson spent a total of 20.6 hours communicating with Dr. Mockovak. Nearly half of this total time was in the first three months of the representation of Dr. Mockovak, between November 14, 2009 and February 4, 2010.<sup>4</sup> After February 4, 2010, there is a large gap, and Mr. Robinson's next documented meeting with Dr. Mockovak does not come until November 1, 2010. After that there is no documentation of any contact between Mr. Robinson and Dr. Mockovak until mid-December of 2010, when there are meetings on three successive days: December 13, 14 and 15. After that, at least so far as the billing records show, there are no meetings and no phone contacts between Mr. Robinson and Dr. Mockovak.

41. The same pattern emerges when total hours for all attorney services are considered. Of the three attorneys, Mr. Robinson spent the least amount of time working on Dr. Mockovak's case. The SGB law firm ultimately billed Dr. Mockovak for 2,383.5 hours of work. Out of this

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reasonable to assume that in addition to the 41.9 hours listed above, Ms. Tvedt spent a good chunk of these 32.3 hours in conference with, or speaking to, Dr. Mockovak.

<sup>4</sup> Mr. Robinson's time entries for 2009 show in person meetings with Dr. Mockovak on November 14, 15, 16; December 8, 16, and 21, and additional in person meetings in 2010 on January 4, 5, 20, 27 and February 4.

total, 564.8 hours was for work performed by paralegal assistants. According to the SGB invoices, the three attorneys performed the following total number of hours of service: Campagna, 789.3 hours; Tvedt, 620.2 hours; and Robinson, 377.0 hours. When the number of hours that the attorneys billed for work performed during the trial are removed from these totals, the disparity between the attorneys is greater.

42. Mr. Robinson has said that, “Although [he] felt that there was a very good possibility that [he] could get these conversations suppressed if [he] made” a motion to suppress the recorded conversations between Kultin and Dr. Mockovak, he made a deliberate “strategic choice not to do that.” *Robinson Declaration*, ¶ 6.

43. Mr. Robinson did not explain how he came to the conclusion that there was a “very good possibility” of winning such a motion. He did not say that he ever did any legal research on the issue of whether the federal law enforcement officials were obligated to abide by Washington’s Privacy Act, RCW 9.73.030, and its prohibition against recording any private conversation without the consent of both parties.

44. I looked through the billing records of the SGB law firm to see whether there was any indication that Mr. Robinson had ever done any legal research on this subject. There are many billing entries which show that *other* legal issues were thoroughly researched.

45. But Mr. Robinson appears to have relied on attorney Campagna not only to do all the legal research, but to correctly advise Mr. Robinson of the results of his research. Sometimes, that reliance was clearly misplaced. For example, Mr. Campagna researched Washington state law regarding the defense of entrapment for many hours. Presumably he discussed the results of his research with Mr. Robinson. And yet at a hearing on the defendant's motion to dismiss, Mr. Robinson said to the state court trial judge that, "In the state of Washington, Dr. Mockovak has to admit to the offense before he can even plead the defense of entrapment." RP 12/6/2010, at p. 15. But this is simply incorrect. Washington case law recognizes that a defendant does *not* have to admit commission of the offense before he can plead entrapment." *See State v. Frost*, 160 Wn.2d 765, 776 n.4, 161 P.3d 361 (2007), citing *Mathews v. United States*, 485 U.S. 58, 62 (1988) ("[E]ven if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment."). Thus, even when legal research in a particular subject area was done by an associate lawyer, it was not done correctly, and Mr. Robinson's reliance upon it was misplaced.

46. While much legal research was done on the subject of an entrapment defense, there are *no* time entries which indicate that any

attorney ever did any research regarding the possibility of bringing a motion to suppress the recorded conversations. There is simply no mention, whatsoever, of the Washington Privacy Act, RCW 9.73.010 et seq., or of suppression of recorded conversations, anywhere in the billing records. Nor is there any record of such research in the legal research file which the SGB attorneys provided to me.

47. Moreover, none of Mr. Robinson's time entries indicate that he ever did any legal research on any subject. Although there are time entries showing that he edited pleadings drafted by other attorneys in support of a defense motion to dismiss, and that he "read cases" cited in that brief in preparation for oral argument of that motion (see time entry for December 3, 2010), there is no indication that he ever did any original legal research.

48. Neither Mr. Campagna nor Ms. Tvedt has indicated that they were aware of Mr. Robinson's assessment that it was strategically wiser not to make any suppression motion, even though there was a good possibility he would win it, and thereby get the case dismissed in state court.

49. Mr. Robinson says that Dr. Mockovak was "aware" of his decision not to make a suppression motion, but he has not indicated *when* he made that decision, or *how* he knows that Dr. Mockovak was "aware" of it, or *when* Dr. Mockovak supposedly became aware of it.

50. Mr. Robinson has explained that in his view, the advantages afforded by the more liberal state court rules of discovery in criminal cases – including being able to interview the State’s witnesses -- outweighed the advantages of being in federal court, where the burden of proof on entrapment was on the prosecution to disprove entrapment beyond a reasonable doubt, and the sentencing guidelines provided for far less punishment if Dr. Mockovak were convicted. *See Declaration of Laura A. Doyle*, at ¶ 6. I asked Mr. Robinson why he did not first conduct all the witness interviews, and then *after* having obtained all the discovery that he was entitled to under the state court rules, *then* move for suppression of the recordings afterwards. Mr. Robinson said that he could not have done that because, by the time he had finished the witness interviews, it was “too late” to move for suppression. When asked why it was “too late,” he simply said that the assigned trial judge would not have let him bring a suppression motion at that time, because it was too close to the trial date.

51. In *federal* court it is common for the trial court judge to assign a cut-off date for the filing of any pretrial motions. But in Washington State courts, this is not normal, and usually there is no such thing as a cut-off date for the filing of pretrial motions. I looked through the Superior Court file in this case to see whether the trial judge had departed from the usual practice and had, for some reason, set a pretrial motions cut-off date. I

found no order setting any cut-off date for the filing of any kind of pretrial motion.

52. I did find the following in the Superior Court file. On December 10, 2010, the Chief Criminal Judge preassigned the case to the Honorable Palmer Robinson for trial. (Copy attached as Appendix N). On December 16, 2010, the Court entered an order continuing the date of the omnibus hearing to January 3, 2011. (Copy attached as Appendix O).

53. The billing records for the SGB law firm make it possible to determine when the last defense counsel interviews of prosecution witnesses were conducted in this case. Mr. Robinson's billing entry for December 22, 2010 states "Prep for and conduct interview of Kultin." (Invoice No. 120764, at p. 4, attached as Appendix P).

54. Mr. Robinson's and Ms. Tvedt's billing entries for December 29, 2010 indicate that defense counsel conducted their "interviews with FBI agents Carr and Carver" on that date. ((Invoice No. 120764, at p. 5, attached as Appendix P).

55. The omnibus hearing in this case was held on January 3, 2011. The Clerk's minute entry for that date shows that at the hearing the parties jointly requested a two day continuance of the trial date from January 10 to January 12, 2011. (Copy attached as Appendix Q). The transcript of

that hearing shows that one of Dr. Mockovak's attorneys, Ms. Tvedt, informed the Court that "there's no 3.5 or 3.6 [motion]." RP 1/3/11, at 99.

55. The Superior Court file contains an Omnibus Order on January 3, 2011. A copy of that order is attached as Appendix R. Paragraph No. 2 of the Omnibus Order has two check boxes which are to be used to indicate whether or not there will be any defense motion to suppress evidence. The language attached to the second box states: "Defendant will move to suppress evidence. Moving party shall comply with CrR 3.6, 8.1 and CR 6. The motion shall be heard, immediately before trial, by the trial judge." This box was not checked. Instead, the first box was checked. The language attached to that box states: "No motion to suppress evidence pursuant to CrR 3.6(a) shall be made."

56. As the Omnibus Order indicates on its face, nothing precluded the defense from advising the Court at the Omnibus Hearing held on January 3, 2011, that it *did* have a motion to suppress. If Ms. Tvedt had informed the Court that there *was* a CrR 3.6 motion to suppress, and had checked the second box, then the defense would have been obligated to comply with the provisions of CrR 3.6(a), which require the filing a written motion to suppress, supported by an affidavit.

57. The defense also would have been required to comply with CR 6. Thus, it would have had to serve the prosecution with the motion not later

than five days before the date set for the hearing of the motion. Since the preprinted language of box number 2 on the Omnibus Hearing Order states that such a suppression motion “shall be heard, immediately before trial, by the trial judge,” that means that if a motion to suppress had been filed it would have been heard on January 12, 2011. Since the fifth day before the hearing date (the trial date) was January 7<sup>th</sup>, pursuant to CR 6, the defense would have been obligated to serve its written suppression motion on the prosecution by no later than January 7<sup>th</sup>. Thus, there is nothing in the Omnibus Order, and nothing in any other order in the court file, which would have precluded the defense from filing a motion to suppress the recorded conversations as late as January 7, 2011, and from having it heard on the first day of trial, January 12, 2011. As defense counsel’s own time records show, by this time all defense interviews of prosecution witnesses had been completed.

58. Mr. Campagna’s and Ms. Tvedt’s billing entries for January 7, 2011 indicate that they conducted witness interviews of Bradley Klock and Christian Monea on that date. (Invoice No. 121118, at p. 2, attached as Appendix S. There are no billing entries after January 7, 2011 which refer to conducting any additional witness interviews.

59. Trial started on January 12, 2011. As the minute entries for that date show, the trial judge first spent half an hour hearing argument and

making rulings on, several pretrial motions. (Copy attached as Appendix T, at pp. 1-2). The parties then selected a jury and that process was not completed and a jury was not sworn to try the case until the afternoon of January 13<sup>th</sup>. (Appendix T, at p. 5). The proceedings were then recessed, and the trial itself did not actually commence until the morning of January 18<sup>th</sup>. (Appendix T, at p. 6).

60. The Superior Court Criminal Rules contemplate the scheduling of an omnibus hearing and the pretrial litigation of evidentiary motions sometime *after* the omnibus hearing:

*At the arraignment the court will usually sets a time for the omnibus hearing which is far enough away to allow sufficient time for counsel to initiate and complete discovery, conduct further investigation of the case, and to explore plea negotiations, but which still provides ample time to schedule and hear evidentiary motions sometime after the omnibus hearing but prior to trial.*

*Evidentiary and constitutional motions which typically require argument at a later date are motions to suppress the fruits of an unlawful arrest or unlawful search and seizure, and motions to suppress an unlawfully obtained confession or identification. . . .*

Ferguson, 12 *Washington Criminal Practice & Procedure*, § 1404 (2004) (emphasis added).

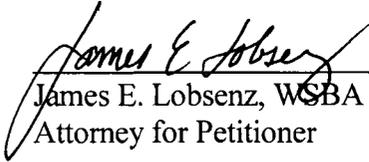
61. In this case, it was not until December 16, 2010 that the federal government agreed to provide the discovery which the defendant had been vigorously seeking for several months. *See* RP 12/16/10, at 3. Because

discovery was provided late, the parties agrees to continue the omnibus hearing to January 3, 2011.

62. Washington State's criminal rules explicitly anticipate that the trial court will allow "ample time to schedule and hear evidentiary motions sometime *after the omnibus hearing but prior to trial*," Ferguson, *supra*, at § 1404. Therefore, in this case, if attorney Robinson had filed a motion to suppress for violation of the Washington Privacy Act, the Superior Court would have been obligated to allow the defense ample time for that motion to be heard sometime after January 3<sup>rd</sup> but prior to the actual start of the trial on January 12, 2011.

63. When interviewed on April 3, 2012, Mr. Robinson said that if he had waited until after all witness interviews had been conducted to note a suppression motion, it would have been "too late." However, both the provisions of the Superior Court Criminal Rules for Omnibus Hearings, and the standard language printed on King County Superior Court Omnibus Hearing Orders, both show that this is not true. If Mr. Robinson or one of his co-counsel had said, at the omnibus hearing of January 3, 2011, that the defense had a motion to suppress the recorded conversations, then the trial judge would have been obligated to hear and decide that motion on the trial date of January 12, 2011.

DATED this 3rd day of July, 2012.

  
James E. Lobsenz, WSBA No. 8787  
Attorney for Petitioner

## **APPENDIX A**

## Lobsenz, Jim

---

**From:** Lobsenz, Jim  
**Sent:** Tuesday, May 01, 2012 4:34 PM  
**To:** 'crabtree@sgb-law.com'  
**Subject:** The final piece! Email communications

Dear Andrea:

There is still this one more request that I have made for files and I am hoping I can get it soon. As you recall, you were going to send me a disk with the email communications between Mike Mockovak and Jeff/Colette/Joe. (Or between Ron Marmer and any of those folks). Do you think you can get that to me tomorrow? After that, I won't ask for anything more for a long while, I promise.

■ Jim

James E. Lobsenz  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104  
tel (206) 622-8020  
fax (206) 622-8983

## **APPENDIX B**

## Lobsenz, Jim

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**From:** Crabtree, Andrea [crabtree@sgb-law.com]  
**Sent:** Friday, May 11, 2012 2:52 PM  
**To:** Lobsenz, Jim  
**Subject:** RE: Still looking for that CD with the emails on it

FINALLY! The disk is ready for pick-up. I also left a vm msg for your assistant Lily. It will be at the front desk in about 2 minutes. Thanks and have a great weekend (I was trying to get out of here by noon today, but I guess 3 PM will do). – Andrea

---

**From:** Crabtree, Andrea  
**Sent:** Friday, May 11, 2012 2:24 PM  
**To:** 'Lobsenz, Jim'  
**Subject:** RE: Still looking for that CD with the emails on it

I'm still waiting for our IT guy to help me burn a disk of .pst files that you will be able to open in Outlook. As soon as I have a disk, I can call your office and tell you that it is ready to be picked up.

I finally figured out that this process is going to be a lot easier than printing and scanning the individual emails and attachments, getting rid of duplicates, and keeping them in some sort of order. The disk will contain 148 emails from Joe Campagna's computer and 282 from my computer. These emails are either to or from Michael Mockovak ([mikemock410@gmail.com](mailto:mikemock410@gmail.com)). Colette's computer crashed and had to be replaced so I still need to search her computer. Jeff reports that he doesn't have any emails left on his machine. If there are additional searches you want me to run – other than to or from [mikemock410@gmail.com](mailto:mikemock410@gmail.com) – I will try to do it next week. The process is much more tedious than you could imagine.

Thank you for your patience.  
-Andrea

---

**From:** Crabtree, Andrea  
**Sent:** Wednesday, May 09, 2012 12:57 PM  
**To:** 'Lobsenz, Jim'  
**Subject:** RE: Still looking for that CD with the emails on it

Jim,

You're no bother. I was out of the office for a few days and then have been swamped. My goal is to have it done and to you before the end of the day tomorrow.

Thanks.  
-Andrea

---

**From:** Lobsenz, Jim [<mailto:Lobsenz@carneylaw.com>]  
**Sent:** Wednesday, May 09, 2012 12:42 PM  
**To:** Crabtree, Andrea  
**Subject:** Still looking for that CD with the emails on it

Andrea:

I don't mean to be a pest but I am hoping to get those emails soon.

■ Jim Lobsenz

James E. Lobsenz  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104  
tel (206) 622-8020  
fax (206) 622-8983

## **APPENDIX C**

## Lobsenz, Jim

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**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Saturday, November 20, 2010 7:51 AM  
**To:** Campagna, Joe; Tvedt, Colette; Robinson, Jeff  
**Subject:** motion

Hi Colette, Jeff, and Joe,

I read the motion to dismiss. I want to compliment you for writing so clearly and strongly that the motion is easily understood by a lay person. I think it is much more forceful than legal-ese. From even a layperson's perspective, it is hard hitting, clear, and thorough while also free of extraneous detail. Thanks for all your hard work.

I was also pleased to see that all three of you signed the motion. It would be great if all three were in court for oral argument given the importance of this motion.

Small point, I think there might be a typo on page 20, lines 11-13:

"Because there is no waiver of sovereign immunity, the Superior Court lacks either to enforce these subpoenas or to compel the FBI or its personnel to appear before it to answer for their purported failure to respond to the subpoenas in the manner or within the time specified."

On the first line, after the word "lacks", I think "jurisdiction" or "authority" is missing.

I also noticed a detail I had previously missed. Exhibit D is a letter from Susan Story to Colette. That letter states that Kultin was the subject of an INS investigation that was quickly resolved. Wow.

Thanks again. I am very pleased.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX D**

## **Lobsenz, Jim**

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**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Monday, November 22, 2010 12:09 PM  
**To:** Tvedt, Colette; Campagna, Joe  
**Subject:** Dec. 1 hearing, future bail requirements

Hi Colette and Joe,

I have a couple of questions which assume that we receive a favorable outcome on Dec. 1.

The hearing starts at 1:30. If we win and I am arrested again, will I likely spend another night in jail? Longer?

In the event I am arrested by the Feds, I assume there would be a bail hearing in Federal Court. I would bail conditions to change:

- from my needing to petition the court to travel outside of King County
- to my needing to inform the authorities, within 72 hours, of my intention to travel outside King County. If the prosecution objects, they would have to petition the court to prohibit my travel. I would of course provide the court with itinerary and location where I'll be staying, just as I do now.

I think given my good behavior and lack of problems with travel over the last year, and given that the court which agreed to my every travel request over the year, we could get this. Let me know your thoughts.

Cash could transfer over from the State to the Feds, as we discussed.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX E**

## Lobsenz, Jim

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**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Monday, December 06, 2010 8:54 PM  
**To:** John Phillips  
**Cc:** Campagna, Joe  
**Subject:** court hearing today

Hi John (copy to Joe Campagna),

I want to give you an update on the criminal case. Randy Squires is aware of these events and I think you should be too.

I appeared in criminal court today for oral arguments on a Motion to Dismiss filed by my criminal attorneys. Jeff Robinson gave the oral arguments for the defense in court.

Here is the background:

- the charges filed in WA State court against me are based on evidence from an FBI investigation.
- the FBI has turned over some but not all relevant evidence to the State of WA.
- we have requested additional evidence from the FBI, and in October obtained a subpoena signed by the WA State Superior Court judge.
- the FBI responded that the court has no jurisdiction over the FBI. Furthermore, the FBI did not acknowledging that the requested evidence exists, and if it does exist, the FBI claimed that the defense has not demonstrated that it is relevant. The FBI added that it may decide to turn over some evidence, not because it is compelled, but because it chooses to do so, and on its own timetable.
- My criminal team filed a motion to dismiss which argues that the FBI's actions force me to decide between proceeding to trial without adequately prepared attorneys or waiving my right to a speedy trial. While the court cannot compel the FBI to turn over evidence, the court can dismiss the case. The motion also laid out what evidence we are requesting and why it is relevant. The motion also stated that if the State dismisses the case, the federal government would likely arrest me and the case would shift to federal court.

In Today's hearing:

Present were counsel for the defense (Jeff Robinson and Joe Campagna), the prosecution, a US attorney for the FBI, Randy Squires, and a handful of other federal officials, both FBI agents and attorneys. Mr. Squires was there to settle an issue regarding access to a computer at Clearly Lasik. That issue was settled first. Mr. Squires then stayed to listen to the remainder of hearing.

At the conclusion, the judge pressed the FBI to respond to certain evidence requests by this Friday at 4 pm. The judge gave the FBI three options: 1) tell her the evidence in question does not exist, 2) tell her the evidence in question exists and turn it over to the defense, 3) tell her the evidence in question exists and present it to the judge in camera only.

The judge will review the evidence over the weekend and will rule on the motion to dismiss at a hearing on Monday, December 13th, at 1:30 pm.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX F**

## Lobsenz, Jim

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**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Saturday, December 11, 2010 8:54 AM  
**To:** Robinson, Jeff; Campagna, Joe  
**Subject:** thoughts about motion to dismiss

Hi Jeff and Joe,

Prior to filing the motion to dismiss, we weighed the pro's and cons of being in Federal vs. State court. We decided there is a big advantage in being in Federal court and I still think that advantage applies. I spoke with Joe briefly on Thursday and he indicated that if all that is withheld from the judge is the manual, we will lose the motion. I don't want to give up so quickly. These are my thoughts.

1. On Monday, December 6<sup>th</sup>, the judge gave told the Federal Government that she wanted to hear one of three responses regarding the items requested: a: that the item doesn't exist; b: that the item exists and it is being turned over to the defense; c: that the item exists and it is being turned over to the judge for an in camera review. Judge Palmer-Robinson did not say that she would be happy if the Federal government decided that it didn't want to turn over certain materials even for in camera review. The Federal government maintains that it will not turn over the Manual to the court for review and cited National Security. It cannot possibly be that the state court cannot be trusted to review the Manual in chambers. (Even a non-lawyer is familiar with our country's history and WWII internment camps and the case before the Supreme Court. I did some browsing on the net last night about *Korematsu V. United States* in 1944. *Korematsu* lost 6-3. It was later discovered that the government knowingly provided false information to the court. In 1983 the decision was reversed. Federal Judge Marilyn Patel stated "in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."  
<http://www.findingdulcinea.com/news/on-this-day/On-this-Day--The-Supreme-Court-Upholds-WWII-Internment-of-Japanese-Americans-.html> ). It is true that the state court cannot order the Federal government to turn over the Manual. This is all the more reason that this matter should be heard in front of a Federal judge who can appropriately assess the validity of the government's claim.
2. The existence of the 2008 Manual on the internet makes claims of national security risk pretty flimsy.
3. The events between the hearings on December 6<sup>th</sup> and December 13<sup>th</sup> demonstrate bad faith on the part of the Federal government. In court on the 6<sup>th</sup>, AUSA Kipnis argued that the defense had not demonstrated that certain documents existed. This argument was designed to call into question the existence of such documents, when the government itself knew full well that the documents existed. In court Judge Palmer-Robinson was able to elicit as much from Kipnis regarding the existence of original agent notes. The government then argued that the FBI is a cumbersome Federal organization and it would take time to process the request. Again, when pushed in court the Federal government suddenly announced that it could have the items in a week. The FBI then turned over some documents three days later. Rather than showing good faith, these events show that the government acted in bad faith by delaying by over nine months the turning over of documents to the last possible minute. Only after realizing it may lose a court motion did the government remit material. (One could make a broader argument here. Attorney Kipnis mentioned in court that it has encountered this argument frequently in court, although not presented as eloquently as Jeff did. This statement reveals that the government routinely denies access to documents and only by dismissing this and all similar cases can this prejudicial practice be halted. I don't know whether this would be helpful to me.) If the case continues in State court, the government has demonstrated that it will to the full extent possible continue to impede justice because, in the absence of a dismissal, there are zero negative repercussions to the Federal Government.

4. Review of the newly received materials has revealed that the following items require further investigation by the defense team: (there must be some new stuff after reviewing the materials). The delay in turning over this material is prejudicial to the defense and interferes with my right to a speedy trial.
5. The government has delayed the interviews of 17 people. Now we need to get them interviewed in the next two weeks. I discussed this with Joe on Thursday. Saying trying to get the government to commit to an interview schedule before Monday may provide evidence for argument.

Colette has urged me not to play lawyer and I don't mean to do that. However, I do want to discuss the strategy, and reasons behind it, before the last hour on Monday. And I want to weigh in given the importance of this hearing to my entire life. I still think that the burden of proof shift in Federal court is an advantage that outweighs the differences in State versus Federal prosecution teams.

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Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

# APPENDIX G

## Lobsenz, Jim

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**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Saturday, December 11, 2010 10:40 AM  
**To:** Campagna, Joe  
**Cc:** Robinson, Jeff; Tvedt, Colette; Crabtree, Andrea; Gust, Alex  
**Subject:** Re: new discovery

Hi Joe,

Great, I'll come in at 8:30 on Monday morning.

More than meeting with Denise and reviewing the new discovery, I'd like first to discuss the approach to the 1:30 hearing with you and Jeff (I'd say and Colette, but I gather she will be busy with her other trial). I don't want to give up on the motion to dismiss if the FBI has withheld the Manual from the court (see my later email from this morning.) I don't want to give up even if they did give the court the Manual. The deadline for turning materials over to the court was 4:00 on Friday. Do you know, finally, what the FBI labelled as evidence that exists and that they were not giving to the court for in camera review?

I won't have time to go through 500 pages of material in the morning, but I can start.

Thanks.

Regards,

Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

On Sat, Dec 11, 2010 at 10:14 AM, Campagna, Joe <[campagna@sgb-law.com](mailto:campagna@sgb-law.com)> wrote:

Hi Mike,

Actually, there should be plenty of time Monday morning for you to review the new material. While in total we received about 500 pages of documents from the FBI, only about 100 pages of that is truly new material, and even some of that consists of multiple copies of the same document. The agent notes make up about 50 pages. The other 400 or so pages consist of copies of documents we already had as well as preliminary transcripts of the recorded conversations. If you want to come in early on Monday, at 8:30 or so, you should be able to get through the new documents before we meet with Denise.

Thanks,

Joe

---

**From:** mikemock410 [mailto:[mikemock410@gmail.com](mailto:mikemock410@gmail.com)]  
**Sent:** Friday, December 10, 2010 10:34 PM  
**To:** Robinson, Jeff; Campagna, Joe  
**Subject:** new discovery

Hi Jeff and Joe,

I'd like to review the new discovery sometime this weekend. I don't think there would be enough time for me to do so on Monday morning.

Please let me know how this can be accomplished.

--

Regards,  
Michael E. Mockovak, MD

[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

--

## **APPENDIX H**

## Lobsenz, Jim

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**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Friday, December 31, 2010 11:28 AM  
**To:** Campagna, Joe; Robinson, Jeff; Tvedt, Colette; Crabtree, Andrea  
**Subject:** thoughts about yesterday's recap of interviews

Hi Colette, Jeff, and Joe,

I thought more about our discussion of the interview with Carr. Carr stated that he was up for a promotion and part of the requirement for his promotion was that he work with a confidential human source. This fact triggered two lines of thought.

1. It indicates that Carr had not previously worked with CHS. In cross examination he can be characterized as a rookie.
2. The fact that Carr needed experience with a CHS for a promotion creates a potential conflict of interest. On the one hand justice may call for dumping the investigation. On the other hand, he may need to continue the investigation to get promoted. I believe I am entitled to explore this conflict of interest. I'd like to see all internal FBI documents that discuss in general the CHS requirement for promotion. I'd also like to see all specific documents, performance reviews, written letters discussing or awarding the promotion, etc. These documents may shed light on the importance of the CHS work and hence shed light on Carr's attitude in the case. I'd specifically like to know whether the CHS requirement mandated that an arrest take place for Carr to be promoted. If I am not mistaken, Carr was promoted shortly after I was arrested. When Jeff argued the motion to dismiss, he explained to Judge Palmer-Robinson that any new information could give rise to requests for additional information. I think we are in exactly that situation. My thought is to present Judge Palmer-Robinson with a subpoena for FBI documents relating to the requirements for promotion, from Carr's former rank to his present one, and any performance reviews of Carr and other relevant records and ask her to sign it. Ask for a three day or so turn around at which point she can rule on the motion to dismiss. The last time she gave the FBI five days so this issue could be addressed quickly.

As always, I'm open to you convincing me that this is not the best way to go. In my mind, there is no down side. If we don't ask for this, we end up in state court. If we do ask for it, and we are denied, we end up in state court with perhaps a stronger argument for appeal. I understand that prior to the FBI interviews, if we had asked for a ruling on the motion to dismiss, we would have lost the opportunity to interview the agents. That time has passed. We have already interviewed the agents and have received all we were going to get from the FBI. Asking for more information doesn't hurt us. If the FBI refuses to give us the information, we ask Judge Palmer-Robinson to rule on the motion to dismiss. I think there is a persuasive argument that I am entitled to this information, and I don't think the judge will be sympathetic to the FBI if they refuse to turn it over.

I'd also like to discuss this with Ron on the phone from your office on Monday morning. I don't want to talk about a topic like this from my cell phone, which I assume is tapped.

Finally, my computer crashed. I will have only sporadic access to email via trips to Fed-Ex Kinkos. If you want to get a message to me, please call or text me at 206-850-1492. I can run up to the 24 hr Kinkos and check any email.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

# APPENDIX I

## Lobsenz, Jim

---

**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Friday, December 31, 2010 4:37 PM  
**To:** Tvedt, Colette; Robinson, Jeff; Campagna, Joe; Crabtree, Andrea  
**Cc:** Mike Mockovak  
**Subject:** Fwd: thoughts about yesterday's recap of interviews

Hi Colette, Jeff, and Joe,

Colette and I spoke on the phone a few hours ago about my email sent this morning.

Regarding point 1, portraying agent Carr as a rookie: Colette explained that the defense team would decide what kind of tone is best to take with Carr. It may be a "hard 8" or a "soft 6". It may not be advantageous to portray him as a rookie. Colette went through some examples of the cross she envisioned. I am on board with Colette's approach.

Regarding point 2, my suggestion that we ask the court to sign a subpoena to the FBI requesting documents related to Carr's statement that he needed to work with a CHS to get a promotion. I am not satisfied with how we left this point after our phone call. Colette explained that the case is more about what Kultin did and what is on the tapes. I agreed with Colette's points. These points don't address the merits of whether we should make this request of the court. I may not have been clear enough in my initial email so I'll restate my point for discussion again.

1- Carr stated in the interview that he was up for a promotion and that to receive this promotion it was required that he work with a CHS.

2- In my opinion, this presents at least a potential if not an actual conflict of interest that merits exploring via discovery.

3- There are likely FBI protocols/guidelines etc. that define what is required for promotion from Carr's former to his current position. There are also certainly performance reviews that discuss his performance vis-a-vis the requirements for advancement. These documents would/could reveal information that is pertinent to Carr's motivation.

4- Specifically, would an arrest be looked upon favorably, be helpful, or even required when an agent's work with a CHS is assessed? Was an arrest required for his promotion? If an arrest is required, this is the sheer definition of conflict of interest. I'm not arrested, he does not get promoted. I'm arrested, he is eligible to be promoted.

5- As I look at the issue, these are the possibilities:

A- We don't ask the court to sign a subpoena for FBI documents, and are in state court.

B- We ask the court to sign a subpoena and the judge denies it. We are in state court.

C- We ask the court to sign a subpoena, and the judge signs a subpoena requesting documents from the FBI.

D- The FBI turns over documents and they are not helpful to us. We proceed in state court.

E- The FBI turns over documents and they are helpful to us. A win for us.

F- The FBI states that no such documents exist. Implausible. There must be some documentation of a promotion. But, this possibility could mean we are in state court.

G- The FBI refuses to turn over the documents.

H- We request that the court dismiss the case because of the FBI's refusal to turn over the requested documents.

I- The court rejects the motion to dismiss. We are in state court, and maybe have help in the event of an appeal.

J- The court dismisses the case. A win for us.

K- The federal government decides not to indict. A very positive outcome.

L- The federal government decides to indict. We are in federal court with the advantages below.

I just don't see a downside in any of the possibilities. Nor do any of the possibilities negatively affect other preparation and arguments in the case.

If you were to tell me that my chances are better in state court, that would influence my thinking. Yesterday I asked both Colette and Joe to handicap my chances in state court and they (understandably) didn't do that. From my own medical practice I know the difficulty of handicapping. I'm left with comparing the maximum sentences - 15 years in State versus 5 years in Federal. I'm also left looking at the burden of proof on me in state court to prove entrapment by a preponderance of the evidence, versus federal court where the government has to prove beyond a reasonable doubt that entrapment did not occur. The advantages of Federal court seem large.

I welcome discussion on these specific points. I'd like to have this issue resolved before Monday morning when there won't be much time before we need to be in court. We've grappled as a group with other issues and I'm sure we can do so here too. I'm very pleased with all the gains in information you have achieved over the last two weeks. Perhaps we can get some more. Thanks again for your hard work, especially on the holiday weekend.

Best Regards,

Mike

----- Forwarded message -----

From: **mikemock410** <[mikemock410@gmail.com](mailto:mikemock410@gmail.com)>

Date: Fri, Dec 31, 2010 at 11:28 AM

Subject: thoughts about yesterday's recap of interviews

To: "Campagna, Joe" <[campagna@sgb-law.com](mailto:campagna@sgb-law.com)>, "Robinson, Jeff" <[robinson@sgb-law.com](mailto:robinson@sgb-law.com)>, "Tvedt, Colette" <[tvedt@sgb-law.com](mailto:tvedt@sgb-law.com)>, "Crabtree, Andrea" <[crabtree@sgb-law.com](mailto:crabtree@sgb-law.com)>

Hi Colette, Jeff, and Joe,

I thought more about our discussion of the interview with Carr. Carr stated that he was up for a promotion and part of the requirement for his promotion was that he work with a confidential human source. This fact triggered two lines of thought.

1. It indicates that Carr had not previously worked with CHS. In cross examination he can be characterized as a rookie.
2. The fact that Carr needed experience with a CHS for a promotion creates a potential conflict of interest. On the one hand, justice may call for dumping the investigation. On the other hand, he may need to continue the investigation to get promoted. I believe I am entitled to explore this conflict of interest. I'd like to see all internal FBI documents that discuss in general the CHS requirement for promotion. I'd also like to see all specific documents, performance reviews, written letters discussing or awarding the promotion, etc. These documents may shed light on the importance of the CHS work and hence shed light on Carr's attitude in the case. I'd specifically like to know whether the CHS requirement mandated that an arrest take place for Carr to be promoted. If I am not mistaken, Carr was promoted shortly after I was arrested. When Jeff argued the motion to dismiss, he explained to Judge Palmer-Robinson that any new information could give rise to requests for additional information. I think we are in exactly that situation. My thought is to present Judge Palmer-Robinson with a subpoena for FBI documents relating to the requirements for promotion, from Carr's former rank to his present one, and any performance reviews of Carr and other relevant records and ask her to sign it. Ask for a three day or so turn around at which point she can rule on the motion to dismiss. The last time she gave the FBI

five days so this issue could be addressed quickly.

As always, I'm open to you convincing me that this is not the best way to go. In my mind, there is no down side. If we don't ask for this, we end up in state court. If we do ask for it, and we are denied, we end up in state court with perhaps a stronger argument for appeal. I understand that prior to the FBI interviews, if we had asked for a ruling on the motion to dismiss, we would have lost the opportunity to interview the agents. That time has passed. We have already interviewed the agents and have received all we were going to get from the FBI. Asking for more information doesn't hurt us. If the FBI refuses to give us the information, we ask Judge Palmer-Robinson to rule on the motion to dismiss. I think there is a persuasive argument that I am entitled to this information, and I don't think the judge will be sympathetic to the FBI if they refuse to turn it over.

I'd also like to discuss this with Ron on the phone from your office on Monday morning. I don't want to talk about a topic like this from my cell phone, which I assume is tapped.

Finally, my computer crashed. I will have only sporadic access to email via trips to Fed-Ex Kinkos. If you want to get a message to me, please call or text me at 206-850-1492. I can run up to the 24 hr Kinkos and check any email.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX J**

**Lobsenz, Jim**

---

**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Friday, January 21, 2011 8:32 PM  
**To:** Robinson, Jeff; Tvedt, Colette  
**Cc:** Campagna, Joe; Crabtree, Andrea  
**Subject:** today's meeting

Hi Colette and Jeff,

Thanks for taking the time to meet with me today. I know you are busy and I appreciate the effort to explain the upcoming days of trial.

I'm gratified that Jeff agreed to ask Judge Palmer Robinson to sign a subpoena instructing the FBI to turn over information about Carr's performance and the FBI's criteria for advancement. In particular, the subpoena should request, for the years 2008, 2009, and 2010; 1) Carr's performance evaluations, including information relating to Carr's experience or lack of experience in dealing with a CHS; 2) documents showing that Carr had not yet worked with, or had worked with, a CHS, including documents describing the status of any investigation involving a CHS who worked with Carr; 3) documents reflecting the FBI's standards, criteria, or job descriptions for the position or positions that Carr held.

I also was pleased that your staff is checking the times of phone calls between Kultin and me and comparing that to the times of the internet searches for airline flights to Australia.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX K**

**Lobsenz, Jim**

---

**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Wednesday, January 26, 2011 7:41 AM  
**To:** Robinson, Jeff; Tvedt, Colette; Campagna, Joe  
**Subject:** request for information

Good Morning Jeff, Colette, and Joe,

As I discussed yesterday, I very much want to ask Judge Palmer-Robinson to sign a subpoena requesting the information from the FBI I described in my email dated January 21st. We are running out of time. Can this request be made this morning?

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX L**

## Lobsenz, Jim

---

**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Wednesday, January 26, 2011 5:26 PM  
**To:** Robinson, Jeff; Tvedt, Colette; Campagna, Joe  
**Subject:** Fwd: request for information

Hi Jeff, Colette, and Joe,

Any progress on getting the subpoena? We are running out of time.

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

----- Forwarded message -----

**From:** **mikemock410** <[mikemock410@gmail.com](mailto:mikemock410@gmail.com)>  
**Date:** Wed, Jan 26, 2011 at 7:41 AM  
**Subject:** request for information  
**To:** "Robinson, Jeff" <[robinson@sgb-law.com](mailto:robinson@sgb-law.com)>, "Tvedt, Colette" <[tvedt@sgb-law.com](mailto:tvedt@sgb-law.com)>, "Campagna, Joe" <[campagna@sgb-law.com](mailto:campagna@sgb-law.com)>

Good Morning Jeff, Colette, and Joe,

As I discussed yesterday, I very much want to ask Judge Palmer-Robinson to sign a subpoena requesting the information from the FBI I described in my email dated January 21st. We are running out of time. Can this request be made this morning?

--  
Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

--

## **APPENDIX M**

## Lobsenz, Jim

---

**From:** mikemock410 [mikemock410@gmail.com]  
**Sent:** Saturday, January 29, 2011 7:39 AM  
**To:** Robinson, Jeff; Campagna, Joe; Tvedt, Colette  
**Cc:** Mike Mockovak  
**Subject:** subpoena for FBI records re Carr's promotion

When Jeff, Ron Marmer, and I last discussed the issue of requesting that the court sign a subpoena requesting the FBI turn over information related to agent Carr's promotion, Jeff said he would do this. This has not yet been done.

When agent Carver testified about his becoming the lead detective on this case, he stated that agent Carr had been transferred and gratuitously added that he had been promoted. He did this in front of the jury to give the jury the sense that Agent Carr is so excellent that he has been promoted.

Given how the FBI have mishandled this case by not adequately vetting their informant, and given how using a confidential informant was a requirement for promotion, my sixth amendment rights entitle me to examine the evidence we have requested.

I want the judge to be presented with a subpoena for her signature. I don't want Jeff in open court to minimize in any way the potential importance of this information. I don't want any compromise made with the FBI to limit the information I want to see. Jeff can argue that because the FBI has not been forthcoming, he has reason to believe there may be exculpatory information in the items requested. If the judge signs the subpoena, we can request a 24 hour recess in which the FBI can hand over the information and we can resume. If the judge does not sign the subpoena, I will have a basis for appeal. If the FBI has not turned over the information by Tuesday morning, we ask the judge to dismiss the case. If she refuses to dismiss the case, I have an argument for appeal.

I know we have a difference in opinion regarding the potential importance of this information, which none of us has seen. Nonetheless, when Jeff, Ron, and I met, Jeff agreed to do this. I made these same points to Colette on Thursday (two days ago), after court, and again when Colette and I spoke on the phone last night. My life is on the line. I want this done. Jeff has agreed to do it.

Here's the information I'd like requested, taken from my Jan 21<sup>st</sup> email:

I'm gratified that Jeff agreed to ask Judge Palmer Robinson to sign a subpoena instructing the FBI to turn over information about Carr's performance and the FBI's criteria for advancement. In particular, the subpoena should request, for the years 2008, 2009, and 2010; 1) Carr's performance evaluations, including information relating to Carr's experience or lack of experience in dealing with a CHS; 2) documents showing that Carr had not yet worked with, or had worked with, a CHS, including documents describing the status of any investigation involving a CHS who worked with Carr; 3) documents reflecting the FBI's standards, criteria, or job descriptions for the position or positions that Carr held.

--

Regards,  
Michael E. Mockovak, MD  
[mikemock410@gmail.com](mailto:mikemock410@gmail.com)

## **APPENDIX N**



## **APPENDIX O**

#61

**FILED**  
KING COUNTY, WASHINGTON

DEC 16 2010

SUPERIOR COURT CLERK  
THERESA GRANAM  
DEPUTY

**ENT'D.**

SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

STATE OF WASHINGTON Plaintiff,

vs.

Michael E. Mockovak  
Defendant.

NO. 09-1-07237-6 SEA

STIPULATED ORDER TO CONTINUE  
OMNIBUS HEARING  
(ORCOMH)  
(Clerk's Action Required)

The parties having stipulated that the omnibus hearing be continued  
@ 8:30 am

January 3, 2011

IT IS HEREBY ORDERED that the omnibus hearing is continued to  
at 8:30 am  
in Room 2835 - Dr. Mockovak's presence  
not heard

January 3, 2011

DATED: 12/16/10

Palmer  
JUDGE

[Signature]  
Deputy Prosecuting Attorney, WSBA # 20187

[Signature]  
Attorney for the Defendant, WSBA # 40263

Stipulated Order to Continue Omnibus Hearing  
10/2/06

## **APPENDIX P**

**SCHROETER**  
**GOLDMARK**  
**& BENDER**

**FILE COPY**

Michael Mockovak  
123 Second Ave N, #320  
Seattle, WA 98109

Statement Date: January 21, 2011  
Account No. 17898.3800  
Statement No. 120764  
Page: 1

Mockovak, Michael adv. State of Washington

500 Central Building  
810 Third Avenue  
Seattle, WA 98104

Phone (206) 622-8000  
Toll free (800) 809-2234  
Fax (206) 682-2305

Previous Balance \$104,392.17

Fees

			Rate	Hours	
12/01/2010	JAC	FBI protocols research	275.00	1.50	412.50
	AC	Emails w/ SGB team; email w/ investigator Snyder; emails w/ Monicka at KCPAO re: add'l discovery; emails w/ AG and IT re: recording from Snyder; conf w/ JPR re: materials for motion to dismiss hearing; to KCPAO to pick-up discovery; scan, OCR, and route Prudential Life Insurance discovery; conf w/ CT re: discovery	115.00	1.20	138.00
12/02/2010	AG	T/c with client	115.00	0.10	11.50
	JAC	Attempt and conspiracy research re new charges	275.00	2.30	632.50
	AC	Emails w/ JAC re: new charging docs and contact w/ client; t/c Carol Sue Janes re: update; emails and conf w/ JPR re: materials for motion to dismiss hearing; review file for hearing prep	115.00	0.50	57.50
12/03/2010	JPR	Reading briefs and cases for argument on motion to dismiss; read new pleadings from the state filed today; prep for argument	450.00	4.00	1,800.00
	JAC	Prep for hearing re motion to dismiss	275.00	3.50	962.50
	AC	Review of SPD materials; email SGB team re: same; email client new charging docs; review draft protective order re: computers; review State's brief opposing our motion to dismiss; email w/ JAC re: client contact; review email re: conf call w/ State, Squires, et al. to address protective order; email w/ Monicka at KCPAO; update working binder for JPR	115.00	1.40	161.00
12/05/2010	JPR	Prep for argument	450.00	2.00	900.00
	AC	Review emails; distribute conf call dial-in info	115.00	0.20	23.00
12/06/2010	JPR	Prep for and argument in court	450.00	5.00	2,250.00



Michael Mockovak (DOC , 8761)

Statement Date: January 21, 2011  
Account No. 17898.3800  
Statement No. 120764  
Page: 2

Mockovak, Michael adv. State of Washington

			Rate	Hours	
	AG	Contact FBI re confidential source informant head	115.00	0.10	11.50
	JAC	Prep for hearing (1.0); hearing re motion to dismiss (2.0); m/w JPR re hearing (.8); t/c w/ prosecution re protective order (.5); FBI protocols research (1.5)	275.00	5.80	1,595.00
	AC	Prep for expert meeting; conf w/ JPR and research murder for hire cases in the media; emails w/ JAC re: various issues; review draft protective order; conf w/ JPR re: materials for hearing; email w/ Carol Sue Jane re: stay of proceedings; review emails and materials from JAC re: FBI guidelines; draft order dismissing case; emails and conf w/ JPR re: same; emails re: local CHS coordinator w/ FBI; assist w/ hearing prep	115.00	3.80	437.00
12/07/2010	JPR	Begin reading file for trial prep; e-mails and t/c's re: computer agreement; e-mails and t/c's re: FBI materials; arrange meeting to review FBI materials	450.00	7.50	3,375.00
	JAC	Review insurance discovery	275.00	1.50	412.50
	AC	Emails re: protective order and joint request for judge pre-assignment, etc.; email from client re: reviewing materials; conf w/ JAC, AG	115.00	0.20	23.00
12/08/2010	JPR	Review of documents to prep for meeting with the FBI; meeting with the FBI re: discovery; t/c's U.S. Atty Office - discovery issues; conf. JAC and paralegals re: trial prep	450.00	4.20	1,890.00
	AG	Email to client re meeting (.1); scan, index new discovery (.2)	115.00	0.30	34.50
	JAC	M/w G. Jennings to review FBI documents (2.0); prep for meeting (1.3); t/c w/ client (.3); review new documents from FBI (2.5)	275.00	6.10	1,677.50
	AC	Emails re: protective order, client coming in to review materials, and FBI materials; t/c Monicka at KCPAO re: witness interviews	115.00	0.20	23.00
12/09/2010	JPR	Reviewing file for trial prep	450.00	4.40	1,980.00
	AG	Meeting with IT re disk from CT	115.00	0.10	11.50
	JAC	Discovery review	275.00	4.10	1,127.50
	AC	Emails w/ DPA Barbosa re: add'l defense witness interviews; emails and confs w/ SGB team members re: interviews and meeting w/ [REDACTED]; email Monicka at KCPAO re: same; emails w/ [REDACTED] re: travel plans, etc.	115.00		
12/10/2010	JPR	Reviewing FBI protocols; t/c Brian Kipnis of the U.S. Atty office re: compromise on the manuals; e-mail and t/c Greg Jennings of the FBI	450.00	3.50	1,575.00
	AG	Scan/OCR FBI recs	115.00	1.40	161.00
	AC	Conf w/ AG re: new materials and upcoming events; emails w/ [REDACTED] review email from DPA Storey to court re: counts in amended charging docs; review motion to amend charging docs; conf w/ CT re: consult w/ [REDACTED]; emails w/ [REDACTED] review letter from FBI SA Jennings; t/c from client re: phone numbers; email client	115.00	1.80	207.00

Michael Mockovak

Statement Date: January 21, 2011  
Account No. 17898.3800  
Statement No. 120764  
Page: 3

Mockovak, Michael adv. State of

			Rate	Hours	
12/12/2010	JAC	Prep for client's direct testimony, chapter outline	275.00	2.40	660.00
12/13/2010	JPR	Prep for hearing in court; t/c's with AUSA Kipnis and FBI Jennings; meet with de la Rue; hearing in court; meet with prosecution team; <del>meet with client and [REDACTED]</del> ; review new discovery	450.00	6.00	2,700.00
	CT	Meeting with [REDACTED]	400.00	2.00	800.00
	AG	Set up for client meeting and [REDACTED] meeting (.2); make disk for [REDACTED] (.1); pull discovery declarations for deps (.1)	115.00	0.40	46.00
	JAC	M/w client and [REDACTED] (5.4); hearing re motions (1.0); review state's supplemental briefing (.2)	275.00	6.60	1,815.00
	AC	Review emails and supplemental briefing from state; emails w/ DPAs; discovery review re: computers; assist w/ interview prep; numerous confs w/ SGB team	115.00	1.30	149.50
12/14/2010	JPR	Conf call with FBI, AUSA and KC Prosecutor; conf client and [REDACTED]; review 2006 guidelines; review SPD report on computers	450.00	2.20	990.00
	CT	Meeting with [REDACTED], JPR, JAC re trial prep	400.00	2.50	1,000.00
	JAC	M/w client and [REDACTED]	275.00	8.10	2,227.50
	AC	Witness interview coordination; review emails from gov't; review discovery re: FBI guidelines	115.00	0.80	92.00
12/15/2010	JPR	Meeting with defense team and client; meeting with defense team; review materials for hearing tomorrow		2.00	n/c
	CT	Meeting with client [REDACTED], JAC trial prep	400.00	6.50	2,600.00
	AG	Create witness list and individual roles	115.00	0.80	92.00
	JAC	M/w client and [REDACTED]	275.00	8.30	2,282.50
	AC	Conf w/ [REDACTED] and meeting set-up (.5); conf w/ CT re: interviews, etc. (.5); conf w/ JAC re: same (.3); brief meeting w/ client (.1); conf w/ JPR (.2)	115.00	1.60	184.00
12/16/2010	CT	Interview with Detective Dunn; meeting with DPA Storey and Barbosa; conf JPR, t/c Barbosa	400.00	3.00	1,200.00
	AG	Prepare motion re travel	115.00	0.30	34.50
	JAC	Prep for interview of Det. Dunn (1.6); interview of Det. Dunn (.8); hearing re omnibus (.6); review computer discovery (2.6); prep for next interviews (2.0)	275.00	7.60	2,090.00
	AC	Emails re: witness interviews and travel order; review SA Nesbitt's spreadsheet; confs w/ SGB team	115.00	2.50	287.50
12/17/2010	AG	Review discovery re witness interviews	115.00	2.30	264.50
	JAC	Review holding cell video of client (1.7); prep for interviews (1.3)	275.00	3.00	825.00
	AC	Review emails	115.00	0.20	23.00
12/19/2010	JPR	Prep for interview of Kultin	450.00	5.00	2,250.00

Michael Mockovak

Statement Date: January 21, 2011  
Account No. 17898.3800  
Statement No. 120764  
Page: 4

Mockovak, Michael adv. State of

			Rate	Hours	
	AC	Trial prep including discovery review and witness binder prep	115.00	4.00	460.00
12/20/2010	CT	Trial prep; t/c [REDACTED], prepare for witness interviews	400.00	4.00	1,600.00
	JPR	Prep for Kultin interview; conf CT re: expert; conf. paralegals re: trial prep; conf. JAC re: recorded conversations	450.00	4.00	1,800.00
	AG	Prepare witness binders and review of handwritten FBI notes	115.00	2.00	230.00
	JAC	Review audio and video (1.8); research Notice of Intent documents (1.3); research notice rules (.3); draft stipulations (.9); t/c w/ [REDACTED] (.5)	275.00	4.80	1,320.00
	AC	Emails w/ expert; review research re: similar case; confs w/ AG re: witness notebook prep; binder prep; confs w/ JAC re: stipulations and notice of intent	115.00	3.20	368.00
12/21/2010	AG	Review rules re Notice of Intent (.1); prepare Carr witness notebook (6.0)	115.00	6.10	701.50
	JAC	Prep for interviews (1.7); interview of SA Woodbury (1.0); interview of R. Maybee (.8); m/w client (.5); review discovery (1.0); analyze D. Kultin phone records (2.5)	275.00	7.50	2,062.50
	AC	Witness interview coordination; emails and confs w/ SGB team; receipt, review, and OCR discovery	115.00	1.50	172.50
12/22/2010	JPR	Prep for and conduct interview of Kultin	450.00	5.00	2,250.00
	AG	Type up client notes re transcripts (.3); prepare Carver witness notebook (4.5)	115.00	4.80	552.00
	JAC	Prep for interviews (2.5); interview of D. Kultin (2.1); interview of SA Hecht (.9); review expert materials (1.5)	275.00	7.00	1,925.00
12/23/2010	JAC	Insurance discovery analysis (3.5); trial prep re jury instructions (2.6)	275.00	6.10	1,677.50
12/24/2010	CT	Prep for meeting with expert; t/c [REDACTED], trial prep	400.00	3.00	1,200.00
	JAC	Outline chapters of cross examination	275.00	6.20	1,705.00
12/25/2010	JAC	Outline chapters of cross examination	275.00	2.40	660.00
12/26/2010	JAC	Cross examination chapter drafting	275.00	4.70	1,292.50
12/27/2010	AG	Review [REDACTED] report	115.00	0.40	46.00
	JAC	Review transcripts and discovery (4.0); revise stipulations (.3); t/c w/ client (.5)	275.00	4.80	1,320.00
	AC	Meeting w/ JAC (1.0); update pleadings file (2.5); update to do list (.5); email [REDACTED], Det. Dunn, and others (.5)	115.00	4.50	517.50
12/28/2010	AG	Update Carr witness notebook with Bates numbered FBI docs	115.00	3.60	414.00
	JPR	Prep for interviews of chief FBI agents	450.00	6.00	2,700.00
	CT	Prepare for interviews with FBI agents; review transcripts and discovery		7.00	n/c
	JAC	Review new discovery (2.2); prep for FBI interviews (3.6 at no			

Michael Mockovak

Statement Date: January 21, 2011  
Account No. 17898.3800  
Statement No. 120764  
Page: 5

Mockovak, Michael adv. State of

			Rate	Hours	
	charge)		275.00	2.20	605.00
AC	Witness prep work		115.00	4.00	460.00
12/29/2010	JPR	Prep for and interview of FBI agents	450.00	6.00	2,700.00
	CT	Interviews with FBI Agents Carr and Carver (2.0 at no charge); conf JPR and JAC; meeting with David Snyder; prepare for trial	400.00	4.00	1,600.00
	JAC	M/w G. Jennings (.4); prep for FBI interviews (2.2); interview of SA Carr (1.0); interview of Det. Carver (1.0); t/c w/ client (.4); other trial prep (1.6)	275.00	6.60	1,815.00
	AG	OCR new discovery	115.00	0.30	34.50
	AC	Trial prep; emails; confs w/ SGB team; draft letter to computer expert; meeting w/ expert on site	115.00	4.00	460.00
12/30/2010	CT	Review new discovery; conf JPR; Snyder; trial prep; meet with client; t/c JPR, JAC, AC re omnibus, trial interviews, pretrial motions	400.00	5.00	2,000.00
	JPR	Trial prep	450.00	5.50	2,475.00
	JAC	Discovery review and trial prep (3.4); insurance document analysis (2.1); m/w client (.4)	275.00	6.30	1,732.50
	AC	Conf w/ CT, JAC, and JPR after brief meeting w/ client; burn disk for CT; upload transcripts for JPR; add'l confs w/ JAC and JPR; emails w/ KCPAO re: interviews, discovery, etc.; t/c to court reporters; email investigator Snyder; t/c's to Sprint re: SDT; other trial prep	115.00	6.00	690.00
12/31/2010	JAC	Analyze client financial documents (2.7); emails w/ client (.6)	275.00	3.30	907.50
		For Current Services Rendered		288.90	84,956.00
		Total Non-billable Hours		9.00	

Summary

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Jeff P. Robinson	70.30	\$450.00	\$31,635.00
Colette Tvedt	30.00	400.00	12,000.00
Joseph A. Campagna	122.70	275.00	33,742.50
Andrea Crabtree	42.90	115.00	4,933.50
Alexandria Gust	23.00	115.00	2,645.00

Expenses

Computer Research	184.04
Photocopies	4.70
Telephone	2.56
Travel	27.73
Photocopies	84.70
Postage	0.44
Total Expenses Through 12/31/2010	304.17

Michael Mockovak

Statement Date:

January 21, 2011

Account No.

17898.3800

Statement No.

120764

Page:

6

Mockovak, Michael adv. State of

Advances

12/01/2010	Records -- King County ECR	0.60
12/08/2010	Joseph W. King Interview	595.80
12/08/2010	Rosemary Winquist Interview	740.00
12/15/2010	Kenneth Ballenger Interview	497.50
12/15/2010	Brad Ruden Interview	422.50
12/15/2010	Brenda Groshart Interview	710.00
12/15/2010	Travel -- Andrea Crabtree	13.62
12/17/2010	Travel -- Cash (client/expert lunches)	17.06
12/17/2010	Photocopy Services -- Cash	6.00
12/27/2010	Process/Service Charges ABC Process Service & Mazon Associates	17.50
12/27/2010	Records -- King County ECR	17.70
12/28/2010	Records -- American Express / Court Copies	22.49
12/29/2010	Expert - Other -- [REDACTED]	500.00
12/30/2010	Photocopy Services -- Cash	6.00
	Total Advances	<u>3,566.77</u>
	Total Current Work	88,826.94
	Balance Due	<u>\$193,219.11</u>

Your trust account #4 balance is \$340,030.47

## APPENDIX Q

#64

CLERK'S MINUTES

SCOMIS CODE: MTHRG

Judge: PALMER ROBINSON  
Bailiff: CHERYL CUNNINGHAM  
Court Clerk: MELISSA EHLERS  
Digital Record: DR E 835  
Start: 8:44:50  
Stop:

Dept. 41  
Date: 1/3/2011

---

KING COUNTY CAUSE NO.: 09-1-07237-6 SEA

State of Washington vs. Michael Mockovak

---

**Appearances:**

DPA Susan Storey and Mary Barbosa present  
Defendant present and represented by counsel Colleen Tvedt  
also present

**MINUTE ENTRY**

- Defendants motion to reduce bond.  Denied.  Granted, bond set at  
On:  CCAP Basic  CCAP Enhanced  EHD  WER
- Joint motion to continue trial date.  Denied  Granted.  
Omnibus date: Trial date: 1/12/11 Expiration date: 2/11/11
- motion for competency evaluation.  Denied.  Granted, Return date:
- Omnibus Hearing Held
- Court and counsel discuss media coverage
- 
- 

Order(s) signed

## **APPENDIX R**

#66

**FILED**  
KING COUNTY WASHINGTON

JAN 03 2011

SUPERIOR COURT CLERK  
BY Melissa Ehlers  
DEPUTY

**SUPERIOR COURT OF THE STATE OF WASHINGTON COUNTY OF KING**

STATE OF WASHINGTON,

Plaintiff,

vs.

Michael Mackovak

Defendant

NO. 09-1-07237-6 SEA

ORDER ON OMNIBUS HEARING

(OOR)  
Charge: Sol to Commit Murder

Trial Date: ~~1/11/11~~ 1/12/11

Expiration: 2/11/11

In Custody  Out of Custody

An omnibus hearing was held on this date.

1. CrR 3.5:

- No custodial statements will be offered in the state's case-in-chief, or in rebuttal. The statements of defendant will be offered in state's rebuttal case only.
- The statements referred to in the state's omnibus application will be offered and:
  - May be admitted into evidence without a pretrial hearing, by stipulation of the parties.
  - A pretrial hearing shall be held.

2. CrR 3.6:

- No motion to suppress evidence pursuant to CrR 3.6(a) shall be made.
- Defendant will move to suppress evidence. Moving party shall comply with CrR 3.6, 8.1 and CR 6. The motion shall be heard, immediately before trial, by the trial judge.

3. CrR 4.7:

Plaintiff has provided the defense with all discovery required by CrR 4.7(a).  
Defendant has provided the plaintiff with all discovery required by CrR 4.7(b).

Plaintiff shall provide the defense with forensic computer report  
302 from King by 1/5/11, 2011.

Defendant shall provide plaintiff with witness list, outstanding discovery  
for phone records by 1/5/11, 2011.

Witness interviews shall be completed by 1/10/11, 2011. No party  
may impede opposing counsel's investigation of the case, CrR 4.7(h)(1).

The general nature of the defense is entrapment.

Discovery orders: \_\_\_\_\_  
\_\_\_\_\_

4. Plaintiff will move to amend the information to done.  
Defense shall be served a copy of the proposed amended information 0 days  
before the trial date.
5. Motions *in limine* are reserved for the trial court.
6. Proposed jury instructions shall be served and filed when the case is called for trial,  
CrR 6.15(a).
7. Other motions not specifically referenced in this order shall be noted before the chief  
criminal judge or criminal motions judge, and shall comply with CrR 8.1, CrR 8.2, CR 6  
and CR 7(b) unless expressly agreed by the parties in writing.
8. Stipulations are being prepared by parties

DONE IN OPEN COURT this 3 day of January, 2011.

[Signature]  
JUDGE

Submitted:  
[Signature]  
DEPUTY PROSECUTING ATTORNEY  
WSBA# 28187

[Signature]  
ATTORNEY FOR DEFENDANT  
WSBA# 38995

I am fluent in the \_\_\_\_\_ language. I have translated this document for the defendant into that language. I  
certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

\_\_\_\_\_  
Date and Place Interpreter

**OMNIBUS HEARING CHECKLIST**

Case Name: State v. Michael Mockovak Trial Date: 1/12/11  
Case No: 09-1-07237-6 SEA Expiration Date: \_\_\_\_\_

**PLEA NEGOTIATIONS COMPLETED**

Yes \_\_\_ No \_\_\_ Plea Possible  
Yes \_\_\_ No  Sent to Plea Calendar this date

**DISCOVERY ISSUES ADDRESSED**

Provided by:

Yes \_\_\_ No  All documentary discovery (photos/tapes) provided 1/5/11  
Yes  No \_\_\_ Prior convictions of defendant/witness provided  
Yes \_\_\_ No  All medical records, expert reports, lab and test results provided 1/5/11  
Yes \_\_\_ No  All state witnesses have been interviewed and are ready for trial  
Yes \_\_\_ No  All defense witnesses have been interviewed and are ready for trial  
Yes \_\_\_ No  All remaining witnesses interviews have been scheduled for specific dates and times or will be completed by 1/7/11  
Yes  No \_\_\_ All discoverable defenses have been disclosed  
Yes \_\_\_ No  All discovery has been completed

If no: Discovery matters which need court's resolution:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**TRIAL / READINESS ISSUES**

Yes \_\_\_ No  The information will be amended  
Yes \_\_\_ No \_\_\_ Co-defendant(s) is/are ready for trial  
2-3 weeks Trial length estimate, including pre-trial motions  
Yes  No \_\_\_ Jury  
Yes \_\_\_ No  CrR 3.5 hearing:  
# of hours \_\_\_\_\_ # of witnesses \_\_\_\_\_  
Yes \_\_\_ No  CrR 3.6 hearing:  
# of hours \_\_\_\_\_ # of witnesses \_\_\_\_\_ -- interview date(s) \_\_\_\_\_  
Briefing schedule \_\_\_\_\_

**OTHER**

Yes \_\_\_ No  Sent to motion calendar  
If yes: Motion to be heard no later than: \_\_\_\_\_  
Briefing schedule: \_\_\_\_\_

If no: Omnibus rescheduled to: \_\_\_\_\_

DATED: 1/3/11

Palma  
\_\_\_\_\_  
JUDGE

[Signature]  
Deputy Prosecuting Attorney

[Signature]  
Defendant's Attorney

# **APPENDIX S**

**SCHROETER  
GOLDMARK  
& BENDER**

**FILE COPY**

Michael Mockovak  
123 Second Ave N, #320  
Seattle, WA 98109

Statement Date: February 10, 2011  
Account No. 17898.3800  
Statement No. 121118  
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Mockovak, Michael adv. State of Washington

500 Central Building  
810 Third Avenue  
Seattle, WA 98104

Phone (206) 622-8000  
Toll free (800) 809-2234  
Fax (206) 682-2305

Fees

			Rate	Hours	
01/02/2011	CT	Trial prep; conf JPR; conf [REDACTED]; prep for opening and cross examinations	400.00	5.00	2,000.00
	JPR	Trial prep	450.00	5.00	2,250.00
01/03/2011	JPR	Trial prep	450.00	6.00	2,700.00
	CT	Omnibus; prep for interviews for remaining witnesses; t/c C. Fricke re PowerPoint for opening statements; t/c [REDACTED]; review jury questionnaire; conf AC	400.00	4.00	1,600.00
	JAC	Insurance document review	275.00	3.30	907.50
	AG	Email ROIs to Snyder re [REDACTED] (.2); review emails re witness interviews, status, to do (.3)	115.00	0.50	57.50
	AC	To KCPAO for add'l discovery; scan, review, distribute, and save discovery; emails w/ IT and computer expert; travel to and meeting w/ expert at his lab; email from client re: logistics of visit with daughter; emails w/ Monicka re: witness interviews and trial testimony; emails w/ [REDACTED]; meeting w/ client; review client's commentary re: [REDACTED]; emails w/ AG re: binder prep; upload deps for JPR; emails w/ client; review memo re: timeline from JAC; conf w/ CT; and other trial prep	115.00	4.80	552.00
	AEL	Conf w/ JPR and review documents and pleadings	400.00	0.70	280.00
01/04/2011	JPR	Trial prep	450.00	6.50	2,925.00
	JAC	T/c w/ C. Fricke re slides (.8); computer discovery review - filtered emails (4.9)	275.00	5.70	1,567.50
	AG	Review emails (.2); draft jury instructions (.4); review phone records re King/Kultin (.3)	115.00	0.90	103.50
	AC	Email w/ [REDACTED]; review PPT from CT; emails re: jury instructions; t/c [REDACTED]; emails w/ IT re: same; emails re: witness interviews; receipt, review, and circulate State's			



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			Rate	Hours	
		witness list; emails and confs re: phone records; receipt and review of materials from investigator re: [REDACTED] email [REDACTED] t/c client and conf w/ SGB team re: next client meeting; emails re: same; email and text investigator re: witness interviews; add'l trial prep	115.00	3.60	414.00
01/05/2011	JPR	Trial prep re: tapes and cross of Kultin; meeting with client; e-mail prosecutors re: [REDACTED]	450.00	6.50	2,925.00
	JAC	Transcript review and trial prep	275.00	6.20	1,705.00
	CT	Conf C. Fricke re PPT slides; prep for interviews; conf JAC on trial brief	400.00	1.50	600.00
	AG	Upload MM's computer on Z:\	115.00	0.20	23.00
	AC	Emails w/ DPAs Storey and Barbosa, Monicka, CT, JAC, [REDACTED], client, D. Snyder, computer expert, IT support; conf w/ JAC re: [REDACTED] materials; t/c court reporters; to KCPAO for add'l discovery; scan, review, and route discovery; multiple confs w/ JPR, CT, JAC, and AG; review C. Monea corrections to interview transcript; review JPR emails to State; add'l trial prep, including organizing photos from Snyder, uploading materials for JPR, etc.	115.00	5.40	621.00
01/06/2011	JAC	Transcript review and trial prep	275.00	6.90	1,897.50
	CT	Prep for interviews with Christian Monea; Brad Klock and Prudential Insurance broker	400.00	3.00	1,200.00
	JPR	Conf. with court; conf. prosecutors; prep for trial; prep Powerpoint	450.00	6.50	2,925.00
	AG	Gather documents for Monea interview (1.3); pick up discovery from gvt (.3)	115.00	1.60	184.00
	AC	Update witness notebooks; OCR discovery; conf w/ JAC re: corrected transcripts; t/c to court reporters (2.5); emails w/ [REDACTED], [REDACTED], CT, D. Snyder, the State, the Court, etc.; transcript review; rebuild discovery index; review Kultin interview notes and correct statement of [REDACTED] review materials from Snyder; review of and emails re: updated witness list from State; t/c [REDACTED]; review of cell phone reports (3.0)	115.00	5.50	632.50
	AEL	Legal research	400.00	2.50	1,000.00
01/07/2011	CT	Interview of Christian Monea and Bradley Klock; conf JAC; conf JPR; trial prep and demonstrative aids for opening	400.00	6.00	2,400.00
	JPR	Trial prep; conf CT and JAC re: interviews; finalize jury instructions; work on cross outlines for witnesses assigned to JPR	450.00	5.50	2,475.00
	JAC	Interview of C. Monea (1.5), prep for interview (2.0); interview of B. Klock (1.0), prep for interview (1.5); prep for opening (1.8)	275.00	7.80	2,145.00
	AG	Deliver Monea Dec from King case to CT	115.00	0.30	34.50
	AC	Emails re: canceling interviews; email client example subpoenas; emails w/ [REDACTED]; email Monicka re: discovery and interviews; review materials from Snyder; emails w/ computer			

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			Rate	Hours	
		expert; t/c and email court reporter; confs and emails re: demo opening; other trial prep	115.00	3.80	437.00
01/08/2011	JAC	Trial prep, prep for opening	275.00	4.80	1,320.00
	AEL	Legal research for trial brief and beginning draft	400.00	6.50	2,600.00
	AC	Review discovery for correct name spellings for transcripts and emails w/ court reporter; email w/ client re: returned check (no charge); review emails from CT and Barbosa re: comments in Klock interview; emails w/ [REDACTED], JPR, JAC, CT, and AEL	115.00	2.00	230.00
01/09/2011	CT	Trial prep; conf JAC	400.00	6.00	2,400.00
	JAC	Trial prep	275.00	5.10	1,402.50
	AC	Witness binder prep (.5); emails w/ SGB team (.3); email w/ expert Leonard; email w/ AEL re: research (.1); discovery review (.5)	115.00	1.50	172.50
	AEL	Legal research and drafting for trial brief and motions	400.00	8.40	3,360.00
01/10/2011	JPR	Trial prep; finish trial brief and instructions	450.00	7.00	3,150.00
	CT	Trial prep; review and prep exhibits	400.00		
	JAC	Interview of J. King (1.0), prep for interview (1.0), trial prep (6.5)	275.00	8.50	2,337.50
	AG	Re-draft jury instructions (.3); review emails (.2); copy and send audio clips to Fricke (.3); prepare Klock Witness Binder (.8); save audio tracks (.2); prepare statement binder with revised/corrected statements (.6)	115.00	2.40	276.00
	AC	Conf and email w/ JPR re: map (.1); conf w/ JAC re: questions for DPAs (.1); conf w/ CT re: same (.1); emails w/ Monicka and DPA Barbosa re: interviews; calendaring (.2); emails w/ JAC and AG re: audio/video files (.1); emails w/ DPA Storey (.1)	115.00	0.70	80.50
	AEL	Finish prep of one motion and circulate; add'l research and briefing re: further issues	400.00	6.70	2,680.00
01/11/2011	JPR	Trial prep; prep jury instructions, voir dire, jury questions for the court, motions in limine	450.00	7.00	3,150.00
	CT	Trial prep; mock opening and brainstorm; conf C. Fricke; prepare PPT slides and audio and video	400.00	11.00	4,400.00
	JAC	Trial prep (6.0), runthrough of opening (1.5)	275.00	7.50	2,062.50
	AG	Final jury instructions (.8); begin Carver Witness Notebook (4.0); compare 8/11 transcript with JPR notes (.3); start Klock Witness Binder (.1)	115.00	5.20	598.00
	AC	Edit and then finalize trial brief; emails w/ SGB team; email w/ AEL re: 404(b) info; emails w/ [REDACTED], voir dire and materials from linguists; format draft voir dire from [REDACTED] email w/ Chris Anderson re: representation of Monea; email transcripts and trial brief to State; email Court; emails and confs w/ AG re: jury instructions; edit and finalize proposed voir dire; file and serve voir dire; emails re: demo opening; emails re:			

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		Rate	Hours	
	witness interviews; email client; add'l trial prep	115.00	6.20	713.00
01/12/2011	JPR Trial and trial prep	450.00	10.00	4,500.00
	CT Pretrial motions; jury selection; meeting with trial consultant	400.00	10.00	4,000.00
	JAC Trial and trial prep	275.00	8.00	2,200.00
	AG Trial prep: witness binders, jury chart, deliveries to court, etc.	115.00	6.00	690.00
	AC Trial prep	115.00	5.80	667.00
01/13/2011	JPR Trial and trial prep	450.00	10.00	4,500.00
	CT Jury selection; conf jury consultant	400.00	8.00	3,200.00
	JAC Trial and trial prep	275.00	8.00	2,200.00
	AG Errand to court (.3); witness notebook updates (6.0)	115.00	6.30	724.50
	AEL Research issue for JPR and draft memo	400.00	0.50	200.00
01/14/2011	JPR Trial prep	450.00	3.00	1,350.00
	JAC Trial and witness prep	275.00	6.90	1,897.50
	AG Witness binder updates	115.00	5.00	575.00
01/15/2011	CT Trial prep; review and prepare cross examinations on all insurance documents; conf JAC; conf JPR	400.00	5.00	2,000.00
	JAC Witness cross prep	275.00	6.20	1,705.00
01/16/2011	CT Trial prep; cross examinations of Christian Monea, Dawn Schreck, Dino Buonopane	400.00	5.20	2,080.00
	JAC Witness cross prep re insurance	275.00	4.70	1,292.50
01/17/2011	JPR Trial prep	450.00	6.00	2,700.00
	JAC Trial and witness cross prep	275.00	8.30	2,282.50
	CT Trial prep	400.00	8.00	3,200.00
01/18/2011	JPR Trial and trial prep	450.00	10.00	4,500.00
	JAC Trial and trial prep	275.00	10.50	2,887.50
	AC Confs w/ CT, JPR, JAC, and AG re: trial prep (.5); t/c JAC re: cell phone recs in discovery; discovery review; text JAC (.1); to courthouse for opening arguments (2.5); pick-up lunches and conference room setup (.5); review emails; email SGB team re: follow-up from last week (.3); confs w/ JPR, CT and JAC re: witness prep, today's testimony and opening arguments; emails w/ D. Snyder; conf w/ Kerry in Word Processing re: transcript; binder prep (2.0)	115.00	5.90	678.50
	CT Trial and prep	400.00	10.00	4,000.00
	AG Trial prep	115.00	2.40	276.00
	WP Transcribe and proof Det. Dunn interview	40.00	2.90	116.00
01/19/2011	JPR Trial and trial prep	450.00	10.00	4,500.00
	JAC Trial and trial prep (4.0 at no charge)	275.00	8.20	2,255.00
	CT Trial prep; conf JAC and AC; prep for cross examination; prepare audio clips	400.00	14.00	5,600.00

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			Rate	Hours	
	AG	Trial prep	115.00	0.40	46.00
	AC	Trial prep, including witness binder preparation, discovery review, brainstorming w/ CT and JAC, cite checking cross materials, review phone records; emails w/ SGB team; trips to courthouse; t/c's and emails w/ US Attorney's Office, FBI Office, and King County Prosecutor's Office re: add'l discovery, etc.	115.00	12.00	1,380.00
01/20/2011	JAC	Trial and trial prep	275.00	6.00	1,650.00
	JPR	Trial and prep	450.00	5.50	2,475.00
	CT	Trial and prep	400.00	5.00	2,000.00
	AC	Meeting w/ JPR, CT, JAC post-court re: tasks, progress, etc.; brief meeting w/ client & R. Marmer; multiple add'l confs w/ JPR, CT, JAC, and AG; t/c bailiff and court reporter re: transcript; to clerk's office to request CD; search discovery re: Kultin FBI materials; add'l trial prep; emails w/ client and JPR re: expert materials	115.00	4.00	460.00
01/21/2011	JPR	Meet with client; trial prep	450.00	6.50	2,925.00
	JAC	Prep for witness cross examination	275.00	6.50	1,787.50
01/22/2011	CT	Trial prep; meeting with JAC	400.00	6.50	2,600.00
01/23/2011	JPR	Prep for cross of Kultin	450.00	4.00	1,800.00
	CT	Trial prep (3.0 at no charge)	400.00	4.00	1,600.00
	JAC	Prep for witness cross examination	275.00	5.60	1,540.00
01/24/2011	JPR	Trial and prep	450.00	10.00	4,500.00
	CT	Trial; conf JAC and AC (4.0 at no charge)	400.00	12.00	4,800.00
	JAC	Trial and trial prep	275.00	12.90	3,547.50
	AG	Review Klock t/c's (.2); pick up lunch (.3); delivery to courthouse (.4); delivery to courthouse (.4)	115.00	1.30	149.50
	AEL	Conf w/ CT and JAC; legal research and drafting related to evidence rule 106, rule of completeness	400.00	4.50	1,800.00
	AC	Conf w/ CT and JAC; trial prep	115.00	1.50	172.50
01/25/2011	JPR	Trial and trial prep	450.00	12.00	5,400.00
	CT	Trial and prep	400.00	10.00	4,000.00
	JAC	Research and draft motion to dismiss count 1, trial and trial prep	275.00	10.60	2,915.00
	AG	Trial prep	115.00	1.60	184.00
	AC	Trial prep; review text messages; witness binder prep; and team conferences	115.00	5.80	667.00
01/26/2011	JPR	Trial prep and trial	450.00	12.00	5,400.00
	CT	Trial and prep	400.00	10.00	4,000.00
	JAC	Draft and revise motion to dismiss count 1, trial and trial prep	275.00	14.30	3,932.50
	AG	Trial prep witness exhibits	115.00	0.60	69.00
	AEL	Review and edit draft of motion to dismiss count 1	400.00	2.50	1,000.00
	AC	Trial prep	115.00	0.50	57.50

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			Rate	Hours	
01/27/2011	JPR	Trial and trial prep	450.00	7.00	3,150.00
	JAC	Revise motion to dismiss count 1, trial and trial prep	275.00	7.50	2,062.50
	CT	Trial and prep	400.00	7.00	2,800.00
	AG	At trial (3.0 N/C); pull transcripts for client, notebook (.3)	115.00	0.30	34.50
	AEL	Attend trial and provide input on cross examination of informant (3.0); final edit of motion to dismiss (1.6)		4.60	n/c
	AC	Emails w/ court re: exhibits and JIs; finalize cited JIs; emails w/ AG re: prep for court today; conf w/ JAC re: motion; edit cites to motion (1.0); t/c JAC re: transcripts (.1); trip to courthouse (.3); add'l edits to motion to dismiss and transcript review (2.0); confs w/ JPR, CT, JAC, and AEL re: Kultin testimony, motion to dismiss, remaining days of trial, etc.; emails w/ JPR, CT, JAC, and AEL re: same; add'l cite work for motion; conf w/ JAC re: filing (2.6)	115.00	6.00	690.00
01/28/2011	JAC	Prep for motion hearing, motion hearing	275.00	3.30	907.50
	JPR	Prep for and argument of motions	450.00	3.00	1,350.00
	CT	Trial prep; conf JPR, JAC	400.00	3.00	1,200.00
	AEL	Motion hearing	400.00	2.50	1,000.00
	AC	Trial and motion prep; emails	115.00	0.80	92.00
01/29/2011	JAC	Trial and closing prep	275.00	9.60	2,640.00
	JPR	Trial prep and closing prep w/ [REDACTED]	450.00	12.00	5,400.00
	CT	Trial prep; meeting with JAC, JPR and C. Fricke	400.00	6.50	2,600.00
	AEL	Compile legal research materials and send to AC	400.00	0.40	160.00
	AC	Email w/ AEL and save research materials	115.00	0.10	11.50
01/30/2011	JAC	Trial and closing prep	275.00	10.20	2,805.00
	JPR	Trial prep	450.00	11.00	4,950.00
	CT	Prep for trial; conf JPR		4.00	n/c
01/31/2011	JPR	Trial and prep	450.00	12.00	5,400.00
	JAC	Trial and trial prep		7.60	n/c
	CT	Trial and prep; conf JPR re closing and rebuttal (4.0 at no charge)	400.00	6.00	2,400.00
	AC	Attend court proceedings		4.50	n/c
		For Current Services Rendered		712.80	236,782.00
		Total Non-billable Hours		20.70	

Summary

Timekeeper	Hours	Rate	Total
Jeff P. Robinson	194.00	\$450.00	\$87,300.00
Amanda E. Lee	35.20	400.00	14,080.00
Colette Tvedt	166.70	400.00	66,680.00
Joseph A. Campagna	203.10	275.00	55,852.50
Andrea Crabtree	75.90	115.00	8,728.50
Alexandria Gust	35.00	115.00	4,025.00

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<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Word Processing	2.90	40.00	116.00

Expenses

Computer Research	25.19
Photocopies	108.40
Telephone	15.24
Travel	189.15
Photocopies	252.30
Total Expenses Through 01/31/2011	590.28

Advances

11/05/2010	Expert - Other -- [REDACTED]	5,575.00
01/05/2011	Expert - Other -- [REDACTED]	10,000.00
01/18/2011	Travel -- First Bankcard / Meal	41.64
01/18/2011	Travel -- First Bankcard / Meals	15.77
01/21/2011	Travel -- Cash (client, friend & expert lunches)	51.01
01/21/2011	Transcript -- Cash (CD)	100.00
01/21/2011	Legal Expert -- [REDACTED]	12,961.71
01/25/2011	Process/Service Charges ABC Legal Services	9.50
01/26/2011	Expert - Other -- [REDACTED]	5,000.00
01/26/2011	Deposition of RoJane Maybee	277.50
01/26/2011	Deposition of Daniel Kultin	777.50
01/26/2011	Depositions of Bradley Klock & Christian Monea	1,141.50
01/26/2011	Deposition of Det Carr	621.00
01/26/2011	Deposition of Joseph King	481.50
01/27/2011	Travel -- Cash (client lunch)	9.51
01/27/2011	Records -- King County ECR	1.95
01/28/2011	Telephone American Express / Budget Conferencing	13.54
01/28/2011	Deposition of Bradley Dean Klock	367.50
01/28/2011	Legal Expert -- [REDACTED]	10,539.72
01/28/2011	Investigation -- David Snyder PI and Associates, Inc.	7,622.40
	Total Advances	55,608.25
	Total Current Work	292,980.53
	Balance Due	<u>\$292,980.53</u>

Your trust account #4 balance is \$156,721.36

# **APPENDIX T**

## CLERK'S MINUTES

SCOMIS CODE: JTrial \$JFA 12 Person

Judge: Palmer Robinson  
Bailiff: Cheryl Cunningham  
Court Clerk: Melissa Ehlers

Dept. 41  
Date: 1/12/2011

Digital Record: DR E-835

---

**KING COUNTY CAUSE NO.: 09-1-07237-6 SEA**

**State of Washington v Michael Mockovak**

---

### Appearances:

State is present and represented by Susan Storey and Mary Barbosa  
Defendant is present and represented by Colleen Tvedt and Jeff Robinson

### MINUTE ENTRY

- 9:13:55 This cause comes on for Jury Trial. Defendant is charged with Count I: Solicitation to Commit Murder in the First Degree; Count II: Solicitation to Commit Murder in the First Degree; Count III: Attempted Murder in the First Degree; Count IV: Conspiracy to Commit Theft in the First Degree; Count V: Attempted Theft in the First Degree
- 9:14:57 Court and counsel discuss scheduling and Voir Dire  
Alternate Jurors will be in Seats #2 & #8
- 9:17:55 State's Motion in Limine:  
Motion to Exclude-Granted  
Record Recollection- Granted  
Motion to Exclude Irrelevant Evidence- Granted  
Cross Examination of State's Witness- Granted  
Impeachment of State's Witnesses- Granted  
Disclosure of Defense- Granted  
Disclosure of Defense Witness- Granted  
Production of defense investigator's notes pertaining to the defense interview- Reserved  
Motion to compel discovery of all potential defense exhibits- Granted

**State of Washington v Michael Mockovak  
King County Cause No. 09-1-07237-6 SEA**

Self-Serving Hearsay- Granted  
Sympathy Evidence- Granted  
Mind Altering Substances- Granted  
Prior Bad Acts of State's Witnesses- Granted  
Juror Note Taking- Granted

- 9:42:26 Defendant's motion in Limine:  
Motion to Inform Witnesses of the Court's rulings on Motion in Limine and Pre-trial Motions- Granted  
Motion to Exclude Witnesses from the Courtroom to Prohibit Witnesses and the parties from disclosing the nature of claims made in opening statement and witness trial testimony to other witnesses- Granted  
Motion to prohibit counsel and witnesses from using the terms victim, suspect or defendant is Denied  
Preemptory challenges- Granted  
Exhibits and Notice of Witness-Granted  
Other Acts Evidence- Reserved  
Jury Instructions- Reserved  
Closing Argument on entrapment defense- Reserved
- 9:48:16 Court and counsel discuss questions regarding voir dire
- 9:57:42 Recess
- 10:38:52 On Record
- 10:42:55 Jury Panel is sworn and Voir Dire Commences
- 11:27:33 Off  
1:30:19 On
- 11:30:35 Following jurors are excused for hardship,  
1,3,10,11,16,26,27,28,29,30,31,39,41,42,45,46,33,38, & 12
- 11:37:06 Juror #5 is questioned outside the presence of the jury panel  
11:45:26 Defendant motion to excuse for cause is Denied
- 11:49:20 Juror #35 is questioned outside the presence of the jury panel.  
11:57:34 Defendant's motion to excuse for cause is Granted
- 11:58:40 Juror #44 is questioned outside the presence of the jury panel and is excused for cause

**State of Washington v Michael Mockovak  
King County Cause No. 09-1-07237-6 SEA**

- 12:00:58 Court and counsel discuss bringing up the second panel of 25 jurors
  - 12:02:26 Side Bar placed on record regarding hardships
  - 12:03:06 Defendant notifies the court regarding scheduling conflict on the 28<sup>th</sup> of January
  - 12:03:55 Counsel motion for individual questioning of jurors who have answered yes to hearing about this case in the media
  - 12:04:31 Lunch Recess
  - 1:52:25 Second Jury Panel is sworn and Voir Dire Commences
  - 2:25:35 Off
  - 2:29:58 On
  - 2:30:05 Following jurors are excused for hardships, #54,56,58,62,63,67,68,69,70 &75
  - 2:39:59 Jury panel released until January 13, 2011 at 9:00 am
  - 2:37:28 Side Bars placed on record regarding hardship of jurors and whether or not panel should be excused until tomorrow.
  - 2:38:05 Court and counsel discuss jurors who need to be questioned individually
  - 2:39:41 Recess
  - 2:52:52 Juror #7 is questioned individually
  - 3:01:35 Juror #9 is questioned individually
  - 3:11:02 Juror #14 is questioned individually
  - 3:19:24 Juror #20 is questioned individually
  - 3:25:36 Juror #34 is questioned individually
  - 3:29:12 Juror #36 is questioned individually. Juror is excused for cause
  - 3:42:59 Juror #37 is questioned individually
  - 3:49:49 Juror #40 is questioned individually
  - 3:54:15 Juror #47 is questioned individually
- Court is adjourned until January 13, 2011 at 9:00 am

**State of Washington v Michael Mockovak  
King County Cause No. 09-1-07237-6 SEA**

**Date: January 13, 2011**

Judge: Palmer Robinson  
Bailiff: Cheryl Cunningham  
Court Clerk: Leah Fontanez

Digital Record: E 835

**Continued from:** January 12, 2011

**MINUTE ENTRY**

Defendant and respective counsel are present.

8:56:07 Court convenes.

Prospective jury panel absent.

Discussion re individual juror voir dire.

8:56:42 Recess

9:09:45 Court reconvenes.

Individual voir dire of jurors 23, 24, 19, 52, 64, 66, 66, 73, 74 occurs.

The Court excuses juror 23 from this case and any further service.

The Court and respective counsel discuss voir dire procedures.

Discussion re transcripts.

Change of Clerk.....Ron Gertler

10:27:20 Trial resumes with continuing Voir Dire

12:02:03 Recess for Lunch

CHANGE OF CLERK -----> JANIE SMOTER

1:39:28 Court resumes.

JURY PANEL ABSENT

Discussion re: disclosure by Juror #49 to the bailiff concerning witness.

**State of Washington v Michael Mockovak  
King County Cause No. 09-1-07237-6 SEA**

1:42:00 Court in recess.

1:53:54 JURY PANEL PRESENT  
Court resumes.  
Jury selection resumes.

2:43:50 State's motion to excuse Juror #40 for cause is granted.

2:50:55 Court takes peremptory challenges.

2:57:05 Defendant's motion to excuse Juror #37 for cause is granted.

2:59:05 Peremptory challenges resume.

3:08:14 The following Jurors are sworn and impaneled:

1 Nathan Swygard	8 Robert Blevins
2 Cynthia Webb	9 Thomas Zylstra
3 Ann Buckley	10 Stephanie Delaney
4 Eric Westphal	11 Janet Polata
5 Donna Walzer	12 Jerry Woo
6 Chelan Jenness	13 Jacob Parker
7 Vicki Langlot	14 Leroi Smith

3:08:33 The Court instructs the Jury re: trial procedures.

3:13:57 Jurors are excused for the day.

3:15:14 Discussion re: prior in chambers conference concerning presence of Ms. King.  
Ms. King's attorney, Anne Bremner, addresses the court.

Court admonishes and orders all parties in the court to not discuss the court proceedings with potential witnesses.

Discussion re: issues raised by Juror #60; Court reads the notes from the Juror into the record.

Defendant's objections to the Court excusing Juror #40 for cause is put on the record.

3:27:31 Prior in chambers discussions and sidebars are put on the record.

3:28:59 Court is in recess until 1/18/11 at 9:00 a.m.

**State of Washington v Michael Mockovak  
King County Cause No. 09-1-07237-6 SEA**

**Date: 1-18-11**

Judge: Palmer Robinson  
Bailiff: Cheryl Cunningham  
Court Clerk: Dawn Tubbs  
Reporter:  
Digital Record: E -835

**Continued from: 1-13-11**

**MINUTE ENTRY**

9:20:27 START

Defendant and respective counsel present

Jury absent

Stipulations of the Parties signed, filed

Discussion re scheduling

9:2:25 Jury present

9:23:30 State's opening statement

10:19:45 STOP

Recess

10:44:16 START

Jury absent

Discussion re logistics, sound equipment

10:49:30 Jury present

10:50:38 Defendant's opening statement

11:45:17 STOP

Recess

1:34:25 START

L09390-5

PRP of Mockovak

APPENDIX A

**FILED**  
KING COUNTY WASHINGTON

MAR 17 2011

SUPERIOR COURT CLERK  
BY Melissa Eilers  
DEPUTY

COPY TO COUNTY JAIL MAR 17 2011

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,

Plaintiff,

Vs.

MICHAEL EMERIC MOCKOVAK,

Defendant,

No. 09-1-07237-6-SEA

JUDGMENT AND SENTENCE  
FELONY (FJS)

**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). K
- (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	2	XV	<del>250-333</del> MONTHS 250-333	75% OF STANDARD	<del>187.5 TO 249.75</del> MONTHS 249.75	LIFE AND/OR \$50,000
Count III	2	XV	<del>250-333</del> MONTHS 250-333	75% OF STANDARD	<del>187.5 TO 249.75</del> MONTHS 187.5 - 249.75	LIFE AND/OR \$50,000
Count IV	1	II	<del>2-4</del> MONTHS 2-4	75% OF STANDARD	<del>1.5-4.5</del> MONTHS 1.5-4.5	10 YEARS AND/OR \$20,000
Count V	1	II	<del>2-4</del> MONTHS 2-4	75% OF STANDARD	<del>1.5-4.5</del> MONTHS 1.5-4.5	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: \$ 1072.50 <sup>PR</sup>. 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 Kultin, Brad Klock, Christian Monea, Sheree Funkhouser, Dawn Schreck, Meggan McKenzie, Brenda Sifferman, and Valrie Jackson, C.I.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

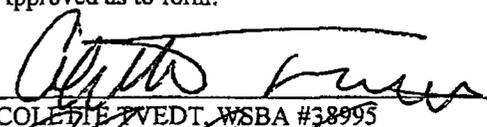
  
PALMER ROBINSON  
JUDGE, King County Superior Court

Presented by:

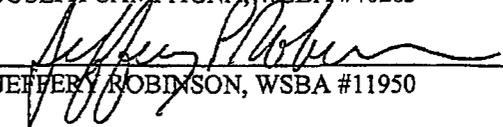
  
SUSANK K. STOREY, WSBA #16447  
Senior Deputy Prosecuting Attorney

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

Approved as to form:

  
COLETTE PVEDT, WSBA #38995

  
JOSEPH CAMPAGNA, WSBA #40263

  
JEFFERY ROBINSON, WSBA #11950

Attorneys for Defendant

FINGERPRINTS



RIGHT HAND  
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE:  
DEFENDANT'S ADDRESS:

*[Handwritten signature]*  
King's Jail

MICHAEL EMERIC MOCKOVAK

DATED: March 17, 2011  
*[Signature]*  
JUDGE, KING COUNTY SUPERIOR COURT

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

CERTIFICATE

OFFENDER IDENTIFICATION

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: \_\_\_\_\_

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

\_\_\_\_\_  
CLERK

BY: \_\_\_\_\_  
DEPUTY CLERK

## **APPENDIX B**

<b>FD-759</b> Revised 07-17-2009 Page 1	FEDERAL BUREAU OF INVESTIGATION <b>Notification of Authority Granted for Use of                  Electronic Monitoring Equipment - Not Requiring a Court Order</b>
--	---

Background Information	
To: SE	Date: 8/10/2009
From: SE	For FBI Field Office Use Only CM#:
Contact Name: SA Lawrence D Carr	<input checked="" type="radio"/> Consensual Monitoring <input type="radio"/> Other Electronic Surveillance
Case File ID: 166C-SE-95743	Title Text: Michael Mockovak; Brad Klock (victim); Murder for Hire

**OIA Authority for CHS**

Are you seeking OIA Authority for a CHS to consensually monitor in a two-party state?

Yes (OIA authority for CHS is only valid for 90 day increments - additional 90 day increments will require submission of another FD-759)

Based upon a thorough review of the aforementioned request, it has been determined that the proposed criminal activity is necessary for the following reason(s):

- To obtain information or evidence essential for the success of an investigation that is not reasonably available without such authorization, or
- To prevent or avoid the danger of death, serious bodily injury, or significant damage to property, and
- The benefits of the activity and evidence to be obtained from the source's participation in the OIA outweigh the risks.

The following points were considered in making the determination:

1. The importance of the investigation;
2. The likelihood that the information or evidence sought will be obtained;
3. The risk that the CHS might misunderstand or exceed the scope of his/her authorization;
4. The extent of the CHS's participation in the OIA;
5. The risk that the FBI will not be able to closely monitor the CHS's participation in the OIA;
6. The risk of violence, physical injury, property damage, or financial loss to the CHS or others; and
7. The risk that the FBI will not be able to ensure that the CHS does not realize undue profits from his/her participation in the OIA.

No (If not OIA, consensual monitoring can be authorized for the duration of the investigation unless the monitoring circumstances substantially change)

OIA approval for a CHS shall be maintained in the appropriate CHS file with a copy placed in the appropriate ELSUR file.

**Investigation Classification Level**

Unclassified     
  Confidential     
  Secret

FEDERAL BUREAU OF INVESTIGATION  
**Notification of Authority Granted for Use of  
Electronic Monitoring Equipment - Not Requiring a Court Order**

1. Reason for Proposed Use: Collect Evidence		2. Types of Equipment: Body Recorder	
		2a. Equipment Concealed: On a Person	
3. Interceptee(s): (If Public Official, Include Title and Entity) Name: Michael Mockovak <input type="checkbox"/> And others yet unknown		4. Consenting Party (Identify ONLY on Field Office Copy): Confidential Human Source <input checked="" type="checkbox"/> Protect Identity Source #: S-00022169	
		4a. The following mandatory requirements have been or will be met prior to Consensual Monitoring taking place: <input type="radio"/> National Security <input checked="" type="radio"/> Criminal <input checked="" type="checkbox"/> Consenting party has agreed to testify; <input checked="" type="checkbox"/> Consenting party has agreed to execute the consent form prior to monitoring/recording; & <input checked="" type="checkbox"/> Recording/transmitting device will be activated only when consenting party is present.	

FD-759  
Revised  
07-17-2009  
Page 3

FEDERAL BUREAU OF INVESTIGATION  
**Notification of Authority Granted for Use of  
Electronic Monitoring Equipment - Not Requiring a Court Order**

5. Location where monitoring will likely occur:		6. Duration of proposed use:	
Location (City or County)	Renton	<input type="radio"/> For the duration of investigation (including OIA for FBI employees)	
State	Washington	<input checked="" type="radio"/> For 90 days (OIA for CHS - renew every 90 days)	
		Expiring On: 11/10/2009	
		6b. Check box if verbal authority was obtained. <input type="checkbox"/>	
7. Chief Division Counsel (CDC)/Office of the General Counsel (OGC) has been contacted, foresees no entrapment, and has advised monitoring is legal & appropriate.		8. Violations	
Name: SA Carrie Zadra		Title: 18	
Date of Contact: 8/10/2009		U.S.C.: 1958	
ADC Review: <i>[Signature]</i>			
Initials: <i>[Signature]</i> Date: 8/10/09			
Field Office: Seattle			

FEDERAL BUREAU OF INVESTIGATION

**Notification of Authority Granted for Use of  
Electronic Monitoring Equipment - Not Requiring a Court Order**

9. DOJ approval is required if the requested monitoring includes any of the following sensitive circumstances (Check all that apply):

- Monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Level IV or above, or a person who has served in such capacity within the previous 2 years.
- Monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any state or territory, or a judge or justice of the highest court of and State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his/her official duties.
- Consenting/non-consenting party is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers.
- Consenting/non-consenting party is in the custody of the Bureau of Prisons of the U.S. Marshals Service.
- Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General for the Criminal Division, or the U.S. Attorney in the district where an investigation is being conducted has requested the investigating agency obtain prior written consent for making a consensual interception in a specific investigation.

10. Synopsis and predicate of Case (the synopsis of the investigation should articulate pertinent, timely facts and predication for which the purpose of the consensual monitoring is requested):

The subject in this case has been communicating with the source for approximately one year with regard to having a former business partner killed. On 08/05/2009, the subject and source met where discussion became obvious the subject was ready to move forward with a plan to bring the plot to fruition. Another meeting was scheduled for 08/11/2009 where it is believed the subject will begin to speak in "plain" language his desires, to include a date for the execution of the planned murder.

Because of this, it would be advantageous in gathering the strongest possible evidence to have the meeting recorded. AUSA Vince Lombardi was briefed on this case and investigative plan and he concurred with the effort.

Some states, by law, do not authorize one party consensual recording of conversations nor provide for a law enforcement exception to this prohibition. Under the AGG-Dom, one party consensual recording of communications to, from, or within such states is Otherwise Illegal Activity. By signature below, the SAC, or a designee, approves the consenting party's Otherwise Illegal Activity in conducting one party consensual recordings of communications when one or both parties are in a state requiring two party consent.

**Approval/Review**

11. ADC Review		12. SSA	
Initials: <i>PC</i>	Date: 8/10/09	Signature: <i>[Signature]</i>	Date: 8/10/09
13. ASAC (If applicable)		14. SAC (If applicable)	
Signature: <i>[Signature]</i>	Date: 8-10-09	Signature:	Date:

**FBI HQ Approvals**

15. Unit Chief (If sensitive circumstances exist)	
Signature:	Date:

## APPENDIX C

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN THE MATTER OF AUTHORIZATION )  
TO INTERCEPT AND RECORD )  
COMMUNICATIONS OR )  
CONVERSATIONS PURSUANT TO RCW )  
9.73.090 )

09-2-12056  
No. 09-14

APPLICATION FOR AUTHORITY TO  
INTERCEPT AND RECORD  
COMMUNICATIONS OR  
CONVERSATIONS

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

I. Affiant Background

Detective Len Carver III, being first duly sworn on oath, deposes and says:

I am a commissioned and sworn law enforcement officer of the Seattle Police Department assigned as a detective with FBI – Safe Streets Task Force. In this capacity, I am sworn as a Special Deputy United States Marshal. Since February, 2008, my full-time official duties have been devoted to the investigation of federal crimes for the purpose of federal prosecution, to the degree that prosecution is warranted. My partner in this investigation is FBI Agent Carr; we have worked

1 closely on this investigation, and I am familiar with all the files and records pertaining to this  
2 investigation. I ~~detective~~<sup>LC</sup> possess the following qualifications to intercept and record  
3 communications or conversations: I have been a police officer for more than nineteen years.  
4 During the course of my employment, I have used a variety of recording equipment, to include, but  
5 not limited to, audiocassette tape recording devices, audio and video digital recording and imaging  
6 devices and others. I have also employed the use of specially-trained police department technicians  
7 for the purpose of deploying and using electronic recording and monitoring devices.

8  
9 II. Authority

10 I have been authorized by Steven Dean, Assistant Special Agent in Charge, Federal Bureau  
11 of Investigation (FBI), Seattle Division, to make this application. I make this application by  
12 authority of RCW 9.73.090.

13  
14 III. Technical Assistance

15 Special Agent Larry Carr, Federal Bureau of Investigation (FBI), Seattle Division, and other  
16 agents and technicians assigned to the FBI's Field Intelligence Group possess the requisite training  
17 and experience to install and operate the interception, transmission and recording equipment  
18 necessary to successfully conclude this investigation and will assist Detective Len Carver and other  
19 investigators that may be assigned to the investigation.

20  
21 IV. Nature of the Investigation

22 There is probable cause to believe that Michael MOCKOVAK has committed the felony  
23 crime of Conspiracy to Commit Murder, 18 U.S.C. 1111 and 1117, which crime is also a violations

1 of Washington State law, Criminal Conspiracy to commit Murder in the 1st Degree, Criminal  
2 Solicitation to Commit Murder, in violation of 9A.28.030 and 9A.28.040, and 9A.32.030,  
3 respectively. Interception and recording of the communications or conversations of Michael  
4 MOCKOVAK should be authorized for the following reasons:

5       On April 10, 2009, DANIEL KULTIN (KULTIN), a permanent US Citizen who  
6 immigrated from Ulyanovsk, Russia, at age 18 and the consenting person to this application,  
7 believed one of his employers, Michael MOCKOVAK (MOCKOVAK), intended to hire  
8 someone to murder a former business associate, Brad KLOCK (KLOCK). KULTIN confided  
9 this to a family member who KULTIN knew to have law enforcement contacts with the Portland  
10 Division of the Federal Bureau of Investigation (FBI). KULTIN's family member, an Oregon  
11 resident, introduced KULTIN to Special Agent George STEUER, Portland Division of the FBI.  
12 KULTIN was subsequently interviewed by STEUER at a restaurant in West Linn, Oregon. Also  
13 present during the interview was Oregon State Investigator Robert Hicks. Upon being advised of  
14 the identity of the investigating officials and the nature of the interview, KULTIN provided the  
15 following information, which he said he had learned from his employment at Clearly Lasik, and  
16 from personal conversations that he had with MOCKOVAK.

17       KULTIN is the Director of Information Technologies for a Seattle-based business known  
18 as Clearly Lasik. The business has eight venues in which they perform Lasik procedures (eye  
19 surgery). Said venues are located in Washington, Oregon, Idaho, British Columbia and Alberta  
20 Canada. KULTIN has been employed with Clearly Lasik for approximately four years,  
21 beginning in early 2006 or late 2005. Until May of 2009, KULTIN was a full time employee of  
22 the company, responsible for maintaining the company's computer systems at each of the  
23 companies locations, and for technical maintenance of online advertising by Clearly Lasik.

1 KULTIN's home office is in Renton, Washington, though he would on occasion travel to the  
2 companies other locations to service the computer systems. KULTIN had daily interaction with  
3 the doctors and other employees to include the company's president, CHRISTIAN MONET.  
4 Since May of 2009, KULTIN only works 20 hours a week performing the same functions.

5 According to KULTIN, the business performs Lasik procedures on approximately 350  
6 patients each month, at a fee of \$3,500 per procedure. The business previously reported earnings  
7 of \$17 million per year, but has slumped to \$10 million in 2008 due to the weak economy. The  
8 current president of the business is CHRISTIAN MONET (MONET), who is related to ED  
9 PEPPIN (PEPPIN) by marriage – MONET married PEPPIN's daughter.

10 The business was founded, and is now owned, by two doctors, Dr. JOSEPH KING  
11 (KING) and Dr. MICHAEL MOCKOVAK (MOCKOVAK). According to the Washington  
12 Secretary of State KING and MOCKOVAK incorporated the business "Clearly Lasik, INC on  
13 05/04/2007, which is headquartered in Renton, WA, Unified Business Identifier (UBI) #  
14 602506093.

15 KOLTON further told investigators that, KING and MOCKOVAK were once related by  
16 marriage – MOCKOVAK was married to KING's sister. However, MOCKOVAK recently  
17 divorced his wife and a rift has developed between the two physicians. Additionally, the doctors,  
18 according to KULTIN, in early 2008 fired all the physicians they had performing Lasik  
19 procedures throughout their eight clinics, and KING and MOCKOVAK now perform all the  
20 procedures themselves.

21 KOLTON stated that, in early 2007, Doctors KING and MOCKOVAK fired the former  
22 president of the company, BRAD KLOCK (KLOCK). KLOCK had been a former professional  
23 hockey player from Vancouver, British Columbia. KING and MOCKOVAK hired him in late

1 2004 to run the company. Over time, the doctors became dissatisfied with KLOCK's  
2 performance and fired him prior to the term of his contract. As is noted above, KULTIN learned  
3 this information in conversations with MOCKOVAK.

4 According to KULTIN, KLOCK has disputed his firing for approximately the past two  
5 years, and has filed a wrongful termination suit. A records search revealed that KLOCK filed a  
6 suit in King County Superior Court on 01/13/2009, cause number 09-2-03018-9, in which  
7 Clearly Lasik, MOCKOVAK and KING are named as defendants. The case is still active and  
8 has a scheduled court date of 06/2010.

9 KULTIN described in detail certain conversations that MOCKOVAK had initiated with  
10 him: Sometime in the spring of 2008, Dr. MOCKOVAK approached KULTIN while they were  
11 both at the Renton, WA, office and jokingly asked if he (KULTIN) had any contacts with the  
12 Russian mafia who might resolve his problems with KLOCK's lawsuit. KULTIN dismissed the  
13 conversation, believing MOCKOVAK was joking about the matter.

14 However, in early 2009, MOCKOVAK approached KULTIN again at work and asked if  
15 he had any Russian mafia connections that could take care of KLOCK. MOCKOVAK was  
16 visibly upset, and let KULTIN know that his upset was a result of some issue related to the  
17 lawsuit filed by KLOCK. KULTIN said that it seemed anytime a court date approached or an  
18 attorneys bill would come to the office, MOCKOVAK would become angered. KULTIN  
19 believed the doctor was only half-serious and told MOCKOVAK that doing that sort of thing in  
20 the United States was risky business, as state and federal law enforcement would aggressively  
21 investigate the matter. KULTIN further commented to MOCKOVAK that such matters did not  
22 occur in the United States like they did back in Russia in the 1990's.

1 The following day, MOCKOVAK approached KULTIN in the office's break room and  
2 advised that he had learned that KLOCK would be traveling to Germany within the next month,  
3 and that it would be the perfect time and place to have KLOCK "eliminated." KULTIN had the  
4 distinct impression that MOCKOVAK seriously wanted to have KLOCK killed.

5 KULTIN said that nobody was present for, or close enough to overhear any of the above-  
6 described conversations between himself and MOCKOVAK.

7 KULTIN told Agent STEUER that he did not believe Dr. KING was aware of  
8 MOCKOVAK's intentions relative to KLOCK. Additionally, KULTIN did not believe  
9 MOCKOVAK had approached anyone else regarding the arranged murder of KLOCK.  
10 MOCKOVAK only approached KULTIN when the KLOCK's civil action progressed and caused  
11 MOCKOVAK to become upset.

12 At this point, Agent STEUER concluded his interview with KULTIN.

13 Because the subjects in this investigation reside and work within the state of Washington,  
14 the matter was referred to the Seattle Division of the FBI. FBI Special Agent Lawrence D. Carr  
15 was provided KULTIN's contact information by FBI Special Agent George Steuer, Portland  
16 Division.

17 On or about May 8<sup>th</sup> 2009, FBI Agent CARR met with KULTIN to discuss the  
18 information he had earlier provided to the Portland Division. KULTIN stated that, since  
19 MOCKOVAK'S early 2009 inquiry about dealing with KLOCK, through MOCKOVAK'S  
20 comments that KLOCK's impending trip to Germany would be a good time to eliminate  
21 KLOCK, MOCKOVAK has not again broached the subject. SA Carr advised KULTIN not to  
22 bring up the matter and if MOCKOVAK did, only listen to what he had to say, and provide no  
23 direction or contribution to the conversation.

1 On or about June 11<sup>th</sup> 2009, SA Carr and I met with KULTIN. KULTIN said  
2 MOCKOVAK still has not brought up any conversation about eliminating KLOCK. He did say  
3 he has had many conversations with MOCKOVAK about life in Russia and Russian organized  
4 crime. KULTIN seemed to think MOCKOVAK is overly interested in these topics as they are a  
5 precursor for many of their conversations.

6 In this same meeting, KULTIN shared with Agent Carr and me that he was traveling to  
7 Los Angeles to visit some friends. Since MOCKOVAK had asked KULTIN if he had Russian  
8 Mafia connections, SA Carr directed KULTIN to share with MOCKOVAK that his friends in  
9 Los Angeles might have mafia connections.

10 In early July of 2009, Agent Carr made phone contact with KULTIN in which KULTIN  
11 discussed a brief conversation he had with MOCKOVAK. KULTIN said that when he told  
12 MOCKOVAK he was going to Los Angeles and that his friends might have mob connections,  
13 MOCKOVAK said he would like to meet them. He brought up the possibility of the two of them  
14 (KULTIN and himself) traveling to Los Angeles for a weekend. MOCKOVAK did not bring up  
15 any discussion of using these connections to arrange a murder.

16 On or about August 3<sup>rd</sup> 2009, KULTIN contacted Agent Carr and advised that  
17 MOCKOVAK called him to request a meeting to discuss "that thing they had talked about."  
18 KULTIN, because of the unusual cryptic tone MOCKOVAK used, he took this request to be  
19 about their discussions about MOKOVICK'S intended murder for hire.

20 On August 4<sup>th</sup>, 2009, Agent Carr met and I with KULTIN and opened him as an FBI  
21 source. On August 5<sup>th</sup>, KULTIN met with MOCKOVAK at his (KULTIN's) office, Clearly  
22 Lasik, 900 SW 16<sup>th</sup> Street, Renton, Washington. On August 6<sup>th</sup> Agent CARR and I met and  
23 debriefed KULTIN regarding the meeting. KULTIN told Agent CARR and me the following:

1 KULTIN met with MOCKOVAK at approximately 2:30 PM on Wednesday August 5,  
2 2009. When he arrived at the office, MOCKOVAK stated he wanted to take a walk around the  
3 parking lot. KULTIN agreed and the two went outside. Nobody was in the vicinity while the  
4 two talked. KULTIN stated that as they walked, MOCKOVAK began to tell him about plans to  
5 split the business in the fall of 2009. He stated that he was upset with his current business  
6 partner, Dr. JOSEPH KING, and felt there would be problems when the split occurs.

7 MOCKOVAK told KULTIN that he was angry with the way things have been going for  
8 him, and said, "I hate people taking advantage of me, like Joe [Dr King], he is a greedy snake."  
9 MOCKOVAK told KULTIN there is a \$5,000,000 "Key Man" life insurance policy on Dr.  
10 KING, should something happen to him. He followed by adding, "If Joe becomes a stumbling  
11 block maybe we can look at him."

12 KULTIN said the conversation then turned to the original target, BRAD KLOCK.  
13 MOCKOVAK stated, "I don't know how these things work? What do I do? Do we just have  
14 someone follow him?" KULTIN said he responded by telling MOCKOVAK he would make  
15 contacts with his friend in Los Angeles.

16 KULTIN said MOCKOVAK was being guarded and careful with his words but the tone  
17 of the meeting was clear -- that MOCKOVAK wished to move forward in developing a plan to  
18 have BRAD KLOCK murdered, and that MOCO VAK was also considering whether to have Dr.  
19 KING murdered. MOCKOVAK told KULTIN that KLOCK will be in Seattle on September  
20 16th and 17th for mediation in regard to his lawsuit against MOCKOVAK's business, Clearly  
21 Lasik. (KULTIN knows from conversations at work that KLOCK resides in Vancouver, British  
22 Columbia, and is a Canadian citizen.)

1 KULTIN said that, at the end of their meeting, he and MOCKOVAK agreed that he  
2 (KULTIN) would make contact with his people in Los Angeles. KULTIN said he told  
3 MOCOYAK that he would make inquiries as to how to proceed with eliminating KLOCK, and  
4 that they'd meet again to discuss what he had learned. KULTIN added that he believed  
5 MOCKOVAK was moving away from wanting KLOCK killed and starting to focus on his  
6 business partner, Dr. Joe KING. SA Carr told KULTIN that, for the next meeting between he  
7 [KULTIN] and MOCKOVAK, he should relay the following story to MOCKOVAK:

8 That his [KULTIN's] friend in Los Angeles was a boyhood associate KULTIN grew up  
9 with in Russia. The friend had become an associate with a Russian Crime group headed by  
10 Sergei Mikhailov. That his friend would be able to arrange a murder of any target and conceal  
11 the murder as a street crime. The cost would be \$10,000 up front and another \$10,000 upon  
12 completion. The only thing that is needed is as much intelligence on the target as possible, the  
13 first installment and date of intended "hit."

14 On August 11<sup>th</sup>, 2009, KULTIN met with MOCKOVAK at the Clearly Lasik offices in  
15 Renton, Washington. KULTIN told investigators the following about that meeting:

16 The two men went out to lunch where KULTIN relayed the story provided by Agent Carr  
17 to MOCKOVAK. KULTIN further made it clear to MOCKOVAK that the individuals who can  
18 perform the murder for him are professionals; they don't make mistakes. He advised  
19 MOCKOVAK that, unless he (MOCKOVAK) had a certain preference, they would make it look  
20 like a carjacking "gone bad." KULTIN also told MOCKOVAK that, whether the victim  
21 cooperated or not, the hit men would make sure the victim was dead by multiple gun shots to the  
22 body and head.

1 On October 28<sup>th</sup> 2009, SA Carr met and I with KULTIN to discuss a phone call he  
2 (KULTIN) had received from MOCKOVAK. KULTIN said that, a few days prior to this  
3 meeting, he received a call from MOCKOVAK. MOCKOVAK told KULTIN that he had been  
4 able to confirm that KING would be traveling to Australia on November 7<sup>th</sup> and staying there  
5 until the 14.<sup>th</sup>

6 On October 29<sup>th</sup> 2009, SA Carr received a call from KULTIN stating that, on November  
7 3, 2009, he is to meet MOCKOVAK for dinner. KULTIN believes that, given that KING's  
8 travel date is approaching; MOCKOVAK wants to meet with him to make arrangements to have  
9 KING killed while he is in Australia. Due to administrative issues related to this order, KULTIN  
10 was instructed to tell MOCKOVAK to postpone the meeting. Investigators anticipate directing  
11 KULTIN to schedule a meeting with MOCKOVAK sometime in the next week, 11/04/2009 thru  
12 11/11/2009.

13 Investigators make this application to record conversations between KULTIN and  
14 MOCKOVAK to determine MOCKOVAK's true intentions with respect to the above-listed  
15 crimes, and, if appropriate, to develop evidence of said crimes.

16 Investigators have obtained records from the above-referenced civil litigation between  
17 KLOCK and Clearly Lasik. In the complaint filed January 13, 2009, KLOCK, through his  
18 attorney, states the following:

19 He resides in Vancouver, British Columbia, and is a Canadian Citizen.

20 Clearly Lasik, Inc is a Nevada corporation; its principal place of business is in Renton,  
21 Washington.

22 KLOCK was approached about heading up the corporation in December, 2004. He was made a  
23 member of the Board of Directors in January, 2005.

1 On November 29, 2006, MOCKOVAK and KING told KLOCK that they were terminating his  
2 employment.

3 On January 27, 2009, the defendants in this civil matter filed a motion to remove the case  
4 to federal court, citing as grounds for removal, that KLOCK is a Canadian resident ant citizen;  
5 the defendant corporation is a citizen of Nevada and California; Dr. MOCO~~V~~AK is a resident of  
6 Camas, Washington; Defendant Heather Mockovak is a resident of Vancouver, Washington;  
7 Defendants King are residents of Newcastle, Washington; KLOCK's claims amount to well in  
8 excess <sup>of</sup> ~~if~~ Superior court jurisdictional amount. The case was ordered removed to Federal Court,  
9 but returned to State court on March 2, 2009.

10  
11 Investigators did not initially consider any prosecution of crimes in State court. It was not  
12 until October 29, 2009, that investigators identified state crimes as additional possible crimes being  
13 committed in this investigation. At that time, investigators determined to focus their investigation  
14 on the above-listed state crimes, in addition to the above-listed federal crimes. Once the possibility  
15 of a state prosecution came to investigators attention, in an abundance of caution, investigators  
16 determined to seek authority pursuant to Washington State law to record all subsequent  
17 conversations between KULTIN and MOCKOVAK in which there is probable cause to believe any  
18 of the above-listed crimes will be discussed. Thus, the following summarized conversations  
19 between KULTIN and MOCKOVAK were recorded pursuant to federal authority, for the sole  
20 purpose of prosecution, if warranted, of federal crimes in federal court.

21 To date, through federal process, there have been three recorded conversations between  
22 KULTIN and MOCKOVAK: August 11, 2009, October 20, 2009 and October 22, 2009. The  
23 August 11, 2009, meeting came a few days after MOCKOVAK requested that KULTIN contact his

1 friends to find out more information about whether MOCKOVAK could hire them to murder  
2 KLOCK. In that meeting KULTIN met MOCKOVAK at the Clearly Lasik Renton office, the two  
3 went to a nearby Teriyaki restaurant. Once there, the two stood outside while they waited for their  
4 food. During this time, KULTIN relayed to MOCKOVAK the back story Agent CARR provided.  
5 KULTIN also told MOCKOVAK that his friends would make sure KLOCK was killed by shooting  
6 him multiple times in the body and head. MOCKOVAK can be heard laughing when he learned  
7 that KLOCK would be shot in the head. MOCKOVAK also approved of the plan to kill KLOCK in  
8 Canada, saying "good, good." MOCKOVAK advised KULTIN that if the civil suit went his way  
9 he was not going to have KLOCK killed, that this was just business and he had no personal dislike  
10 for KLOCK to the point of just having him killed. As such he told KULTIN to delay furthering the  
11 plan until they knew how the upcoming depositions turned out.

12 On 10/20/2009 KULTIN again met with MOCKOVAK, at MOCKOVAK's request at the  
13 Clearly Lasik Renton offices. In this meeting, which took place in KULTIN's office,  
14 MOCKOVAK stated that he now considered KLOCK to be "a fly on the wall" compared to his  
15 issues with Dr. KING. MOCKOVAK told KULTIN that he recently learned KING will be  
16 vacationing somewhere in Australia beginning November 7, 2009. MOCKOVAK stated that this  
17 would be the perfect time to get rid of KING and that it would never come back to him if the  
18 murder were to be committed so far away. MOCKOVAK indicated that he wanted KULTIN to  
19 check with his friends to see if KING could be killed in Australia. MOCKOVAK also relayed to  
20 KULTIN that he has been shifting money from his bank account and gambling junkets for the down  
21 payment. He relayed that he has been able to shift \$11,000.00 so far. KULTIN agreed that he  
22 would make some inquiries and the two decided to meet in two days to discuss what KULTIN had  
23 learned.

1 On 10/22/2009, KULTIN met with MOCKOVAK at the Bellevue Club located at 11200 SE  
2 6<sup>th</sup> Street, Bellevue. MOCKOVAK is a member and had invited KULTIN to the club for a  
3 workout and lunch. After lunch the two exited the club and began walking nearby. As they  
4 walked, KULTIN relayed to MOCKOVAK a predetermined story that Agent CARR and I had  
5 provided to KULTIN. Specifically, that the murder can take place in Australia but because it is a  
6 different group, his friend in Los Angeles will be missing out on the proceeds. Because of this  
7 there would be a \$5,000.00 dollar "finder's fee," payable when the murder occurs. This changed  
8 the total to \$25,000.00, to which MOCKOVAK agreed. In further discussion, MOCKOVAK  
9 revealed that KING would be travelling with his wife and children. MOCKOVAK stated that he  
10 did not want KING's wife killed, only KING himself. KULTIN told MOCKOVAK that these  
11 people are professional and they don't make mistakes. To assist with this, KULTIN requested  
12 that in the coming days, MOCKOVAK obtain as much information about KING's vacation as  
13 possible. MOCKOVAK agreed and that the next time they met, MOCKOVAK would have a  
14 dossier comprised the travel information and initial payment, stating "I have some work to do."

15  
16 V. Investigative Plan

17 Investigators intend to have KULTIN meet with MOCKOVAK in person and engage him  
18 in conversations and communications regarding the crimes alleged in this application;  
19 specifically, Criminal Conspiracy to Commit Murder in the 1st Degree and Criminal Solicitation to  
20 Commit Murder. We anticipate that KULTIN, he will arrange to meet MOCKOVAK for dinner,  
21 at which time it is believed KULTIN will be provided the requested documents and \$10,000.00  
22 dollars.

1           Though investigators do anticipate that this meeting will occur as planned, I cannot say  
2 with certainty that it will occur. I do not know at this time which restaurant the two will meet at,  
3 but anticipate that the meeting will occur in King County. Nor can I predict in advance where in  
4 the restaurant the meeting will occur. Due to these facts, it is unlikely that investigators will be  
5 in a position to overhear the conversation between KULTIN and MOCKOVAK. Further, it is  
6 clear that MOCO VAK is conscious that the murder he is soliciting is a crime, and that he does  
7 not want his conversations on this topic to be overheard. As he has in the past, he is likely to  
8 take precautions to ensure that no one will be in a position to overhear the conversations.

9           As is also clear from the above-summarized facts, conversations between KULTIN and  
10 MOCKOVAK about MOCKOVAK's solicitation of murder have been ongoing for quite some  
11 time. Investigators anticipate that, like the pattern of conversation that MOCKOVAK and  
12 KULTIN have established to date, the two will need to have several additional conversations  
13 about MOCO VAK'S murder solicitation.

14           Investigators cannot predict with any certainty, at this time, when and where these  
15 additional conversations will take place. The communications and conversations between  
16 KULTIN and MOCKOVAK could take place via telephone, at MOCKOVAK's place of residence,  
17 his place of business, or some other yet to be determined location. Any conversations that are  
18 recorded via telephone will be on KULTIN's cell phone 206-251-2356. According King County  
19 Assessor's records, MOCKOVAK owns a residence within King County at 15301 SE 80<sup>th</sup> Street,  
20 New<sup>LC</sup>Castle. KULTIN has told investigators that this is MOCKOVAK's primary residence.

21           Investigators anticipate that the locations of all face to face meetings between  
22 MOCKOVAK and KULTIN will occur either at a location suggested by MOCKOVAK, or one  
23 agreed to by MOCKOVAK. To date, MOCO VAK has controlled the time and location of his

1 meetings with KULTIN. If KULTIN were to insist on a particular time or location for a meeting,  
2 MOCKOVAK could become suspicious of KULTIN's cooperation with law enforcement. This  
3 could place KULTIN's safety at risk, and could also chill MOCO VAK's willingness to further  
4 discuss his crimes with KURTIN. KULTIN will suggest alternate locations if investigators  
5 determine that the locations initially suggested by MOCKOVAK present too great a risk to  
6 KULTIN's safety. Investigators anticipate that all meetings will occur within King County. Daniel  
7 KULTIN has consented to have his communications and conversations with MOCKOVAK  
8 intercepted and recorded.

9       Investigators have every intention of expeditiously concluding this investigation. However,  
10 events beyond the control of investigators may occur to prevent the necessary conversations  
11 between KULTIN and MOCKOVAK from occurring. If for some reason, MOCKOVAK is unable  
12 to meet with KULTIN, it may not be possible for the initial conversation to occur as planned.  
13 Additionally, as noted above, it is likely that several conversations will be required to complete this  
14 phase of the investigation. Investigators are not in control of the number of conversations that may  
15 be required and anticipate that it may take several conversations and meetings between KULTIN  
16 and MOCKOVAK before it is determined that MOCKOVAK intends to commit the crime alleged.  
17 For these reasons, investigators request authority to record these conversations for a seven (7) day  
18 period or until the investigative plan described has run its course, whichever comes first.

19  
20 VI. Investigative Need for Recording

21       Normal investigative techniques are too dangerous to try, and reasonably appear unlikely to  
22 succeed if tried. Law enforcement is normally reactive. However, it would be irresponsible for the  
23

1 Federal Bureau of Investigation to wait until police receive a 911 call reporting a Murder before  
2 <sup>LE</sup> <sup>0</sup> <sup>12</sup> responding to the criminal scheme described.

3 The crimes of Criminal Conspiracy to commit Murder in the 1st Degree and Criminal  
4 Solicitation to Commit Murder are anticipatory crimes. In such crimes it is absolutely imperative  
5 that the fact finder be given all obtainable evidence to accurately interpret the intent of the defendant  
6 at the time the words constituting the crime are spoken. In this case, MOCKOVAK has chosed to  
7 confide in and use KULTIN to aid him in the commission of the crimes. There is simply no other  
8 investigative method that will afford the fact finder the opportunity to hear the emotion and  
9 determination in the voice of MOCKOVAK when he discusses the plan for the murder, yet that is  
10 the very information that will best allow the fact finder to understand MOCKOVAK's true intent in  
11 this matter. The actual content, tone, inflection, speech patterns and volume of MOCKOVAK's  
12 voice may contain meaning outside that contained in the spoken words themselves and will be a  
13 critical determination of <sup>LE</sup> <sup>0</sup> <sup>12</sup> ~~MA~~MOCKOVAK's involvment in these crimes. The delivery is at least as  
14 important at the words themselves in determining whether MOCKOVAK genuinely intends to pay  
15 another person to cause the murder of KING. Additionally, it is unlikely there will be physical or  
16 documetary evidence which, standing alone, will significantly link MOCKOVAK to the crimes.  
17 No other investigative technique will be able to provide this evidence to the fact finder given the  
18 nature of this case.

19  
20 MOCKOVAK is comfortable with KULTIN through a relationship cultivated over some  
21 time. MOCKOVAK only trusts divulging his plans in privacy. His intended crimes carry a stiff  
22 penalty, of which MOCKOVAK is likely aware. Due to the criminal nature of the anticipated  
23

1 conversations, MOCKOVAK is not likely to discuss his own involvement in the described crimes  
2 in the presence of anyone who he does not believe is also a conspirator.

3 It is anticipated entrapment may be a defense to any criminal charges that result from this  
4 investigation. MOCKOVAK may also claim that he was not seriously planning anyone's death,  
5 but was merely "fantasizing" or "kidding" about it. Possession of all the actual verbal exchanges  
6 between MOCKOVAK and KULTIN, in the form of a recording, are necessary to resolve these  
7 issues. A recording of conversations between MOCKOVAK and KULTIN will provide  
8 evidence of exactly what is said by who, thus providing investigators with evidence that will be  
9 critical to sorting out who planned or is planning the crimes, and whether that person is being  
10 encouraged in any way to commit crimes that he would not otherwise commit.

11  
12 VII. Period Requested

13 Interceptions and recording of communications or conversations by any device or  
14 instrument should be authorized commencing November 4, 2009, at 5:00 PM, to be completed  
15 no later than November 9, 2009, at 5:00 PM.

16  
17 VIII. Prior Intercepts

18 I know of no previous RCW 9.73 applications involving the same persons named herein,  
19 whose communications or conversations are to be recorded.

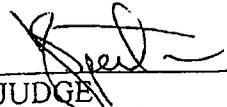
20  
21 IX. Conclusions

22 In view of the foregoing, I believe based upon my training and experience that  
23 communications or conversations concerning the crimes of Criminal Conspiracy to commit Murder

1 in the 1st Degree, Criminal Solicitation to Commit Murder 18 U.S. C. 1111 and 1117 RCW  
2 9A.28.030 and RCW 9A.28.040, respectively, will occur during the time intervening between  
3 November 4th, 2009, at 5:00 PM and November 11th, 2009, at 5:00 PM involving NON-  
4 CONSENTING PARTY MICHAEL MOCKOVAK; that those communications or conversations  
5 will be evidence of the above listed crimes; and that interception and recording of those  
6 communications or conversations by any device or instrument should be authorized commencing  
7 November 4th, 2009, at 5:00 PM, to be completed no later than November 11th, 2009, at 5:00 PM,  
8 or upon completion of the investigation, whichever occurs earliest.

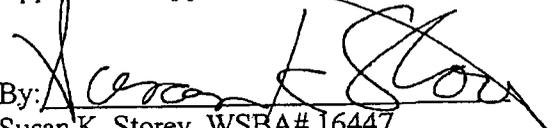
9  #6118  
10 Detective Len Carver  
11 Seattle Police Department  
12 FBI – Safe Streets Task Force

13 SUBSCRIBED and SWORN to before me  
14 this 4<sup>th</sup> day of November, 2009, at 4:5<sup>1/2</sup> a.m./p.m.

15   
16 JUDGE

**JULIE SPECTOR**

17 Application Approved.

18   
19 By: Susan K. Storey, WSBA# 16447  
20 Senior Deputy Prosecuting Attorney  
21 Fraud Division – Special Operations Unit  
22  
23

APPLICATION FOR AUTHORITY TO INTERCEPT  
AND RECORD COMMUNICATION  
OR CONVERSATIONS - 18

00038 MEM

Dan Satterberg, Prosecuting Attorney  
FRAUD DIVISION  
900 Fourth Avenue  
Seattle, Washington 98164  
(206) 296-9010 FAX (206) 296-9009

## **APPENDIX D**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN THE MATTER OF AUTHORIZATION )  
TO INTERCEPT AND RECORD )  
COMMUNICATIONS OR )  
CONVERSATIONS PURSUANT TO RCW )  
9.73.090 )

No. 09-2-12056  
09-14

ORDER AUTHORIZING INTERCEPTION  
AND RECORDING OF  
COMMUNICATIONS OR  
CONVERSATIONS PURSUANT TO RCW  
9.73.090

TO: FBI Agent Carr, Seattle Police Detective Len Carver III, members of the FBI Criminal Squad, Safe Streets Task Force and members of the Seattle Police Department:

WHEREAS, sworn application having being made before me by Detective Len Carver III, a commissioned law enforcement officer of the Seattle Police Department, and full consideration having been given to the matters set forth therein, the court hereby FINDS:

- (a) There is probable cause to believe that MICHAEL MOCKOVAK has committed the federal crimes of Conspiracy to Commit Murder, 18 U.S.C. 1111 and 1117, and the felony crimes Criminal Conspiracy to Commit Murder in the 1<sup>st</sup> Degree, Criminal Solicitation to Commit Murder, in violation of RCW 9A.28.030 and RCW 9A.28.040;

00039 MEM

- 1 (b) There is probable cause to believe that communications or conversations relating
- 2 to said crimes will take place and will be obtained as evidence through
- 3 interception and recording as hereafter authorized;
- 4 (c) DANIEL KULTIN, one party to the expected communications or conversations,
- 5 has given consent to interception and recording of same;
- 6 (d) Normal investigative techniques have been tried and failed, and reasonably appear
- 7 likely to succeed;
- 8

9 NOW THEREFORE,

10 IT IS HEREBY ORDERED that FBI Agent Carr, Seattle Police Detective Len Carver III,  
11 members of the FBI Criminal Squad, Safe Streets Task Force and members of the Seattle Police  
12 Department are authorized to intercept and record by any device or instrument the  
13 communications or conversations of DANIEL KULTIN, with Michael Mockovak, concerning  
14 commission of the felony crimes of Criminal Conspiracy to Commit Murder in the 1<sup>st</sup> Degree,  
15 Criminal Solicitation to Commit Murder, in violation of 18 U.S.C. 1111 and 1117 and RCW  
16 9A.28.030 and 9A.28.040; expected to occur beginning on or about November 4, 2009, at 5:00  
17 p.m. at or upon the following.

18 Any location within King County suggested by or agreed to by Michael Mockovak and  
19 via telephone using telephone number (206) 251-2356.

20 ////  
21 ////  
22 ////  
23 ////

00040 MEM

1 IT IS FURTHER ORDERED that this authorization is effective November 4, 2009, at  
2 5:00 p.m., and shall terminate November 11, 2009, at 5:00 p.m, or upon completion of the  
3 authorized communications or conversations, whichever occurs first.  
4

5 SIGNED this 4<sup>th</sup> day of November, 2009, at 4:55 a.m./p.m.

6  
7   
SUPERIOR COURT JUDGE

8 JULIE SPECTOR

9 Presented by:

10   
11 SUSAN K. STOREY, WSBA# 16447  
12 Senior Deputy Prosecuting Attorney  
13 Special Operations Unit  
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00041 MEM

ORDER AUTHORIZING INTERCEPTION AND  
RECORDING OF COMMUNICATIONS OR  
CONVERSATIONS PURSUANT TO RCW 9.73.090 - 3

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104

## **APPENDIX E**

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**FEDERAL BUREAU OF INVESTIGATION**

Precedence: ROUTINE

Date: 11/17/2009

To: Seattle

From: Seattle

C -1

Contact: SA Lawrence D Carr 206-262-2063

Approved By: Dean Steven M  
Maeng J Sung

Drafted By: Carr Lawrence D: ldc

Case ID #: 166C-SE-95743-19 (Pending)

Title: MICHAEL MOCKOVAK;  
JOSEPH KING (victim);  
MURDER FOR HIRE

Synopsis: ASAC approval for continued investigative efforts in regard to captioned case.

Details: On April 10, 2009, DANIEL KULTIN (KULTIN), a permanent US Citizen who emigrated from Ulyanovsk, Russia, at age 18, believed one of his employers, Michael MOCKOVAK (MOCKOVAK), intended to hire someone to murder a former business associate, Brad KLOCK (KLOCK). KULTIN confided this to a family member who KULTIN knew to have law enforcement contacts with the Portland Division of the Federal Bureau of Investigation (FBI). KULTIN's family member, an Oregon resident, introduced KULTIN to Special Agent George STEUER, Portland Division of the FBI.

KULTIN was subsequently interviewed by STEUER at a restaurant in West Linn, Oregon. KULTIN provided the following information:

KULTIN is the Director of Information Technologies for a Seattle-based business known as Clearly Lasik. The business has eight venues in which they perform Lasik procedures (eye surgery). Said venues are located in Washington, Oregon, Idaho, British Columbia and Alberta Canada. KULTIN has been employed with Clearly Lasik for approximately four years, beginning in early 2006 or late 2005. KULTIN's home office is in Renton, Washington; though he would on occasion travel to the company's

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To: Seattle From: Seattle  
Re: 166C-SE-95743, 11/17/2009

other locations to service the computer systems.

The business was founded and owned by two doctors, Dr. JOSEPH KING (KING) and Dr. MICHAEL MOCKOVAK (MOCKOVAK). themselves. KULTIN stated that, in early 2007, Doctors KING and MOCKOVAK fired the former president of the company, BRAD KLOCK (KLOCK). KLOCK had been a former professional hockey player from Vancouver, British Columbia.

According to KULTIN, KLOCK has disputed his firing for approximately the past two years, and has filed a wrongful termination suit. A records search revealed that KLOCK filed a suit in King County Superior Court on 01/13/2009, cause number 09-2-03018-9, in which Clearly Lasik, MOCKOVAK and KING are named as defendants. The case is still active and has a scheduled court date in June 2010.

KULTIN described in detail certain conversations that MOCKOVAK had initiated with him some time in the spring of 2008. Dr. MOCKOVAK approached KULTIN while they were both at the Renton, Washington, office and jokingly asked if he (KULTIN) had any contacts with the Russian mafia who might resolve his problems with KLOCK's lawsuit. KULTIN dismissed the conversation, believing MOCKOVAK was joking about the matter.

However, in early 2009, MOCKOVAK approached KULTIN again at work and asked if he had any Russian mafia connections that could take care of KLOCK. KULTIN believed the doctor was only half-serious and told MOCKOVAK that doing that sort of thing in the United States was risky business.

The following day, MOCKOVAK approached KULTIN in the office's break room and advised that he had learned that KLOCK would be traveling to Germany within the next month, and that it would be the perfect time and place to have KLOCK "eliminated." KULTIN had the distinct impression that MOCKOVAK seriously wanted to have KLOCK killed.

Because the subjects in this investigation reside and work within the state of Washington, the matter was referred to the Seattle Division of the FBI. Special Agent Lawrence D. Carr was provided KULTIN's contact information by Special Agent George Steuer, Portland Division.

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Re: 166C-SE-95743, 11/17/2009

On or about May 8, 2009, Agent CARR met with KULTIN to discuss the information he had earlier provided to the Portland Division. KULTIN stated that since MOCKOVAK'S early 2009 inquiry about eliminating KLOCK in Germany, MOCKOVAK has not again broached the subject. SA Carr advised KULTIN not to bring up the matter and if MOCKOVAK did, only listen to what he had to say, and provide no direction or contribution to the conversation.

On or about June 11, 2009, SA Carr met with KULTIN. KULTIN said MOCKOVAK still has not brought up any conversation about eliminating KLOCK. He did say he has had many conversations with MOCKOVAK about life in Russia and Russian organized crime. KULTIN seemed to think MOCKOVAK is overly interested in these topics as they are a precursor for many of their conversations.

In this same meeting, KULTIN shared with Agent Carr that he was traveling to Los Angeles to visit some friends. Since MOCKOVAK had asked KULTIN if he had Russian Mafia connections, SA Carr directed KULTIN to share with MOCKOVAK that his friends in Los Angeles might have mafia connections.

On or about August 3, 2009, KULTIN contacted Agent Carr and advised that MOCKOVAK called him to request a meeting to discuss "that thing they had talked about." KULTIN, because of the unusual cryptic tone MOCKOVAK used, took this request to be about their discussions about MOKOVAK's intended murder for hire.

On August 4, 2009, Agent Carr met with KULTIN and formally opened him as an FBI source.

On August 5, 2009, KULTIN met with MOCKOVAK at his (KULTIN's) office, Clearly Lasik, 900 SW 16th Street, Renton, Washington. On August 6, 2009, Agent Carr met and debriefed KULTIN regarding the meeting.

KULTIN reported the following:

He met with MOCKOVAK at approximately 2:30 PM on Wednesday, August 5, 2009. When he arrived at the office, MOCKOVAK stated he wanted to take a walk around the parking lot. KULTIN agreed and the two went outside. Nobody was in the vicinity while the two talked. KULTIN stated that as they walked, MOCKOVAK began to tell him about plans to split the business in the fall of 2009. He stated that he was upset with

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To: Seattle From: Seattle  
Re: 166C-SE-95743, 11/17/2009

his current business partner, Dr. JOSEPH KING, and felt there would be problems when the split occurs.

MOCKOVAK told KULTIN that he was angry with the way things have been going for him, and said, "I hate people taking advantage of me, like Joe [Dr King], he is a greedy snake." MOCKOVAK told KULTIN there is a \$5,000,000 life insurance policy on Dr. KING, should something happen to him. He followed by adding, "If Joe becomes a stumbling block maybe we can look at him."

KULTIN said the conversation then turned to the original target, BRAD KLOCK. MOCKOVAK stated, "I don't know how these things work? What do I do? Do we just have someone follow him?" KULTIN said he responded by telling MOCKOVAK he would make contacts with his friend in Los Angeles.

KULTIN said MOCKOVAK was being guarded and careful with his words but the tone of the meeting was clear -- that MOCKOVAK wished to move forward in developing a plan to have BRAD KLOCK murdered, and that MOCO VAK was also considering whether to have KING murdered. MOCKOVAK told KULTIN that KLOCK will be in Seattle on September 16-17, 2009, for mediation in regard to his lawsuit against MOCKOVAK's business, Clearly Lasik. (KULTIN knows from conversations at work that KLOCK resides in Vancouver, British Columbia, and is a Canadian citizen.)

KULTIN said that, at the end of their meeting, he and MOCKOVAK agreed that he (KULTIN) would make contact with his people in Los Angeles. KULTIN said he told MOCO VAK that he would make inquiries as to how to proceed with eliminating KLOCK, and that they would meet again to discuss what he had learned. KULTIN added that he believed MOCKOVAK was moving away from wanting KLOCK killed and starting to focus on his business partner, Dr. Joe KING.

SA Carr told KULTIN that, for the next meeting between he [KULTIN] and MOCKOVAK, he should relay the following story to MOCKOVAK:

That his [KULTIN's] contact in Los Angeles was a boyhood friend that KULTIN grew up with in Russia. The friend had become an associate of a Russian Crime group headed by Sergei Mikhailov. That his friend would be able to arrange a murder of any target and conceal the murder as a street crime. The cost would be \$10,000 up front and another \$10,000 upon completion.

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To: Seattle From: Seattle  
Re: 166C-SE-95743, 11/17/2009

The only thing that is needed is as much intelligence on the target as possible, the first installment and date of intended "hit."

From August 11th until MOCKOVAK's arrest on 11/12/2009, KULTIN met or called MOCKOVAK eight different times and wore a wire for seven of these encounters. During this four month period, MOCKOVAK'S intended target did switch from KLOCK to his business partner KING. MOCKOVAK was very unhappy with regard to the way KING was proposing a split of the Clearly Lasik business.

Beginning in August, SA CARR briefed AUSA Vince LOMBARDI with regard to the case and investigation to date. SA CARR utilized federal process for approval of recorded conversations, per FBI/DOJ guidelines. SA CARR fully believed from conversations with AUSA LOMBARDI (although nexus was never discussed) that this case would end in a federal prosecution.

During the last week of October, SA CARR provided AUSA LOMBARDI with transcripts and documents to support what SA CARR had previously briefed AUSA LOMBARDI. SA CARR advised AUSA LOMBARDI that he believed MOCKOVAK was ready to make a down payment to further the plot.

AUSA LOMBARDI stated he had concerns with whether or not we had proven a federal nexus. It was then decided that in an abundance of caution, SA CARR would seek a state court order allowing the source to record the payment. SA CARR was left with the impression that the case was still going to be a federal prosecution and the state court order was merely relief should a strong federal nexus not avail itself.

From August 4th (date of state court order was signed) until payment on August 7th there were three recordings made. In these recordings, SA CARR believed a strong federal nexus was discovered: 1) the transfer of funds from a Canadian bank account to a US bank account and 2) Travel by MOCKOVAK from Seattle to Portland and from Portland to Seattle. In this trip, MOCKOVAK recovered a King family photo from a Vancouver office and transported it to the source for the "hitmen" to use in their efforts to locate the King family in Australia.

On 11/10/2009, this information was relayed to AUSA LOMBARDI and AUSA Todd GREENBERG. Both agreed that with some follow-up investigation, there appears to be a federal nexus and the crime a violation of federal law. They, however, felt that

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Re: 166C-SE-95743, 11/17/2009

due to sentencing guidelines and the fact that King County had shown an interest in the case, the best course of action was to continue a state prosecution.

On 11/10/2009, SA CARR, A/SSA COTE, ACDC BENNET, CDC JENNINGS and ASAC DEAN met to discuss how this case should proceed. ASAC DEAN was briefed by ACDC BENNET on DIOG section 12.5.C.1 and how this investigation would apply. After consideration, ASAC DEAN approved continued FBI involvement in the captioned matter as outlined by 12.5.C.1

On 11/12/2009, Michael MOCKOVAK was arrested by members of the PSVCTF and a state search warrant executed at his residence. Assistance was provided to state authorities per DIOG chapter 12.5.C.1. On 11/16/2009, MOCKOVAK was charged in Washington State Court with Criminal Conspiracy to commit Murder in the 1st Degree and Criminal Solicitation to Commit Murder.

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## **APPENDIX F**

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 08/05/2009

To: Seattle

Attn: CHSC

From: Seattle

C - 1

Contact: SA Lawrence D Carr, (206) 262-2063

Approved By: Maeng J Sung *Maeng J Sung*

Drafted By: Carr Lawrence B. ldc

Case ID #: 137-SE-95730 (Pending) *5*

Title: SE-00022169

Synopsis: Admonishments provided to the Confidential Human Source (CHS).

Details: The following are instructions to be given to a CHS at opening and for other specified operational reasons.

Admonishments

Section 4.1 of the Confidential Human Source Policy Manual (CHSPM) states that at opening (before first operational tasking) and thereafter at least annually or more often if circumstances warrant, at least one FBI Agent and a witness who is either another FBI Agent or another government official must provide the CHS with all applicable instructions. (These guidelines shall be administered at opening, prior to the first operational use and no later than 90 days after the date of opening.)

The CHS was opened on 08/04/2009 and the instructions were provided to the CHS on 08/05/2009. The captioned CHS was provided with the instructions set forth below:

I. Opening

1. The CHS's assistance and the information provided to the FBI are entirely voluntary.
2. The CHS must provide truthful information to the FBI.
3. The CHS must abide by the instructions of the FBI and must not take or seek to take any independent actions on behalf of the US Government.

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To: Seattle From: Seattle  
Re: 137-SE-95730, 08/05/2009

4. The US Government will strive to protect the CHS's identity but cannot guarantee it will not be divulged.

## II. Additional Admonishments

If applicable to the particular circumstances of the CHS, or as they become applicable, the following admonishments need to be completed. They need not be given if they have no relevance to the CHS's situation. (For example, the immunity instruction need not be given unless there is an issue of apparent criminal liability or penalties relating to the CHS. The Attorney General's Guidelines emphasize, however, that whether or not these instructions are given, the FBI has no authority to confer immunity and that agents must avoid giving any person the erroneous impression that they have any such authority.) Indicate whether the following instructions were given:

1. The FBI on its own cannot promise or agree to any immunity from prosecution or other consideration by an FPO, a state or local prosecutor, or a Court in exchange for the CHS's cooperation because the decision to confer any such benefit lies within the exclusive discretion of the prosecutor or a Court. However, the FBI will consider (but not necessarily act upon) advising the appropriate prosecutor of the nature and extent of the CHS's assistance to the FBI. (This instruction should be given if there is any apparent issue of criminal liability or penalty).  Yes/No
2. The CHS is not authorized to engage in any criminal activity and has no immunity from prosecution for any unauthorized criminal activity. (This instruction is not necessary for CHSs who have such authorization. This instruction should be repeated if the CHS is suspected of committing unauthorized illegal activity).  Yes/No
3. The CHS is not an employee of the US Government and may not represent himself/herself. (This instruction should be given to all CHSs except under those circumstances where the CHS previously has been or continues to be otherwise employed by the US Government).  Yes/No
4. The CHS may not enter into any contract or incur any obligation on behalf of the US Government, except as specifically instructed and approved by the FBI. (This instruction should be given to all CHSs except to those CHSs who are otherwise authorized to enter into a contract or incur an obligation on the behalf of the US).  Yes/No

To: Seattle From: Seattle  
Re: 137-SE-95730, 08/05/2009

5. No promises or commitments can be made, except by the Department of Homeland Security (DHS), regarding the alien status of any person or the right of any person to enter or remain in the US. (This instruction should be provided if there is any apparent issue of immigration status that relates to the CHS.) Yes/No
  6. The FBI cannot guarantee any rewards, payments, or other compensation to the CHS. Yes/No
  7. Each time a CHS subject to the AGGs CHS receives any rewards, payments, or other compensation from the FBI, the CHS shall be advised at the time of payment that he/she is liable for any taxes that may be owed on that compensation. Yes/No
  8. Whenever it becomes apparent that the CHS may have to testify in a court or other proceeding, the CHS must be advised of that possibility (see Confidential Human Source Policy Manual [CHSPM], Section 9.1). Yes/No
- III. Additional Instructions Based on Employment or Position
9. If a CHS is in a position to obtain information from a subject who is facing pending criminal charges for whom his/her 6th Amendment right to counsel has attached, the CHS must be advised not to solicit such information from the subject regarding the pending charges (see CHSPM, Section 9.4). Yes/No
  10. For CHSs in a position to obtain information from a subject who is represented by counsel or planning a legal defense, the CHS must be advised not to interfere with an attorney/client relationship (see CHSPM, Section 9.4). Yes/No
  11. If the CHS is an employee of a financial institution, the CHS must be advised that he/she remains subject to the provisions of the Right to Financial Privacy Act and that the FBI will not knowingly accept information which violates the provisions of the Act. (CHSPM, Section 4.2.2) Yes/No
  12. If the CHS is an employee of an educational institution, the CHS must be advised that he/she remains subject to the provisions of the Family Educational Rights and Privacy Act of 1974 (20 USC Sec. 1232 g) known as the Buckley amendment (see CHSPM, Section 4.2.3). Yes/No



CLERK OF COURT  
JULY 11 2012  
MOC03-5 MMS:57

NO. Ca 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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

DECLARATION OF  
PETITIONER MICHAEL E.  
MOCKOVAK

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

1. I am the petitioner in this case.
2. I have personal knowledge of the facts set forth here.
3. Throughout the entire time that I was represented by attorneys Jeff Robinson, Colette Tvedt and Joe Campagna, no one ever told me that it was possible to move to suppress the tape recorded conversations that I had with Daniel Kulin.
4. Throughout the entire time that I was represented by Robinson, Tvedt and Campagna, no one ever told me that there was such a thing as the Washington State Privacy Act, or that there were laws restricting the taping of a person's private conversation

without his consent. No one ever told me that in Washington private conversations could not be taped without the consent of all the participants, unless there was a judicial order authorizing such taping.

5. I first learned about the possibility of making a motion to suppress my conversations with Kultin from my appellate lawyer Jim Lobsenz. He explained that my trial attorneys could have moved to suppress all my recorded conversations with Kultin.
6. He explained to me the differences between federal law and Washington State law on the subject of the taping of private conversations, and he explained that if such a motion had been made and granted by the King County Superior Court, then the county prosecutors would not have been able to proceed with a prosecution against me, and the state court prosecution would have been dismissed.
7. He explained to me that if the state court prosecution had been dismissed following a successful suppression motion, then it is extremely likely that I would have been prosecuted in federal court, because the federal court would not be obliged to follow Washington State law on the taping of private conversations,

and the federal prosecutors would have been able to use the taped conversations as evidence even though their taping violated Washington State law.

8. I was stunned to learn that my trial attorneys could have made a suppression motion.
9. My appellate attorney Jim Lobsenz further has informed me that when he spoke with my trial attorney Jeff Robinson on this subject, Mr. Robinson agreed that he could have made such a suppression motion and that he actually thought about doing so.
10. I have read the declaration which Mr. Robinson executed on April 23, 2012. I was stunned to read that Mr. Robinson thought if he had made a suppression motion that there was “a very good chance that [he] would win such a motion” and get the first set of taped conversations suppressed, and “a reasonable probability” that he could get the second set of taped conversations suppressed as well.
11. When informed of these things I immediately had two questions: (a) If Mr. Robinson thought he could win a suppression motion and get all the taped conversations suppressed, then why didn't he make a suppression motion?

And (b) Why didn't Mr. Robinson ever tell me about the option of making a suppression motion?

12. If I had known about the option of bringing a suppression motion, I would have insisted that such a motion be brought as a tactic to get a dismissal in state court which would then lead to prosecution in federal court.

13. I was informed at an early stage in the pretrial proceedings that the FBI had been agency that investigated me, and that initially law enforcement had intended to prosecute me in federal court. I was informed that law enforcement changed its mind and decided it would be better to prosecute me in state court.

14. My attorneys did share with me the information that there was a memorandum they received in discovery which said that the federal prosecutors thought it would be better to prosecute me in state court because the sentencing ranges for the crimes that I was charged with were much higher in state court than the corresponding federal sentencing guidelines. So I knew early on that if I had been prosecuted in federal court, and if convicted there, I would likely get a much shorter sentence than I would get if I were convicted in state court.

15. Mr. Robinson told me that if I were tried and convicted in federal court I would face a sentence of about 5 years. He also told me that if I were convicted in state court, I'd be looking at a sentence of something like 20 years.
16. For this reason, I had a strong preference for having my case tried in federal court.
17. There was a second very important reason why I preferred to be prosecuted in federal court rather than state court. I learned from Mr. Ron Marmer about the different burden of proof rules in state and federal court on the issue of entrapment. Mr. Marmer is an attorney, but not an attorney skilled or experienced in criminal law. Sometime in the summer of 2010 he told me that he had spoken with Colette Tvedt and she had explained to him the following: In federal court the burden of proof was on the prosecution to prove beyond a reasonable doubt that a defendant was *not* entrapped. But in state court the burden of proof was on the defendant to prove by a preponderance of the evidence that he *was* entrapped.
18. After Mr. Marmer told me this, I spoke with Ms. Tvedt directly and she confirmed that there was this enormous difference in the burden of proof rules between state and federal court.

Since everyone agreed that entrapment was the key to my defense, everyone agreed that it would be much harder for me to prevail on an entrapment defense in state court than it would be in federal court.

19. For two reasons, therefore, I very much wanted to get my case out of state court and thereby force the authorities to prosecute me in federal court instead.

20. My attorneys did explain to me that they were having difficulty getting all the discovery materials that they wanted to get because the federal authorities were reluctant to provide it. Mr. Robinson explained to me that the discovery rules in state court were more favorable to defendants than the discovery rules in federal court. He also explained to me that a state court judge could not order federal law enforcement agencies to turn over discovery materials to the defense, because a state court judge did not have the legal power to tell federal officers what to do.

21. He further explained, however, that a state court did have the legal authority to dismiss the criminal charges against me if the state court judge felt that the refusal to provide the defense with discovery would prevent me from getting a fair trial. Mr. Robinson explained that he was going to file a motion to

dismiss and ask the state court judge, Judge Palmer Robinson, to dismiss the charges against me if the federal authorities did not provide the discovery materials that we wanted to obtain, and which we would normally have had a right to under state law if the materials had been in the hands of state agents instead of federal agents.

22. I approved of this strategy because I very much wanted to get the discovery materials that the federal authorities had been unwilling to provide, and also because I very much preferred to be tried in federal court. So I viewed it as a win-win situation. Either (a) the motion for a dismissal of the charges would succeed in persuading the federal authorities to give my attorneys the discovery materials that we wanted, or (b) if the federal authorities still declined to provide the materials we wanted, then Judge Robinson might very well grant the dismissal motion, the charges in state court would get dismissed, and then I would wind up being charged and tried in federal court, which is where I greatly preferred to be tried.

23. I read a first draft of the brief which Mr. Robinson wrote in support of the motion to dismiss. I liked what I read and I told Mr. Robinson that I liked it. I told him I liked the fact that we

were arguing that the case should be dismissed, leaving it to the federal authorities to file a case against me in federal court.

24. Mr. Robinson argued the motion to dismiss to Judge Palmer Robinson at a hearing held on Monday, December 6, 2010. I have recently read a transcript of that hearing. The transcript of that hearing shows that during that argument about the federal government's refusal to turn over requested discovery materials, Mr. Robinson pointed out that the authorities had made a tactical decision to prosecute in state court (a) because of the lengthier sentences they could obtain there; and (b) because the state court burden of proof rule on entrapment was more favorable to the prosecution:

“[E]ssentially what we've been told is: We may give it to you and we may not. If we give it to you, we will decide what we will give you, we will decide if it's a summary or the original documents, we will decide when we will give it to you, and you have no resource.

“Your Honor, you have been backed into a corner by the federal government's position in this matter, and it's a position that I have to say is a significant one for you to consider, because, your Honor, if Dr. Mockovak engaged in behavior like this with discovery, you would have him in jail.

“If a civil litigant took a position like this in discovery, you would issue sanctions, and you might even dismiss the case, if it was the plaintiff who was ignoring the order from the court to produce discovery.

“And this is against the backdrop, your Honor, of what is – and again, I want to be clear, I have no problem with this decision – but *it was a tactical decision to file this case in King County Superior Court*, and that decision is completely within the purview of the King County Prosecutor’s office and federal law enforcement.

“I am not suggesting they did anything underhanded or anything else by making the decision, but they made it. We didn’t and you didn’t. They made it.

*“And they made that decision, your Honor, because the sentencing guidelines in state court provide for a harsher penalty than the guidelines in federal court, guidelines which, I might add, are not even mandatory anymore under U.S. Supreme Court case law, unlike the guidelines in the state of Washington.*

*“In the State of Washington, Dr. Mockovak has to admit to the offense before he can even plead the defense of entrapment. In federal court, the government must prove the absence of defense of entrapment beyond a reasonable doubt.*

*“The legal standards are significantly different, the penalties are significantly different, and so one can understand the tactical choice to charge the case in state courts.”*

RP 12/6/10, at 14-15 (emphasis added).

25. The transcript also shows that my attorney argued that if the federal government insisted on refusing to provide the requested discovery, that Judge Robinson had the power to dismiss the case in state court, and that she should exercise that

power, while giving the federal authorities sufficient time to obtain a grand jury indictment and to proceed with a prosecution in federal court:

***“The appropriate remedy is dismissal of this case, and dismissal at a point – I am asking you to dismiss this case a week from today, not so we can have other hearings, not so we can see if somebody finally wants to comply – because the time for that has passed – but to ensure that federal authorities have more than adequate time to address the issue of seeking an indictment against Dr. Mockovak, in federal court, for virtually the exact same charges, so that conditions of release can be set in federal court before they expire in King County Superior Court, and so that there is zero risk to the public or to any litigant that Dr. Mockovak will be unsupervised, even for a second.”***

***“Then if the case is going to go forward in federal court, because they want to play by the federal rules of discovery, then the case can go forward in federal court, and I would suggest to the court, frankly, that the one thing that is different is that I don’t think the U.S. Attorney’s Office and the FBI can take the position that a federal judge can’t order them to disclose this information.”***

RP 12/6/10, at 18-19 (emphasis added).

26. The attorney for the federal government told Judge Robinson that he believed that the federal government would decide to produce more discovery materials to the defense and that the defense would have that material on the following Monday.

RP 12/6/10, at 41.

27. In reply, my attorney, Mr. Robinson, told the Judge Robinson that the federal government's offer to provide some additional information by the following Monday was not satisfactory: "You know how much effort and expense has gone into trying to get this information, and the offer the government makes now is too little too late." *Id.* at 65. Mr. Robinson argued strenuously that the case in state court should be dismissed, again noting the tactical reasons why the authorities had chosen to file in state court rather than in federal court:

***"This case should be dismissed. It is the only sanction that is appropriate, your Honor, because they have taken advantage of every benefit of a state prosecution, sentencing guidelines that if you – you or any other trial judge – I can't come to you and say: You know what? The U.S. Supreme Court has said these aren't mandatory. You don't have to give him 15 to 20 years. I can't say that here, because they are mandatory, and everybody connected with the prosecution knows that.***

***"I can't say to this jury: The state has to prove beyond a reasonable doubt that this was not entrapment – I can't say that – because the law of the State of Washington is different. If we were in federal court, that law would be flipped.***

***There are huge advantages that the prosecution in this case has taken advantage of by placing it in this jurisdiction, and they have failed to follow the rules of this jurisdiction, not once, not twice, not three times, despite numerous requests and despite an order from this court, and now we come in to court in December***

and say; Well, we understand that this has been an issue for you for the last nine months, and we understand that you issued a subpoena, and we're not complying with any of it, but we'll talk to you next week, your Honor, I think – I think to let that behavior go unsanctioned is – I don't know what adjective to use, but "fair" isn't one of them; "fair and just" is not one of them. [Rule] 8.3(b) talks about dismissal in the "interest of justice.

"There has been – not by individuals but by the institutions here, there has been games played. We've been involved in a shuffle game: It's under this cup or it's under this cup (indicating). We're taking advantage of the jurisdiction here, but you can't have the evidence like you would in this jurisdiction because we're the federal government."

RP 12/6/10, at 65-66 (emphasis added).

28. My attorney proceeded to explain why he was asking for a dismissal, but also asking that the dismissal not take effect for one week:

*"It's time for that game playing to stop, your Honor, and you can dismiss this case with no harm to the safety of the public, to the integrity of the criminal-justice system, or to the ability to have this case decided fully and fairly by a jury of Dr. Mockovak's peers.*

"You can dismiss this case under circumstances where he will not spend one second unsupervised by a court system so that any alleged victim in the case and the community at large has no question about safety –

"And I should say, nobody in this courtroom, I think, is going to credibly say to you that at this point, Dr. Mockovak is a threat to do something. He has been perfect on pretrial release – perfect – and there's no

reason to assume that if you dismiss this case, and we know the indictment is coming from federal court, that he's all of a sudden going to do something crazy.

***“But even if that was a concern, I’m asking you to make the order of dismissal effective in a week, and that gives the U.S. Attorney’s Office plenty of time to seek an indictment.***

“To tell us to wait for another week and see what they give us, and then come back to this court to litigate more issues, or come back to do an in camera review, what we’re now talking about is not four weeks from trial, we’re talking about three weeks from trial. We’re coming right up on Christmas, and we have worked extremely hard so that we could not be in this position, your Honor.

“If the court doesn’t dismiss the case I can virtually assure you that within the next two weeks, we will be coming before you asking for a continuance, and we will have good cause for it, because this information was not disclosed in a timely fashion.”

RP 12/6/10, at 67-68 (emphasis added).

29. Ms. Barbosa, one of the state court prosecutors then argued that the delay in providing discovery materials pertinent to an entrapment defense was not really something the government should be blamed for because “[n]owhere in the pleadings, letters, requests, has it been made known to us that the defense was going to be entrapment. We’re hearing it today on the record.” RP 12/6/10, at 70-71.

30. At this point the judge commented that even a person with very little experience in criminal law would have realized from the very start of the case that this was a case where entrapment would be the defense in play. RP 12/6/10, at 71. As she said, “But you know, nobody could read this cert and come away from it without thinking that Mr. Kultin’s credibility and who put whom up to what is, if not at the heart of this case, pretty close to it.” RP 12/6/10, at 72.

31. Judge Robinson then stated that she was going to defer ruling on our motion to dismiss until she had a chance to see whether the federal government was going to produce more discovery materials to my attorney. RP 12/6/10, at 74. She set a time for another hearing on the afternoon of Monday, December 13, 2010. And she directed that by no later than 4 p.m. on the preceding Friday, December the 10<sup>th</sup>, the federal government should either (a) provide the requested discovery to the defense; or (b) certify that the materials sought by the defense did not exist, or (c) provide existing materials the government wished to withhold from the defense to the judge so that she

could conduct an in camera review of it to see whether it should be produced to the defense.

32. I was pleased with the oral arguments made by Mr. Robinson at the hearing held on December 6th. I was pleased to hear him repeatedly point out how state court had been selected over federal court because it made it easier for the prosecution to get a conviction and to get a longer sentence imposed.

33. I was also very pleased to hear him argue strenuously that the judge should dismiss the case, after giving the federal authorities to charge me in federal court, because I wanted the case to be tried in federal court, not state court.

34. Between the hearing of December 6<sup>th</sup> and the hearing of December 13<sup>th</sup>, I told Mr. Robinson repeatedly that I did not want to make any compromise deal with the federal government about the discovery we had requested. In particular, we had requested and we're seeking to obtain a copy of an FBI manual which instructs FBI agents on how to supervise and manage their confidential informants. We suspected that the manual contained instructions on how to prevent an informant working for the FBI from entrapping a person into committing a crime. In open court Mr. Robinson

had explained the relevance of this manual to Judge Robinson and why it was very important that we see it. I told Jeff that I did not want to compromise on this point and that we should insist on getting a copy of the manual.

35. On Monday, December 13, 2010, another hearing was held before Judge Robinson. At this hearing, Mr. Robinson told Judge Robinson that the federal government had provided everything that the defense had requested *except* the FBI manual on how to manage confidential informants. RP 12/13/10, at 9-10.

36. Without telling me in advance that he was going to do so, Mr. Robinson said he had a proposal to make to Mr. Brian Kipnis, Assistant U.S. Attorney who had been representing the federal government in Judge Robinson's court. RP 12/13/10, at 10. Mr. Robinson noted that he had a security clearance, and he proposed that he be allowed to look at the manual in order to determine whether he could formulate the kinds of cross-examination questions that he wanted to ask of the FBI agent at trial. Mr. Robinson said he thought it might be possible for him to be satisfied with just reading the manual, and that he might not need to actually obtain a possess a copy of it. RP

12/13/10, at 11. He told the court that it was critical to his preparation of adequate cross-examination that he at least read portions of the manual, but maybe he did not have to actually get a copy of it. *Id.* at 15. He asked Judge Robinson to give the parties another couple of days to see if this proposal would work. *Id.* The attorney for the FBI said he did not know whether that proposal would be acceptable or not, but he would see. Judge Robinson then set another hearing for Thursday, December 16<sup>th</sup>. *Id.* at 25.

37. I was very *unhappy* with this development. I had no advance warning that Mr. Robinson was going to make this proposal. After the hearing of the 13<sup>th</sup> I told him I did not like it, and I wanted us to insist on getting the entire manual, and if we could not get it, then I wanted to go ahead with our motion to dismiss to see if we could get the case dismissed in state court.

38. Despite my opposition, Mr. Robinson went ahead with his proposal. At the hearing on December 16, 2011, he told Judge Robinson that the FBI and the defense had reached an agreement regarding the FBI manual. RP 12/16/10, at 3. Since the defense had everything it wanted (according to Mr.

Robinson), the defense motion to dismiss became moot and Judge Robinson never had occasion to make a ruling on it.

39. I was furious about what had happened and after the December 16<sup>th</sup> hearing I told Mr. Robinson how upset I was that he had caved in and not insisted on getting a copy of the FBI manual. I told him that I had wanted to get a ruling on the motion for dismissal because I wanted very much to have my case tried in federal court.

40. He responded angrily, saying “Your case is going to be tried in state court. Period. End of story.” Up until the time he said this to me, I had been led to believe that it was our strategy to try and get the case moved to federal court. I understood that was why we had made the motion to dismiss. My other attorney, Ms. Tvedt, had told me that I’d be much better off in federal court, and Mr. Robinson had argued at length that I was much worse off in state court, which is why the FBI chose to have state court prosecutors charge the case.

41. I have read Mr. Robinson’s declaration and I have read the part where he says that I knew about his tactical decision not to make any motion to suppress the tape recordings. That is not true. He never told me any such thing. Not only was I

completely unaware of the fact that had decided not to bring a suppression motion, I was completely unaware of the fact that a suppression motion was even a possibility. No one ever told me that a suppression motion was a possibility. Had I known that a suppression motion was possible, I would have insisted that we make such a motion. Had I known that that there was another way to try and get my case tried in federal court that we had not tried, I would have absolutely insisted upon it.

DATED this 15<sup>th</sup> day of May, 2012.

*Michael E. Mockovak*

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Michael E. Mockovak, Petitioner

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NO. 49390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

APR 24 2012  
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49390-5

In re the Personal Restraint of,

MICHAEL EMERIC  
MOCKOVAK,

Petitioner.

DECLARATION OF JEFFERY  
P. ROBINSON

I, JEFFERY P. ROBINSON, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct.

1. I have personal knowledge of the facts set forth here.
2. I was admitted to the Washington State Bar Association in 1981. I have been practicing criminal defense for over thirty years.
3. I represented Dr. Michael Mockovak in the case of *State v. Mockovak*, King County Cause No. 09-1-07237-6. I was lead counsel. Assisting me were attorneys Colette Tvedt and Joseph Campagna.
4. I have read the declaration of Joseph Campagna dated April 23, 2012. I agree with the statements made by Mr. Campagna regarding the WPIC pattern instruction on entrapment, which we proposed to the trial judge, and which the trial judge gave.

5. Although Mr. Campagna was the attorney to whom many legal research tasks were delegated, and although he researched the defense of entrapment, I was lead counsel and therefore it was ultimately my responsibility to see to it that we proposed correct jury instructions and that we objected to erroneous jury instructions.

6. I have been asked to explain why I failed to make any motion to suppress the recorded conversations which took place between Daniel Kultin and Dr. Mockovak. Although I felt that there was a very good possibility that I could get these conversations suppressed if I made such a motion, I made a deliberate strategic choice not to do that. Dr. Mockovak was aware of this strategic choice.

7. The recorded conversations fell into two groups. First, there were conversations which occurred without any judicial authorization at all. These recorded conversations occurred on August 11, October 20, and October 22 of 2009. These conversations all took place in Washington State. No attempt was made by Detective Leonard Carver and FBI Special Agent Larry Carr to get judicial approval from a Washington State Superior Court judge to record these conversations without the consent of Dr. Mockovak (who did not know he was being recorded). Absent judicial approval, RCW 9.73.030 requires the consent of all parties before a private conversation can be recorded. Therefore, I knew that if I moved to suppress the first group of recorded private conversations pursuant to RCW 9.73.050, there was a very good chance that I would win such a motion and these conversations would all be suppressed.

8. The second group of recorded conversations includes those conversations which King County Superior Court Judge Julie Spector authorized Detective Carver and Agent Carr to record without Dr. Mockovak's knowledge or consent. These recorded private conversations occurred on November 6, 7, and 11 of 2009. Judge Spector issued an order authorizing the recording of these conversations on November 4, 2009.

9. I believed that there was a reasonable probability that I could get these recordings suppressed as well. I believed that the second group of recordings was tainted by the fact that the judicial authorization to record them was based primarily on evidence obtained in the first group of recordings which were never judicially authorized. Thus, the second group of recordings was a "fruit of the poisonous tree" because it was derived from the earlier illegal set of recordings for which there was no judicial authorization. I believed that if I moved to suppress the second group of recordings that I probably would win that motion as well.

10. I did not consider other state law based grounds for suppressing the statements because I believed the statements were excludable as mentioned above.

11. I believed that if I moved to suppress all the recorded conversations and won suppression of all of them, that the State prosecutors would have to dismiss the state court prosecution because it would be impossible for them to proceed with their case in state court. I knew that under cases like *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d

897 (1990), if the recordings were suppressed then the State would not only be precluded from presenting the recordings in evidence, it would also be precluded from having any witness testify as to his recollection of the conversations or to his visual observations made during the time the recordings were being made. Thus, I knew that a successful motion to suppress all the recordings would put an end to prosecution of Dr. Mockovak in state court.

12. However, I was also sure that if this occurred, the same criminal charges would simply be filed in U.S. District Court under the parallel federal laws against conspiracy to commit murder and attempted murder. Thus, making successful suppression motions in state court would simply lead to a change of venue, and the same criminal case would wind up being tried in federal court.

13. In my judgment, it was better for the defense to try this case in state court than to try it in federal court, for several reasons. First, a defendant's right to discovery is much broader in state court than in federal court. In federal court a defendant has no right to interview prosecution witnesses; in state court he does. In this case, our ability to interview all of the State's witnesses was critical to preparing a defense that had a reasonable possibility of success. This was especially true regarding the interviews of Daniel Kultin, both Special Agents with the FBI, both alleged victims, and the employees of the business run by Dr. Mockovak and Dr. King. Also, in state court the defendant has significantly broader rights to get copies of all investigative police reports

and witness statements. In this case, we had access to FBI materials I believe we would have never accessed in federal court. In federal court, a defendant has a much more limited right to discovery of police reports and witness statements.

14. In my judgment, the caliber of the prosecutors would be at least as good as the prosecutors in state court and the federal prosecutors have significantly lower caseloads and try many fewer cases than state court prosecutors. I did not believe the transfer would make our case stronger.

15. At the same time, I was aware that there were certain advantages to being in federal court. First, under federal law, when a defendant raises the defense of entrapment in federal court, the burden of proof is placed on the prosecution to prove beyond a reasonable doubt that the defendant was not entrapped. By comparison, under state law, in a Washington State court, the defendant carries the burden of proving by a preponderance of the evidence that he was entrapped.

16. I also knew that if Dr. Mockovak were to be convicted in federal court, the presumptive sentencing guidelines would provide for considerably more lenient sentences than he would receive if he were convicted of the same offenses in Washington State court. In the course of discovery, we had received copies of a memorandum written by FBI Agent Carr, in which he related that it was the judgment of the federal prosecutors who looked at the case against Dr. Mockovak that there appears to be a federal nexus and the crime a violation of federal law. The federal prosecutors felt that due to sentencing guidelines and the fact that

King County had shown an interest in the case, the best course of action was to continue a state prosecution. While these federal guidelines were not mandatory and would not have prevented the federal judge from imposing a severe sentence, at least the presumptive guidelines were lower than the guidelines in state court.

17. 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.

18. 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 private conversations which took place between Daniel Kultin and Dr. Mockovak.

DATED this 23<sup>rd</sup> day of April, 2012.

  
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Jeffery P. Robinson, WSBA No. 11950  
Trial Defense Counsel for Petitioner

CLERK OF COURT  
STATE OF WASHINGTON  
2012 OCT -5 AM 10:57

NO. 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

In re the Personal Restraint of,

MICHAEL EMERIC  
MOCKOVAK,

Petitioner.

DECLARATION OF RONALD  
L. MARMER

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

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

2. I am an attorney and a 1977 graduate of the University of Virginia School of Law. I am a member of the bars of Illinois, New York, the Northern District of Illinois, the Eastern District of Michigan, the Southern District of New York, the Eastern District of New York, the Second, Sixth, Seventh, and Ninth Circuits of the United States Court of Appeals, the Illinois Supreme Court, and the United States Supreme Court.

3. I currently serve as Chair of the Section of Litigation of the American Bar Association. I practice complex and commercial litigation with a particular focus on matters involving securities, derivatives, and financial disputes. I have represented businesses, directors and officers, attorneys, and other professionals in judicial proceedings, arbitrations, and before the Securities and Exchange Commission.

4. I do not have any special expertise in criminal law, although I have occasionally represented *pro bono* clients accused of state and federal crimes in the trial courts and on appeal. On one occasion many years ago I argued a criminal appeal in the Seventh Circuit. Together with other lawyers, I have also represented people charged with possession of illegal weapons, armed robbery, and murder. I have also counseled and advised

executives and professionals who were under investigation for crimes such as insider trading and securities fraud.

5. I am a long time friend of the petitioner, Dr. Michael Mockovak. I have known him for almost 40 years. His father contacted me after Dr. Mockovak was arrested and charged in King County Superior Court in the fall of 2009. Dr. Mockovak was initially able to post bail and secure his own release. But after he was briefly released, the State sought and obtained a substantial increase in the amount of bail. At this point I put up the bail money which was used to secure Dr. Mockovak's second release from custody.

6. Dr. Mockovak hired Seattle attorney Jeffery P. Robinson to represent him on the criminal charges of attempted murder and conspiracy to commit murder, which were filed against him in King County Superior Court, in Seattle, Washington. When I learned that Dr. Mockovak could not pay all of his legal bills himself I agreed to help pay them. I loaned Dr. Mockovak more than half a million dollars to help pay his legal expenses in the trial court.

7. Together with Dr. Mockovak I met in person with attorneys Robinson and Colette Tvedt in December of 2009. I flew to Seattle and met with them in their office.

8. Because I am an attorney, and because I am a friend of Dr. Mockovak, I asked attorneys Robinson and Tvedt if I could act as co-counsel with them, and thus participate in the case as one of Dr. Mockovak's attorneys. We discussed this at our initial face-to-face meeting in December of 2009. Dr. Mockovak was present when we discussed this.

9. At my initial face-to-face meeting with him, attorney Robinson told me that because I had put up Dr. Mockovak's bail money, I had an economic interest that made it impossible for me to act as his counsel because if Dr. Mockovak ever failed to appear I would have a conflict of interest. He informed me that a Washington ethical rule prohibited me from posting Dr. Mockovak's bail and also acting as one of his trial attorneys.

10. At the same time, Mr. Robinson told me that he and Ms. Tvedt could consult with me and that such consultations would remain privileged.

11. Both before and at trial, Ms. Tvedt and Mr. Robinson talked to me about the strategic defense decisions that they were making.

12. In late April of 2010, together with Dr. Mockovak, I had a second face-to-face meeting with attorney Tvedt (and Mr. Joseph Campagna may have been there as well) at her law office. Mr. Robinson did not attend this meeting.

13. At that April meeting I asked Ms. Tvedt if there wasn't a way to put the State to its burden of proof on the mens rea elements of the charges. She told me about the possibility of presenting a diminished capacity defense. (At some point, quite possibly during this conversation, I was informed about the fact that a potential expert witness was being consulted.)

14. During this conversation in April she told me that we had to pick between the defenses of entrapment and diminished capacity. She said it was an "either/or" proposition and that we could not do both. She said that if we presented an entrapment defense, we would have to be very careful not to do anything that would make it appear that we were also making a diminished capacity argument, because under Washington law (she said) one cannot simultaneously claim that the crime did not occur and also present a defense of entrapment. She said if we presented a diminished capacity defense and argued that Dr. Mockovak did not have the ability to form the intent necessary to commit the charged crimes, then we would be prevented from arguing entrapment as a defense. She said that to assert entrapment one must admit that the crime was committed. (Much later, after the trial was over, attorney James Lobsenz advised me that this was *not* an accurate statement of the law in Washington State.)

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

16. Much later, after the jury had returned its verdicts, I had a meeting with Mr. Robinson and Ms. Tvedt to discuss sentencing issues. I believe this meeting was in February of 2011. During this meeting I referred to the "subjective test" for entrapment. Mr. Robinson interjected that he did not know where I got the idea that the test was subjective, and that use of the word "reasonable" in the standard jury instruction on entrapment

plainly reflected an objective standard. There was a brief pause and I waited to see whether Ms. Tvedt would either disagree with Mr. Robinson, or else acknowledge that she had previously advised me that the test was a subjective test. However, she did not say anything at all. I then stated that I had been told by lawyers from his law firm that the test was subjective, and that any misunderstanding I might have come from that advice. There was no further discussion of the subjective/objective question.

17. Shortly thereafter I spoke to attorney Lobsenz, and I sent him a request asking him to tell me whether Washington's test for entrapment was subjective or objective. He told me that the test for entrapment was subjective. He also told me that the test for determining whether government agents had engaged in outrageous governmental misconduct, causing a due process violation, was an objective test, and that a judge, not a jury, decided that separate question.

18. I first learned about the difference between state and federal court on the burden of proof for an entrapment defense from Ms. Tvedt. She told me that (a) in federal court the burden of proof was on the prosecution to prove beyond a reasonable doubt that the defendant was *not* entrapped; and that (b) in Washington State court the burden of proof was on the defendant to prove by a preponderance of the evidence that he *was* entrapped.

19. Ms. Tvedt and I agreed that due to this difference in the burden of proof, Dr. Mockovak would have a much better chance of winning an acquittal on entrapment grounds if he were tried in federal court.

20. Either Dr. Mockovak or Ms. Tvedt also told me that the federal sentencing guidelines were much more favorable to Dr. Mockovak than the state sentencing guidelines. Either Ms. Tvedt told me, or Dr. Mockovak told me that he had learned from one of his attorneys, that if convicted in federal court Dr. Mockovak would then face an "advisory" sentencing guideline that called for a sentence of about 5 years in prison. Either Mr. Robinson or Ms. Tvedt told me that in Washington State court the state sentencing guidelines called for a sentence of 20 years in prison for the crime of first degree murder, and that for attempted murder or solicitation of murder that would be reduced by 25% to 15 years.

21. Based on the fact that both the sentencing guidelines and the burden of proof rule for entrapment were more favorable to the defendant in federal court, Ms. Tvedt told me that it was the defense strategy to try

and get the case moved to federal court. I agreed wholeheartedly with that strategy.

22. I told Ms. Tvedt that I thought she should hire a jury consulting firm to conduct a mock trial. She agreed this was a good idea. A jury consultant was engaged, and she invited me to attend the mock jury trial. The mock jury exercise was held in September of 2010. I traveled to Seattle to observe part of the mock trial, and when it was over I met with attorney Tvedt to discuss the mock trial. We both were convinced that some of the jurors reacted favorably to the defense of entrapment.

23. Mr. Robinson did not attend the mock jury trial or the meeting to discuss the mock jury trial. I was told that it was his practice to watch tapes of mock jury proceedings.

24. In early November of 2010, together with Dr. Mockovak, I met with all three attorneys, Robinson, Tvedt, and Campagna. By this time, the main topic of discussion was how to get the discovery materials that the defense needed. The attorneys wanted to interview the informant, Daniel Kultin, and several other witnesses. They also wanted copies of the FBI records pertaining to their investigation, to their training and instruction of informant Kultin, and to federal guidelines for the management of informants.

25. At some point I learned that the federal government was delaying making any definitive response to the defense requests and refusing to promise that disclosures would be forthcoming.

26. Either during the month of October, or at our November face-to-face meeting, Ms. Tvedt and Mr. Robinson discussed with me a motion to dismiss that they intended to file. I learned that they intended to ask the state court trial judge to dismiss the state court case unless the federal government turned over to the defense the additional discovery materials which the defense had requested. Eventually I learned that Mr. Robinson would be arguing that while the state court judge might not have the legal authority to order the federal government to provide the defense with the discovery that the defense wanted, she did have the legal authority to dismiss the charges filed in state court if the federal government continued to withhold the requested discovery. I also learned that he would argue that if she dismissed the case in state court, the federal government could then file essentially the same criminal charges in federal court, and then Dr. Mockovak would be tried there. We discussed the mechanics of how

that would unfold and what would happen to Dr. Mockovak in the interval between state court dismissal and the filing of federal charges. Since federal court was so much more favorable a venue than state court (for a defendant presenting an entrapment defense), this strategy made great sense to me. Dr. Mockovak told me that he strongly approved of this strategy as well.

27. On December 6, 2010, attorney Jeff Robinson argued the defense motion to dismiss in state court before the Honorable Palmer Robinson, the state court trial judge.

28. Dr. Mockovak called me and told me that we didn't get a ruling and we would have another hearing in a week when the judge would make a decision. But he also told me that the good news was that the judge seemed to agree that we were entitled to discovery; she seemed to be unhappy with the federal lawyer; and if the federal government didn't provide all the discovery, it looked like she was going to grant the motion to dismiss. He told me he was very optimistic that the case would end up in federal court.

29. I learned that Judge Robinson had ruled that the federal government must either (a) provide requested discovery materials to the defense, or (b) provide them to her by 4 p.m. December 10<sup>th</sup> so she could conduct an *in camera* review of what the federal government proposed to withhold; or (c) make a determination that they were not going to provide some or all of the materials requested by the defense. On December 13<sup>th</sup> Dr. Mockovak called and told me that attorney Jeff Robinson had asked Judge Robinson to give the federal authorities a few more days.

30. On December 16<sup>th</sup> I received another phone call from Dr. Mockovak. He was very upset. He told me that attorney Jeff Robinson told Judge Palmer Robinson that he had received additional discovery materials; that he was satisfied that he had obtained all that he needed to obtain; and that in return for the federal government's provision of additional discovery materials, he was withdrawing his motion seeking an order of dismissal. Dr. Mockovak told me he had no idea that Mr. Robinson was going to do this, and that he was very unhappy that he had done it. He told me that he had wanted Mr. Robinson to press to obtain *all* the discovery documents that the defense had originally requested, including, in particular, an FBI manual on how to manage FBI informants.

31. At no time prior to December 16<sup>th</sup> did Mr. Robinson ever tell me that he had decided to make this compromise agreement with the federal authorities. If he had told me in advance that this was what he was planning to do, I would have strongly opposed it.

32. I attended a significant portion of Dr. Mockovak's trial and I was present when the jury returned its verdicts on February 3, 2011. I had another meeting with attorneys Robinson and Tvedt on that day. I also had additional meetings with attorney Robinson later that month and in March.

33. At no time did attorney Robinson ever inform me of any of the following things:

(a) that there was a possibility of making a suppression motion of any kind, or that he was considering making a suppression motion of some kind;

(b) that he believed there was a good chance that he could win a suppression motion;

(c) that it might be possible to get the state trial judge to suppress the tape recorded conversations which occurred between Kultin, the government's informant, and Dr. Mockovak;

(d) that there was any other way (besides the motion he made and argued in December of 2010 regarding federal refusal to provide discovery materials) of getting the case dismissed in state court, so that it would be tried in federal court.

34. Similarly, neither attorney Tvedt nor attorney Campagna ever told me any of the things listed above in the preceding paragraph.

35. It was not until long after Dr. Mockovak's trial had ended that I learned from his appellate attorney, James Lobsenz, that it would have been possible to make a motion to suppress all evidence of the tape recorded conversations between Dr. Mockovak and the FBI informant, Daniel Kultin.

36. I also learned from Mr. Lobsenz that Mr. Robinson had stated in a declaration that he believed that if he had made a motion to suppress all the recorded conversations that there was a "very good chance that [he]

would win such a motion.” I was shocked to learn that Mr. Robinson said that he knew about grounds for a suppression motion that he had never made, even though he thought he could have won it, and could thereby have moved the case to federal court.

37. This is particularly shocking to me since I recall Mr. Robinson telling the state court judge at the sentencing hearing that he believed that had the case been tried in federal court there could well have been a complete acquittal in federal court.

38. Since a central defense strategy had been to get the case moved from state court to federal court, it is difficult to conceive of a reason why Mr. Robinson never told me anything at all about the possibility of making such a suppression motion. (Attorneys Tvedt and Campagna never mentioned this possibility to me either.)

39. I have read Mr. Robinson’s declaration executed on April 23, 2012. In particular I have read his statement in ¶ 6 where he states that he made a deliberate strategic choice not to make a suppression motion. I have read Mr. Robinson’s statement that “Dr. Mockovak was aware of this strategic choice.” For the reasons set forth below, I believe that the statement that Dr. Mockovak “was aware” of Mr. Robinson’s deliberate strategic choice is incorrect.

40. Dr. Mockovak discussed with me the differences between state court rules and federal court rules; the possibility of a diminished capacity defense; the nature of an entrapment defense; the questions that he felt should be asked of each witness that his defense team was interviewing; about cases and articles he had read on legal questions; and discovery issues and the inability to obtain discovery from the federal authorities. Moreover, he talked with me about his strong preference for being tried in federal court, rather than state court. He told me that his preference for federal court was based on the more favorable burden of proof rule applicable to the entrapment defense in federal court. I completely agreed with Dr. Mockovak that he’d be much better off if his case was tried in federal court.

41. It is inconceivable to me that Dr. Mockovak was aware that his attorney, Jeff Robinson, had made a choice not to bring a suppression motion which he (Robinson) believed he had a good chance of winning. If Dr. Mockovak had been aware of such a possibility, I am certain that he would have asked me what I thought about the wisdom of deciding *not* to

bring such a suppression motion. Not only am I a close friend of his, and not only was I loaning him the funds to pay his legal expenses, but I am an experienced and respected trial lawyer. In 2006, for example, I was named by *Lawdragon Magazine* as one of the 500 Leading Lawyers in America. And in every year from 2006 to the present I have been selected as an Illinois “Superlawyer.”

42. If Dr. Mockovak had known of the possibility of making a motion to suppress the conversations he had with Kultin, Dr. Mockovak would have discussed this possibility with me. Since he never discussed it with me, I do not believe he was aware of it. Thus, I believe that Mr. Robinson is wrong when he says Dr. Mockovak was aware of this possibility and of Mr. Robinson’s self-described “strategic decision” not to make this motion which, if successful, would have resulted in leaving the state prosecutors with no choice but to dismiss the charges in state court.

43. One more fact strongly indicates to me that Mr. Robinson is mistaken. I distinctly recall speaking to Ms. Tvedt about the desirability of having the case tried in federal court instead of state court. She told me they had a strategy to get the case to federal court. But she also said they were going to wait until after they had taken advantage of the more liberal state court discovery rules by doing as much discovery as they could in state court. She said they were going to delay making their state court motion to dismiss until they had interviewed all the witnesses they were entitled to interview under state court discovery rules. When they were done with these interviews, then they would make their motion to dismiss which, if successful, would lead to the case ending up in federal court, (where she said the federal discovery rules did not afford the defendant any entitlement to interview the prosecution’s trial witnesses). I responded that I understood that waiting until the witness interviews had been conducted made sense, but I said they should not cut it too close because we needed to get the case to federal court. She said she agreed with my statement and said I shouldn’t worry because we would do both (conduct the interviews and then move to dismiss in state court).

44. If Ms. Tvedt had been aware that Mr. Robinson had made a deliberate strategic decision *not* to make a suppression motion which, if it succeeded, would have resulted in state court dismissal and the refile of criminal charges in federal court, she certainly would have mentioned it to me during this conversation. Since she did not mention it, this indicates that she was not aware that Mr. Robinson had made a decision not to make such a suppression motion.

45. The fact that Mr. Robinson appears to have never told his trial partner about his decision not to make a suppression motion indicates that he didn't tell anyone that he had made this decision. While he may believe that he told Dr. Mockovak, I am quite sure that he is mistaken when he asserts that Dr. Mockovak was aware of it.

DATED this 11<sup>th</sup> day of June, 2012.

  
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NO. 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Personal Restraint of,

MICHAEL EMERIC  
MOCKOVAK,

Petitioner.

DECLARATION OF JOSEPH  
A. CAMPAGNA

I, JOSEPH A. CAMPAGNA, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct.

1. I have personal knowledge of the facts set forth here.
2. I was admitted to the Washington State Bar Association in June of 2008.
3. Together with Jeffery P. Robinson and Colette Tvedt, I represented Dr. Michael Mockovak in the case of *State v. Mockovak*, King County Cause No. 09-1-07237-6.
4. I was primarily responsible for doing the initial legal research on the defense of entrapment and the initial preparation of the defendant's proposed jury instructions.
5. I prepared the defense proposed jury instruction on entrapment which the trial judge ultimately gave to the jury. I used the WPIC model

jury instruction on entrapment, WPIC 18.05, which includes this sentence: “The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.” At the time the instruction was proposed, I was not aware that there was an argument that this sentence should not have been included in the jury instruction.

6. Generally speaking, whenever I read a reported appellate decision that appears to be important to the case at hand, I put an electronic copy of the decision in the legal research folder on our firm’s server. I have gone back and looked at that folder to see what it contains. It contains copies of many state and federal appellate decisions on the entrapment defense, and it also contains a copy of RCW 9A.16.070, the statute which defines the entrapment defense in Washington State.

7. RCW 9A.16.070(1) provides that “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.” The statute makes no mention whatsoever of any requirement that the defendant prove that the police or their agents used more than a reasonable amount of persuasion to overcome the defendant’s reluctance to commit the crime.

8. The research folder contains a copy of *State v. Keller*, 30 Wn. App. 644, 637 P.2d 985 (1981). The copy in the folder contains yellow highlighting that I recall applying, which shows that I read the opinion and I highlighted certain passages in it.

9. In *Keller* the convicted defendant argued on appeal that he should have received an entrapment defense instruction. The Court of Appeals agreed with him, and reversed his conviction.

10. Among the portions of the *Keller* opinion which I highlighted are the following paragraphs:

Defendant contends that there was substantial evidence to support an instruction on entrapment. On the other hand, the State contends the evidence was insufficient to submit defendant's proposed instructions because (1) defendant did not show the conduct of the officer or informant was unfair or outrageous but only showed that they provided an opportunity for defendant to enter into the transaction, and (2) the only evidence addressing this issue was defendant's uncorroborated testimony. We disagree with the State's contentions and hold the instructions should have been given.

**First, it is true as the State argues that use by police officials of a normal amount of persuasion does not constitute entrapment.** *State v. Waggoner*, 80 Wash.2d 7, 10-11, 490 P.2d 1308 (1971). **However, it is not necessary to prove outrageous conduct when asserting the statutory defense. That evidence is relevant only if it is contended the conduct violated due process.** [Four case citations, which I did not highlight, are omitted here]. Here, defendant's argument is based upon the statutory elements of the defense, not due process principles. The essence of the defense is (a) an absence of propensity, and (b) an inducement or persuasion from governmental authority to commit the crime. . . .

*Keller*, 30 Wn. App. at 646-47 (emphasis added).

11. Although I read and highlighted these portions of *Keller*, my initial draft of our entrapment instruction included the "reasonable amount of persuasion" language from WPIC 18.05.

12. The electronic research folder for the Mockovak case does not contain a copy of *State v. O'Neill*, 91 Wn. App. 978, 967 P.2d 985 (1998). It is possible that I read *O'Neill* and did not place a copy of it in the research folder, although I do not have a clear recollection of doing so.

13. In *O'Neill* this Court reversed the defendant's conviction for bribing a police officer because the WPIC jury instruction given on the statutory defense of entrapment was erroneous. In the following passage this Court held that the sentence about "use of a reasonable amount of persuasion" should not have been given:

O'Neill also attacks the entrapment instruction's language that the "use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment[.]" **While this sentence is also included in the WPIC, it does not derive from the entrapment statute, RCW 9A.16.070. We hold that this language should not have been given on the facts of this case because it suggested that [police officer] Stone could have illegally threatened incarceration to extort bribe money by using a "reasonable" amount of persuasion.** Because Stone did not legitimately negotiate the bribe in an attempt to enforce the law, no amount of persuasion would have been reasonable or sanctioned by law.

*O'Neill*, 98 Wn. App. at 989 (emphasis added).

14. Regardless of whether I read the *O'Neill* case, my initial draft of our entrapment instruction included the "reasonable amount of persuasion" language from WPIC 18.05.

15. I did not discuss with Ms. Tvedt or Mr. Robinson the appropriateness of the "reasonable amount of persuasion" language in our

entrapment instruction. There was no strategic or tactical reason for not discussing the appropriateness of this sentence.

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

DATED this 23 day of April, 2012.



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Joseph Campagna, WSBA No. 40263  
Trial Defense Counsel for Petitioner

Timothy K. Ford, on oath, states:

1. I am an attorney and a member of the Bar of the State of Washington and several federal courts. I was admitted to the Bar of the State of Washington in 1975 and have practiced criminal and civil litigation ever since. A copy of my Curriculum Vitae is attached as Exhibit A.

2. I am familiar with prevailing professional norms in criminal trial practice in the State of Washington, from the following experience:

2.1 Since 1976, I have represented criminal defendants at the trial level in the state courts of Washington and several other states, and in the United States District Court for the Western District of Washington. In Washington State I have represented criminal defendants in trial level cases in King County Superior Court and in the Superior Courts of at least nine other counties. I have also represented criminal defendants in appeals and postconviction proceedings in the Supreme Court of the United States, several United States Courts of Appeals and United States District Courts, and state appellate courts in Arizona, California, Montana, Nebraska, Utah, and Washington.

2.2 During my career, I have consulted on a formal or informal basis with trial counsel in hundreds of criminal cases—capital cases in every state that has capital punishment, and noncapital criminal cases in nearly every Washington county.

2.3 I have been a member of the Washington Association of Criminal Defense Lawyers since shortly after it was founded in the mid-1980s. I served on its Board of Directors for several years, and as its President from 1993 to 1994.

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2.4 I have taught classes on issues relating to trial level criminal defense in continuing legal education programs in a number of states and several Washington counties.

2.5 I am Chair of the Washington Supreme Court's Capital Qualifications Committee, which certifies lawyers to handle capital cases under Washington's court rules at trial and appeal (Washington Superior Court Special Proceedings Criminal Rule 2) as well as in postconviction proceedings (Washington Rule of Appellate Procedure 16.25). I have been a member of this Committee since its creation in 1997. I am certified under these Rules to act as lead counsel in capital trials, appeals and postconviction proceedings.

2.6 I have testified as an expert in support of claims of ineffective assistance of counsel involving the performance of trial counsel in capital sentencing in six capital cases: two in Washington and one each in Arizona, Idaho, Nevada and Wyoming. In each of those cases, the federal district court judges who heard the case held that trial counsel was ineffective at sentencing.

3. I have been asked to provide opinions regarding whether Dr. Michael Mockovak received ineffective assistance of counsel at his murder solicitation trial, by his defense counsels' failure to file a motion to suppress private conversations recorded without his consent in violation of RCW 9.73.030, and by their submission of an entrapment instruction that misstated the statutory elements of that defense.

4. My opinions regarding the effectiveness of Dr. Mockovak's trial counsel are based on a review of the files and documents listed in Exhibit B, certain assumptions described below, and my own legal research and experience. Based on these sources, I have the following opinions on these subjects:

5. Regarding the failure to file a motion to suppress conversations recorded in violation of RCW 9.73.030:

5.1 In my opinion, a criminal defense lawyer performing in a manner consistent with his or her professional obligations and prevailing professional norms in the State of Washington would have known of, and would have informed Dr. Mockovak of, the possibility of filing a motion to suppress under RCW 9.73.030 the recorded conversations offered by the prosecution at his trial.

5.1.1 The two-party consent rule imposed by this Washington statute is or should be known to any Washington criminal trial lawyer. Police witness interviews and other recorded statements almost always begin with an express, on-the-record waiver of this statutory protection. Investigative and trial preparation options are limited by it. According to a Westlaw search I conducted on July 22, 2012, RCW 9.73.030 has been cited in 137 Washington appellate court decisions since 1972, 55 of them since 2000.

5.1.2 A Washington criminal defense lawyer with a knowledge of the relevant law consistent with prevailing professional norms would know that the protections of this statute are very strict and place stringent limits on the admission of private conversations recorded without the consent of all parties involved, and would do legal research into the protections of the statute if he or she was not already familiar with them. Even minimal legal research would show that the statute applies to recordings made by federal government agents and it prohibits testimony about the recorded transaction as well as the recording itself. See, e.g., *State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980).

5.1.3 According to the description of the trial evidence in the Appellant's and Respondent's Briefs in Dr. Mockovak's case, the prosecution's

case against him rested largely, if not exclusively, on evidence and testimony about conversations between Dr. Mockovak and Daniel Kultin. Washington criminal discovery rules would have required this to be disclosed in advance of trial, and according to the Declaration of Jeffrey Robinson, it was.

5.1.4 In my opinion, any criminal defense lawyer practicing in a manner consistent with prevailing professional norms in the State of Washington would have informed his client of the possibility of filing a motion to suppress these recordings and testimony about the conversations they contained in these circumstances. This is so even if the lawyer believed the ultimate decision about whether to file this suppression motion was the lawyer's and not the client's, because of its potential impact on this case. *See*, ABA Criminal Justice Section Standards, The Defense Function, Standard 4-3.8(b) (“defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”). I do not believe there could be any sound tactical or strategic reason for not informing the client of the possibility of bringing such a motion.

5.1.5 Because this motion had such potential significance, any decision not to file it would be extremely unusual and risky to the case and to the lawyer. Because of that, I believe that a lawyer practicing in a manner consistent with prevailing professional norms in the state of Washington not only would have consulted the client about the decision but also would have memorialized the fact that he or she had done so—particularly if the client disagreed with it. *See* ABA Defense Function Standard 4-5.2(c).

5.2 In my opinion, a lawyer practicing in a manner consistent with prevailing professional norms would have filed a motion to suppress these

recordings and these conversations in this case, and the information and materials I have reviewed reveal no sound strategic reason not to do so in this case.

5.2.1 Based on the descriptions of the circumstances of the recordings in the Appellant's and Respondent's Briefs in Dr. Mockovak's appeal, and the Declaration of Jeffrey Robinson, I agree with Mr. Robinson that if a motion to suppress these recordings and conversations had been filed, it likely would have been granted with respect to all five recorded conversations. Washington courts have taken an expansive view of the "fruit of the poisonous tree" doctrine with regard to violations of this statute. *See, e.g., State v. Faford*, 128 Wn.2d 476, 488-89, 910 P.2d 447 (1996). If such a motion was denied, I believe there is at least a reasonable probability that decision, and Dr. Mockovak's convictions, would have been reversed on appeal on that ground.

5.2.2 Based on the description of the trial evidence contained in the Appellant's and Respondent's Briefs in this matter, I believe that a successful motion to suppress would have been devastating to the prosecution against Dr. Mockovak, and Mr. Robinson's belief that the grant of such a motion would have resulted in the dismissal of the state charges is reasonable.

5.2.3 Although there may be legitimate tactical or strategic reasons for deciding not to file a motion to suppress in a criminal case in some circumstances, *see Kimmelman v. Morrison*, 477 U.W. 365, 380, 104 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), based on the information available to me I do not believe there was any sound strategic reason not to do so in this case.

5.2.4 Where a suppression motion has a reasonable chance of resulting in the exclusion of a substantial portion of the prosecution's case or dismissal of the prosecution, counsel practicing in a manner consistent with

prevailing professional norms in the State of Washington would make such a motion unless there are extremely strong strategic reasons not to do so.

5.2.5 I do not agree with Mr. Robinson's contention that such a suppression motion could not have been brought in this case after the defense completed its investigation and discovery utilizing Washington State's investigation and discovery rules. According to the chronology set forth in the Declaration of James Lobsenz, the defense discovery and investigation was completed the day of, or the day after, the omnibus hearing in Dr. Mockovak's case. I know of no legal basis on which the trial court could have disallowed such a motion noted at the time of the omnibus hearing. The Omnibus Order attached to Mr. Lobsenz' Declaration includes a line that could have been checked by defense counsel to give notice such a motion. No provision of Washington or King County court rules precludes the noting of such a motion at an omnibus hearing. Had the trial court refused to allow Dr. Mockovak's defense counsel to note a motion to suppress at the omnibus hearing in his case, or to pursue such a motion thereafter, I believe that decision almost certainly would have been reversed on appeal.

5.2.6 There is only one facially plausible strategic or tactical reason to refrain from filing a motion to suppress those conversations and recordings that I have seen referenced in any of the materials I have reviewed or that I have been able to conceive of myself. That is the concern that suppression in state court would result in termination of the state prosecution and initiation of a federal prosecution for violations of federal criminal law in Dr. Mockovak's alleged acts. In rare circumstances, this sort of concern can provide a legitimate strategic reason for refraining from taking some potentially successful action in a criminal case. However, it is almost always to a criminal defendant's advantage to interrupt or terminate any ongoing criminal prosecution for a serious felony

offense. I therefore believe that a decision to refrain from filing a motion to suppress the recorded conversations in Dr. Mockovak's case could only be a sound tactical or strategic one if (1) the likelihood was very high that a termination of the state prosecution would result in federal charges, *and* (2) a federal prosecution would have been significantly more likely to result in a conviction and/or a much harsher sentence.

5.2.7 Under federal law, where a defendant claims entrapment, the Government has the ultimate burden to prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. *See United States v. Charles*, 581 F.3d 927, 935, *Jacobson v. United States*, 503 U.S. 540, 549, 112 S.Ct. 1535, 118 L.Ed.2d 184 (1992). In Washington, the defendant bears the burden of proving the defense of entrapment by a preponderance of the evidence. *See State v. Burton*, 165 Wn. App. 866, 872, 269 P.3d 337 (2012); WPIC 18.05. In this concrete respect, at least, federal law would be significantly *more* favorable to Dr. Mockovak than state law with regard to his defense of entrapment.

5.2.8 I agree with Mr. Robinson that the caliber of federal prosecutors in this District is at least as high as that of the senior prosecutors in the King County Prosecuting Attorney's Office, and that federal prosecutors generally have lower caseloads than state court prosecutors. However, I see no indication in Mr. Robinson's Declaration, or in the record, that the state prosecutors in this case lacked the time or resources to effectively prosecute this case. Therefore, I do not believe that a sound strategic decision could be made to refrain from filing this suppression motion on that basis.

5.2.9 I am not an expert on the federal sentencing guidelines, and have not attempted to calculate the sentence Dr. Mockovak would have faced

if convicted of a violation of federal law arising from these conversations. I assume it is true, as stated by Mr. Robinson on the record and in his Declaration, that the federal sentencing guidelines would have called for a substantially shorter sentence than state law on conviction of this crime. If so, sentencing considerations would have militated in favor of a federal prosecution as well, and cannot have provided a sound strategic reason for declining to file a suppression motion that could have terminated the ongoing state prosecution.

5.2.10 It is difficult to gauge the strength or significance of Dr. Mockovak's desire to have "a trial as quickly as possible" from the brief reference to it in Mr. Robinson's Declaration (at ¶ 17). However, I cannot conceive of circumstances in which such a desire on the part of a client could provide a sound strategic reason to refrain from filing a motion that could result in the dismissal of an ongoing prosecution where the client is not being held in pretrial custody and has already waived speedy trial rights.

5.2.11 Nothing in the records I have reviewed suggests there were any other disadvantages that Dr. Mockovak's defense would suffer in federal court that could have provided a sound strategic reason for failing to filing a motion to suppress under RCW 9.73.030.

6. Regarding the proposed entrapment instruction:

6.1 Any lawyer practicing in a manner consistent with prevailing professional norms in the State of Washington, handling a case involving an entrapment defense, should be familiar with the language of the governing statute, RCW 9A.16.070, and the case law interpreting it. Any lawyer familiar with that statutory language who read or copied WPIC 18.05 should recognize that the WPIC contains an additional sentence that is not in the statute: a sentence reading "The use of a reasonable amount of persuasion to overcome reluctance does not

constitute entrapment.” This language obviously is not part of the statute. It effectively imposes an additional burden on the defendant that is not contained in the governing statute, a burden of proving that the amount of persuasion used was more than “reasonable.” The WPIC language is therefore inherently disadvantageous to the defendant.

6.2 Because of that disadvantage, I do not believe that a lawyer practicing in a manner consistent with prevailing professional norms in the State of Washington would affirmatively propose the WPIC language, and there could be no sound strategic reason for defense counsel to do so.

6.2.1 Any criminal defense or other trial lawyer in the State of Washington knows or should know that submission of a jury instruction waives any objection to its language.

6.2.2 The basic research any lawyer handling an entrapment case would do would show that there is a plausible argument that the added WPIC language misstates the law. It deviates from the statutory language; it is rooted in case law that predates the 1976 revision of the criminal code; it significantly alters what the statute says the defendant is required to prove and effectively adds another element to the affirmative defense.

6.2.3 I can conceive of no sound strategic reason a lawyer representing Dr. Mockovak could have elected to propose an instruction using this WPIC language, thereby waiving any objection to its deviation from its statutory language. Nothing in the records I have reviewed suggests that there was any possibility that the prosecution would have submitted, or the court would have given, an instruction on entrapment *less* favorable to the defense than WPIC 18.05. Submission of the WPIC language therefore gained Dr. Mockovak no advantage and deprived him of the opportunity to challenge the statutory language on appeal.

6.3 In my opinion, the submission of the WPIC language by Dr. Mockovak's lawyers was prejudicial to him.

6.3.1 Based on the legal research and arguments on this issue in the parties' Briefs, in my opinion there is at least a reasonable possibility that an appellate court could find the added WPIC language is erroneous, either generally or as applied to Dr. Mockovak's case. If the court were to so conclude, Dr. Mockovak would be prejudiced by his trial counsel's affirmative submission of this WPIC language if it were held to waive a meritorious appellate argument.

6.3.2 Based on the descriptions of the evidence and arguments of counsel in the Appellant's and Respondent's Briefs in Dr. Mockovak's case, the closing arguments of the defense and prosecution at trial, the verdict acquitting Dr. Mockovak of the charge of solicitation to murder Mr. Klock, and the juror interviews described in the Declaration of David Snyder attached to the Defense Sentencing Memorandum in Dr. Mockovak's case, in my opinion there is a reasonable probability that an instruction that adhered to the statutory language would have produced a different verdict.

6.3.3 I have stated my opinions regarding the merits of Dr. Mockovak's challenge to this instruction in terms of reasonable probabilities because that issue has been briefed by the parties and is before this court for decision so I do not believe it would be appropriate or helpful for me to opine further on how that issue will or should be resolved.

I swear under penalty of perjury under the laws of the State of Washington that the above statements are true to the best of my knowledge and I am prepared to so testify if called.

Dated at Seattle, Washington, this 6 day of August, 2012.

A handwritten signature in black ink, appearing to read 'TK Ford', written over a horizontal line.

Timothy K. Ford, WSBA #5986

## EXHIBIT A

### ***CURRICULUM VITAE*** **TIMOTHY K. FORD**

**Born:** Greenville, South Carolina, November 15, 1948

**Education:** B.A., Washington State University; J.D., Stanford Law School (1974)

**Bar Memberships:** Supreme Court of the United States; Supreme Court of Washington; United States Courts of Appeals for the Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits; United States District Courts for the Eastern and Western Districts of Washington; Arizona; Northern District of California.

**Litigation Experience:** Supreme Court of the United States; United States Courts of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits; United States District Courts for the District of Arizona, the Middle District of Georgia, the Districts of Alaska, Idaho, Montana, Nebraska, Nevada and Utah, the Western District of New York, the Southern District of Ohio, the Southern District of Texas, and the Eastern and Western Districts of Washington; the Supreme Courts of Arizona, Montana, Utah, Washington; the Courts of Appeals of Washington (Divisions I, II, and III) and California (6<sup>th</sup> District); State Trial Courts in Montana, Arizona, Idaho, Nebraska, California and Utah and Washington (20 counties); Utah Board of Pardons; Washington State Medical Quality Assurance Commission; Washington State Dental Disciplinary Board; Washington State Bar Association; Washington State Indeterminate Sentence Review Board; Washington State Pharmacy Board.

**Appointments:** Member, Capital Counsel Qualification Committee, Supreme Court of Washington, 1998-present; Member, Advisory Committee on Rules of Court and Internal Operating Procedures, United States Court of Appeals for the Ninth Circuit, 1995-2001; Member, Seattle-King County Bar Association, Judicial Screening Committee, 1995-1999; Member, Special Committees on Capital Punishment Representation and Rules of the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Western District of Washington and the Supreme Court of Washington; President and Board of Directors, Washington Association of Criminal Defense Lawyers, 1986-1995.

**Professional Honors:** Best Lawyers in America 1996-2012; American Academy of Appellate Lawyers, 1993-2012; Martindale Hubble, AV rating 1983-2012; Thurgood Marshall Award 1998, Association of the Bar of New York; President's Commendation 1997, National Association of Criminal Defense Lawyers; Courageous Award 1995, Washington State Bar Association; William O. Douglas Award 1992, Washington Association of Criminal Defense Lawyers.

**Professional certification:** Qualified to act as lead counsel for trials, appeals and postconviction proceedings under Washington SPRC 2 and RAP 16.25.

**Expert witness:** United States District Courts for the Districts of Arizona, Idaho, Nevada, Western Washington, Wyoming; state courts in Colorado and Washington.

**Teaching:** Adjunct Professor of Law, University of Puget Sound Law School, Tacoma, Washington (1977-1979); Continuing Legal Education Teaching: Administrative Office of the United States Courts; Arizona Attorneys for Criminal Justice; California Attorneys for Criminal Justice; Federal Public Defenders for the Districts of Arizona, Eastern and Western Washington, Idaho, Tennessee; Idaho Attorneys for Criminal Justice; Kentucky Department of Public Advocacy; NAACP Legal Defense Fund; National Association of Criminal Defense Lawyers; Gonzaga Law School; National Institute of Trial Advocacy; National Legal Aid and Defender Association; Ohio State Public Defender; Oklahoma State Public Defender's Office; Oregon Defense Lawyers Association; New York Capital Defender's Office; Southern Committee on Human Rights; Southern Poverty Law Center; Southern Prisoner Defense Committee; Washington Association of Criminal Defense Lawyers; Washington Criminal Justice Training Commission; Washington Defender Association; Washington State Bar Association; Washington State Trial Lawyers Association; Washington Death Penalty Assistance Center; Wyoming State Public Defenders.

EXHIBIT B TO DECLARATION OF  
TIMOTHY K. FORD

List of Materials Reviewed

1. Transcript of Proceedings, *State v. Mockovak*, December 6, 2010
2. Transcript of Proceedings, *State v. Mockovak*, January 31, 2011
3. Transcript of Proceedings, *State v. Mockovak*, February 1, 2011
4. Index to Trial Attorney's Legal Research File
5. Schroeter Goldmark Bender Legal Research File on Jury Instructions (DVIR)
6. Schroeter Goldmark Bender E-Research on Jury Instructions/B-Entrapment
7. Defendant's Sentencing Memorandum and Attached Declaration Regarding Juror Interviews
8. Defendant's Sentencing Memorandum Exhibits A-C
9. Defendant's Sentencing Memorandum Exhibits D-H
10. Declaration of James E. Lobsenz With Appendices
11. Declaration of Laura A. Doyle
12. Declaration of Ronald L. Marmer
13. Declaration of Joseph A. Campagne
14. Declaration of Jeffery P. Robinson
15. Declaration of Michael Mockovak (unsigned)
16. Brief of Appellant, *State v. Mockovak*, Court of Appeals No. 66924-9-1
17. Brief of Respondent, *State v. Mockovak, supra*
18. Reply Brief of Appellant, *State v. Mockovak, supra*
19. ABA Standards Relating to the Defense Function, Standard 4-5.2, Control and Direction of the Case

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

In re the Personal Restraint of,

MICHAEL EMERIC  
MOCKOVAK,

Petitioner.

DECLARATION OF LAURA  
A. DOYLE

I, LAURA A. DOYLE, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct.

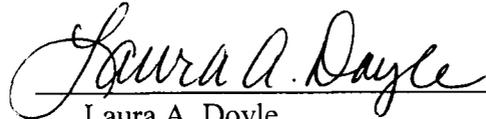
1. I have personal knowledge of the facts set forth here.
2. I am currently employed as a paralegal by the law firm of Carney Badley Spellman, P.S., and I have been employed by the Carney law firm since 1988.
3. At the request of attorney James E. Lobsenz, I accompanied him when he jointly interviewed Dr. Mockovak's trial attorneys, Joe Campagna and Jeffery Robinson, on April 3, 2012. Attorney Colette Tvedt was also present when these interviews took place. The interviews took place at Mr. Robinson's law office at 810 Third Avenue, Suite 500, Seattle, Washington 98104.
4. Mr. Lobsenz asked Mr. Robinson why he did not move to suppress the tape recorded conversations between Dr. Mockovak and Daniel Kultin, the FBI informant, on the grounds that the recording violated Washington State's Privacy Act.
5. Mr. Robinson said he thought about it, and he recognized that he could have made such a suppression motion. He said he thought he had "a good chance" of winning suppression

if he decided to make such a motion. He also acknowledged that the result of winning such a motion would have been that the state prosecution would have been dropped because without the tape recordings the State could not make a case against Dr. Mockovak. If he had made the motion and won it, he said that after the state court charges had been dismissed, federal prosecutors would have indicted Dr. Mockovak and he would have been prosecuted in U.S. District Court for the same alleged crimes of conspiracy to commit murder.

6. Mr. Robinson acknowledged that in federal court the burden of proof rule for entrapment was much more favorable to defendants than the counterpart rule in Washington State court. He also acknowledged that the federal sentencing guidelines for Dr. Mockovak's offenses were much more lenient, and thus more favorable to Dr. Mockovak, than the applicable Washington State sentencing guidelines.
7. Despite these admitted advantages of having the case tried in federal court, Mr. Robinson explained that he felt prosecution in Washington State court was to the defendant's advantage because the State had more favorable discovery rules. He said that if he had moved for suppression at an early stage of the proceedings while the case was in state court, he would not have gotten the benefit of the more liberal Washington State discovery rules for criminal cases, which gave him the right to interview prosecution witnesses. A lot of the discovery that the defense was able to get in state court did not actually get produced until the "last minute" before trial. Mr. Robinson said it was important to get the benefit of conducting interviews of the prosecution witnesses, and therefore he did not make a motion to suppress in state court.

8. Mr. Lobsenz asked Mr. Robinson why he didn't make a motion to suppress after he had finished interviewing all the prosecution witnesses.
9. Mr. Robinson said he didn't do that because by the time he had finished interviewing all the prosecution witnesses, it was too late to make a motion to suppress the tape recordings.
10. Mr. Lobsenz asked Mr. Robinson why it would be too late, and Mr. Robinson said that by the time he had received all the discovery the defense was entitled to, motions were already supposed to have been filed. He said the state court trial judge would not have entertained a motion to suppress at that point in time.

DATED this 2nd day of July, 2012.

  
\_\_\_\_\_  
Laura A. Doyle

COURT OF APPEALS  
STATE OF WASHINGTON  
1912 OCT - 5 10:51

NO. 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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

DECLARATION OF WILLIAM  
FOOTE, Ph.D.

I, WILLIAM FOOTE, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct.

1. I am a clinical and forensic psychologist. I received my Ph.D. in Clinical Psychology from the University of New Mexico in 1978 and I have been licensed to practice clinical psychology in New Mexico since 1979. I received my Diplomate in Forensic Psychology from the American Board of Professional Psychology in 1984. I have served as an adjunct professor of law at the University of New Mexico School of Law and as an adjunct professor of psychology in the University of New Mexico Department of Psychology. I have published widely in the field of forensic psychology.
2. I am a consultant to the Albuquerque Police Department and to the New Mexico Police Academy. I served as the Clinical Director for the Society of Northern Renewal, a nonprofit organization dedicated to treating sexually abused Inuit men in Nunavut Territory, Canada. Together with Jane Goodman Delahunty, I am the 2005 recipient of the American Psychology-Law Society Biennial Book Award, given for outstanding

scholarship in psychology and law. A copy of my curriculum vitae is attached to this declaration as Appendix A.

3. Children who survive sexual abuse vary widely in their reactions to those experiences (see Kendell-Tackett & Finkelhor, 1993). For some, especially those who experience recurrent, unavoidable sexual assaults, the reactions and behavioral patterns developed in response to this destructive trauma persist long after the abusive experiences have stopped. Some of these reactions, like dissociation (the child removing himself cognitively from the immediate situation) become part of the child's, and later, the adult's strategies for avoiding traumatic thoughts or feelings (Sandberg, Matorin & Lynn, 1999).
4. In almost every case of child sexual abuse, the abuser is older, more powerful, and uses either seductive or coercive techniques to assure that the child acquiesces to the abuse and refrains from reporting the assaults. These techniques effectively make the child helpless to avoid the abusive situation, and helpless to escape it once it starts. When this happens over and over again, the child learns to be helpless when interacting with a more powerful and coercive figure. This phenomenon has been termed "learned helplessness" (Peterson & Seligman, 1983).
5. This "learned helplessness" becomes part of the child sexual abuse survivor's personality and ways of relating to others, especially those who are viewed as more powerful or those who act in a coercive manner (Kelly, 1986; Shea, 2008). This leads many child sexual abuse victims to be targets of violence as adults (Cotney, 1997; Field et al., 2001).
6. Indeed, considerable research has demonstrated that victims of child sexual abuse are significantly more prone to subsequent victimization. They are more likely to be targets

of other sexual assaults (Briere & Runtz, 1988; Classen, Field, Koopman, Nevill-Manning, & Spiegel, 2001; Genuis, Thomlison, & Bagley, 1991; Herman, Russell, & Trocki, 1986; Sandberg et al., 1999; Wilson, Calhoun, & Bernat, 1999). Child sexual abuse survivors are also more likely to be victims of domestic violence, and one study, (Briere & Runtz, 1988) showed that some 49% of women who experienced child sexual abuse were battered in later relationships, compared to only 18% of non-abused peers.

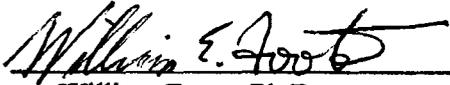
7. Recent research has directly measured learned helplessness in a sample of men sexually abused by clergy and men sexually abused by others (Shea, 2008). This study used a scale designed to assess the degree of learned helplessness in adults. In this study, abuse survivors showed higher levels of learned helplessness than would be expected in a normal population. This study illustrated, as has other research, that having “learned” as a child that there is no escape from sexual abuse, adult victims, who may actually have the wherewithal to escape the situation, continue to apply this lesson to other types of victimization. As one researcher stated, adult victims of childhood sexual abuse have “greater difficulty in being assertive in their relationships with other adults” (Classen et al., 2001, p. 502).
8. Given this data, it is not surprising that the experience of trauma in childhood has been shown to make adults more susceptible to suggestion and influence by others (Gudjonsson, Sigurdsson, Asgeirsdottir & Sigfusdottir, 2007; Gudjonsson, Sigurdsson, Sigfusdottir, & Asgeirsdottir, 2008). In research on false confessions, the experience of childhood trauma, especially that which involved intimidation by a more powerful person, was a principal factor in making people more susceptible to falsely confessing to crimes.

9. All of these factors enter into the context of entrapment. From my understanding of Washington state law (RCW 9A.16.070), entrapment has two elements: “The criminal design originated in the mind of law enforcement officials, or any person acting under their direction *and* the actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.”
10. A history of being a victim of child sexual abuse would apply to both of these elements. 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 (e.g., Bargai, Ben-Shakhar & Shalev, 2007; Walker & Browne, 1985) 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 the inducement of defendants to commit crimes that they might not otherwise commit relates to the psychological process of suggestibility (Gudjonsson et al., 2007; Gudjonsson et al., 2008). Suspects’ suggestibility has been implicated as a factor in false confessions (Kassin et al., 2010). In the context of custodial interrogations, suspects who falsely confess not only agree to facts which they know are untrue, but may even actively enter into the process of writing falsely inculpatory statements. In the same way, the heightened suggestibility of child

sexual abuse survivors would cause them to actively engage in criminal activity that they might not otherwise do. This is especially true in the context of repeated contacts with a highly influential individual who is suggesting the offense.

12. Complete citations to the research cited above are provided in Appendix B to this declaration.

DATED this 5<sup>th</sup> day of September, 2012.

  
\_\_\_\_\_  
William Foote, Ph.D.

# **APPENDIX A**

**NOTE: Professional credentials are subject to change over time. For that reason, the contents of this document may not be accurate if some time has passed since the last revision (see last page for date). Direct contact with Dr. Foote is encouraged.**



**WILLIAM E. FOOTE, PH.D.**

215 Gold Avenue SW, Suite 202  
Albuquerque, NM 87102-3364  
Phone: (505) 243-2777 Fax:  
(505) 243-2776

Date of birth: November 4, 1946

**EDUCATION**

1978	Ph.D.	University of New Mexico	Psychology
1974	MA	University of New Mexico	Psychology
1969	BA	University of New Mexico	Psychology

**LICENSES**

#193 for clinical psychology from the New Mexico Board of Psychologist Examiners, June 1979.

**BOARD CERTIFICATION**

Diplomate in Forensic Psychology by the American Board of Professional Psychology, September 1984.

**PROFESSIONAL EXPERIENCE**

Present: Individual private practice in psychology, specializing in forensic applications of clinical and rehabilitation psychology.

Psychological Consultant, Incident Management Group Ft. Lauderdale, FL

Member, the Forensic Panel

Consultant to Samaritan Counseling Center, Albuquerque

Consultant to Psychological Assessment Resources, Inc, Lutz, Florida

Consultant to the Internship Consortium, UNM Children's Hospital, Albuquerque Veteran's Administration Hospital.

Consultant to the Albuquerque Police Department

**PROFESSIONAL EXPERIENCE** (contd.)

- Consultant to the New Mexico Police Academy
- Consultant to the Federal Aviation Administration
- 2011, Fall      Lecturer, UNM Department of Psychology
- 2010-2011      Research Assistant Professor, UNM Department of Psychology
- 2010-2011      Clinical Professor, UNM Department of Psychiatry
- 2008            Adjunct Professor, UNM School of Law
- 2002-2005      Clinical Director, Society of Northern Renewal (A not-for-profit organization dedicated to treating sexually abused Inuit men in Nunavut Territory, Canada)
- 1998-1999      Consultant to the Forensic Hospital, Las Vegas Medical Center, Las Vegas, New Mexico.
- 1996-1998      Consultant to Criminal Investigations Division, Albuquerque Police Department, New Mexico State Police Homicide Division.
- 1984-1998      Regional Medical (Psychology) Consultant, Social Security Administration.
- 1993, 1998, 2000      Spring Semester Adjunct Professor, University of New Mexico School of Law, Seminar in Advanced Evidence and Trial Practice (Psychological Evidence).
- 1989, 1992, 1994,      Spring Semester; Adjunct Associate Professor, University of New Mexico Department of Psychology, Psychology and the Law Graduate Seminar.
- 1979-1991      Diagnostic Consultant--Indian Health Service, Santa Fe, New Mexico, area.
- 1986-1987      Fall Semester            Instructor, Department of Psychology, University of New Mexico. Graduate Seminar in Professional Ethics and Issues.
- 1980-1981      Spring Semester            Instructor, Guidance Counseling Department, University of New Mexico.
- 1977-1981      Clinical Psychologist, New Mexico Division of Vocational Rehabilitation, Psychological Services Unit, Albuquerque, New Mexico.

- 1976-1977 Psychology Intern, Atascadero State Hospital. Atascadero, California (An internship approved by the American Psychological Association).
- 1975-1976 Psychological Clinician. New Mexico Division of Vocational Rehabilitation project at St. Joseph's Hospital, Albuquerque, New Mexico.
- 1974-1976 Group Facilitator. First Offender's Drug Abuse Education Program, Albuquerque, New Mexico.
- 1974-1975 Psychological Counselor. Penitentiary of New Mexico, Santa Fe, New Mexico.
- 1970-1972 Personnel Psychology Specialist (E-5). United States Army, Armed Forces Entrance and Examining Station, Cincinnati, Ohio.

### **INVITED PRESENTATIONS**

PSYCHOTHERAPISTS GO TO COURT (AND OTHER TALES OF FEAR AND LOATHING) Presentation for the staff of Samaritan Counseling Center, Albuquerque, NM June 26, 2012

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology, Austin, TX, March 28-31, 2012

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology, Palm Springs, CA, October 27-30, 2011

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology, Albuquerque, NM, March 31-April 2, 2011

PERSONAL INJURY EVALUATIONS: TORT LAW & THE ASSESSMENT OF DAMAGES & CAUSATION A workshop sponsored by the American Academy of Forensic Psychology. Philadelphia, PA, December 12, 2010

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology, Cleveland, OH, April 8-9, 2010

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology, San Francisco, CA December 8-12, 2010

PTSD IN CIVIL LITIGATION. A workshop for the New Mexico Psychological Association, October 16, 2009.

## **INVITED PRESENTATIONS (cont.)**

PSYCHOLOGICAL EVALUATION OF CAPACITY AND OTHER LEGAL ISSUES WITH OLDER AND DISABLED ADULTS. A workshop for the New Mexico Association for Continuity of Care, October 15, 2009

SEXUAL HARASSMENT. Webinar for the international staff of Intel. October 7 and 8, 2009.

YOUTH VIOLENCE ASSESSMENT AND DEALING WITH BOUNDARIES IN TREATMENT. A Workshop for the staff of New Day Youth and Family Services. April 2, 2009

FUNDAMENTALS OF FORENSIC EVALUATION IN TORT AND CIVIL RIGHTS CASES. A workshop for the Maine Forensic Evaluators. Augusta, Maine, July 10, 2009

THE OTHER TWO PIECES TO THE SEXUAL HARASSMENT EQUATION: THE HARASSER AND THE HARASSMENT CONTEXT. National Employment Lawyers Association Annual Meeting, Chicago, IL, October 18, 2008.

EVALUATIONS OF INDIVIDUALS IN SECURITY SETTINGS. A WORKSHOP FOR PSYCHOLOGISTS IN THE CIA, WASHINGTON, DC, SEPTEMBER 19., 2008.

ETHICAL ISSUES IN ADJUDICATIVE COMPETENCE EVALUATIONS. A WORKSHOP FOR THE OHIO ASSOCIATION OF FORENSIC PSYCHIATRIC CENTER DIRECTORS. NEWPORT, OH, JUNE 14, 2008.

POST-TRAUMATIC STRESS DISORDER IN LITIGATION. NEW MEXICO WORKERS COMPENSATION ORGANIZATION. ALBUQUERQUE, NM, APRIL 10, 2008.

ASSESSMENT OF PSYCHOLOGICAL DAMAGES IN CIVIL LITIGATION. A workshop for the American Academy of Forensic Psychology. New Orleans, LA, February 10, 2008.

ETHICAL ISSUES IN EVALUATIONS AND TREATMENT IN SECURITY SETTINGS. A workshop for the National Security Agency, Washington, DC. January 18, 2008

ASSESSING POTENTIAL FOR DANGEROUSNESS AMONG ADOLESCENTS. A workshop for the physicians, interns and psychologists of the University of New Mexico Childrens' Psychiatric Hospital. November 30, 2007

PSYCHOLOGICAL EVALUATION AND CONSULTATION IN CLERGY AND TEACHER SEXUAL ABUSE CASES. A workshop for the American Board of Forensic Psychology, Newport RI, April 28, 2007  
FORENSIC PSYCHOLOGY: INTRODUCTION. A workshop sponsored by the American Academy of Forensic Psychology, Newport, RI, April 27, 2007.

## **INVITED PRESENTATIONS (cont.)**

PSYCHOLOGICAL EVALUATION IN TORT CASES AND WILL CONTESTS. A workshop sponsored by the Louisiana Psychological Association, Baton Rouge, LA, January 20, 2007.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology, Pittsburgh, PA, November 1-4, 2006

MALINGERING AND DISSIMULATION. A workshop sponsored by the New Mexico Psychological Association, October 20, 2006.

PSYCHOLOGICAL EVALUATION AND CONSULTATION IN CLERGY AND TEACHER SEXUAL ABUSE CASES. A workshop for the American Board of Forensic Psychology, June 12, 2006

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Berkeley, California, January 19-21, 2006.

THE INUIT PROJECT: FORENSIC EVALUATION AND TREATMENT OF A LARGE GROUP OF SEX ABUSE SURVIVORS. University of New Mexico Hospital Psychiatry Grand Rounds October 7, 2005

UNDUE INFLUENCE. A workshop for the New Mexico State Bar Continuing Legal Education bureau, the Elderlaw Seminar, April 1, 2005.

PSYCHOLOGICAL CONSULTATIONS IN TESTAMENTARY COMPETENCE AND UNDUE INFLUENCE CASES. A workshop sponsored by the New Mexico Psychological Association, February 4, 2005.

PSYCHOLOGICAL EVALUATION AND CONSULTATION IN CLERGY AND TEACHER SEXUAL ABUSE CASES. A workshop for the American Board of Forensic Psychology, October 1, 2004.

FORENSIC PSYCHOLOGY: BEYOND THE FUNDAMENTALS. A workshop for the New Mexico Psychological Association. October 15, 2004.

INTRODUCTION TO EVALUATION IN CIVIL CASES. A workshop for the New Mexico Psychological Association. October 16, 2004

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Denver, Colorado, October 23-25, 2003.

INTRODUCTION TO CONFIDENTIALITY, PRIVILEGE, CIVIL COMMITMENT AND DUTY TO WARN. Presentation for the Interns of the Consortium at the Veteran's Administration Hospital, Albuquerque, NM., October 22, 2003.

### **INVITED PRESENTATIONS (cont.)**

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Dallas Texas, March 20-23, 2003.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Minneapolis, Minn., October 2-5, 2002.

INTRODUCTION TO CONFIDENTIALITY, PRIVILEGE, CIVIL COMMITMENT AND DUTY TO WARN. Presentation for the Interns of the Consortium at the Veteran's Administration Hospital, Albuquerque, NM., September 25, 2002.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Atlanta, Georgia, April 18-21, 2002.

PSYCHOLOGICAL EVALUATION IN SEXUAL HARASSMENT CASES. Workshop presented for the American Academy of Forensic Psychology, New Orleans, Louisiana, January 14,

POSTTRAUMATIC STRESS DISORDER—MALINGERING AND OTHER ISSUES. A presentation to the New Mexico Worker's Compensation Administration, December 14, 2001.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Seattle, Washington, October 18-21, 2001.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. St. Louis, Missouri, April 24-29, 2001.

POSTTRAUMATIC STRESS DISORDER AND THE COURTS: RECENT ADVANCES. A presentation to the New Mexico Workers' Compensation Association. Albuquerque, New Mexico, April 13, 2001.

ASSESSING VIOLENCE POTENTIAL. Presentation to Veterans Administration Interns. Albuquerque, New Mexico, April 11, 2001.

WORKPLACE VIOLENCE AND DIRECT THREAT: AN APPROACH FOR PREVENTION, INTERVENTION AND SAFETY. A presentation for Human Relations professionals. Albuquerque, New Mexico, June 27, 2000.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. Tampa, Florida, September 13-17, 2000.

EMPLOYMENT DISCRIMINATION CASES: INTRODUCTION TO EVALUATION AND CONSULTATION. A workshop sponsored by the American Academy of Forensic Psychology. San Juan, Puerto Rico, June 9, 2000.

### **INVITED PRESENTATIONS (cont.)**

INTRODUCTION TO APPLICATIONS OF FORENSIC PSYCHOLOGY IN CRIMINAL CASES. A workshop sponsored by the American Academy of Forensic Psychology. San Juan, Puerto Rico, June 8, 2000.

EMPLOYMENT DISCRIMINATION: INTRODUCTION TO SEXUAL HARASSMENT AND THE ADA. A workshop presented and sponsored by the American Psychological Association. On board the Ocean Princess, April 1, 2000.

RISK FACTORS FOR VIOLENCE AND AGGRESSION AMONG YOUTH. Presentation for the Staff of Albuquerque Public Schools. Albuquerque, New Mexico, March 15, 2000.

PSYCHOLOGICAL CONSULTATIONS IN AMERICANS WITH DISABILITIES ACT CASES. A workshop presented and sponsored by the American Academy of Forensic Psychology. New Orleans, Louisiana, March 10, 2000.

FORENSIC PSYCHOLOGY: INTRODUCTORY AND ADVANCED COURSES. A workshop sponsored by the American Academy of Forensic Psychology. San Diego, California, February 17-20, 2000.

POST-CONVICTION RELIEF: COMPETENCY ISSUES IN CAPITAL CASES. Joint American Psychological Association/American Bar Association Conference on Psychological Expertise and Criminal Justice. (Session Chair and Conference Chair). Washington, DC, October 14-17, 1999.

INTENSIVE FORENSIC PRACTICE WORKSHOP: VIOLENCE ASSESSMENT; PRESENTATIONS ON: ASSESSMENT OF VIOLENCE POTENTIAL, TESTAMENTARY CAPACITY AND UNDUE INFLUENCE;

PSYCHOLOGICAL CONSULTATION IN RACE DISCRIMINATION CASES; PSYCHOLOGICAL CONSULTATION IN EMPLOYMENT DISCRIMINATION CASES. A workshop sponsored by the American Academy of Forensic Psychology. Washington, DC, September 30–October 3, 1999.

BEREAVEMENT, GUILT AND GETTING WHAT'S MINE: COMMON EMOTIONAL REACTIONS WHICH APPEAR ABOUT THE TIME THE WILL IS READ. The Probate Institute sponsored by the New Mexico Bar Association, September 10, 1999.

THE PSYCHOLOGY OF CHILD SEXUAL ABUSE: SUGGESTIBILITY AND SYMPTOMS. A workshop sponsored by the New Mexico Defense Lawyers Association. Albuquerque, New Mexico, July 7, 1999.

THE PSYCHOLOGY OF SCHOOL VIOLENCE: FOCUS ON PREVENTION. Presentation for the City of Albuquerque and Albuquerque Public Schools convocation on school violence. Albuquerque, New Mexico, June 29, 1999.

#### **INVITED PRESENTATIONS (cont.)**

PREDICTION OF VIOLENT BEHAVIOR IN CLINICAL SETTINGS. A workshop sponsored by the New Mexico Psychological Association. Albuquerque, New Mexico, May 21, 1999.

INTRODUCTION TO FORENSIC EVALUATION IN EMPLOYMENT DISCRIMINATION CASES. A workshop sponsored by the American Academy of Forensic Psychology. Austin, Texas, February 6, 1999. WORKPLACE DISCRIMINATION: AN INTRODUCTION TO LAW, Research and Practice

PSYCHOLOGICAL EVALUATIONS. Part of the American Board of Professional Psychology Summer Institute. Portland, Oregon, June 18, 19, 20, 1998.

GRIEF FOLLOWING VIOLENT DEATH. Part of *The Many Faces of Death* Conference. Albuquerque, New Mexico, April 25, 1998.

INTRODUCTION TO FORENSIC CRIMINAL EVALUATION. Wyoming Psychological Association Workshop. Saratoga Springs, Wyoming, September 27 & 28, 1997.

CONFIDENTIALITY, LEGAL ISSUES AND ETHICS IN COUNSELING PROBLEM GAMBLERS AND THEIR FAMILIES. 1<sup>ST</sup> Annual Compulsive Gambling Symposium: Understanding and Treating the Problem Gambler. Albuquerque, New Mexico, August 27, 1997.

RESOLVING INTERDISCIPLINARY DISPUTES: WHY CAN'T WE JUST GET ALONG? American Bar Association/American Psychological Association Family Law Conference. Los Angeles, California, April 19, 1997.

STALKING AND RAPE: OFFENDER PATTERNS AND IMPACT UPON VICTIMS. Female & Safe Symposium. Albuquerque, New Mexico, March 4, 1997.

THE ROLE OF PSYCHOLOGISTS IN EMPLOYMENT DISCRIMINATION CASES. A workshop sponsored by the American Academy of Forensic Psychology. Kansas City, Missouri, March 2, 1997.

EMERGING ISSUES IN PUBLIC ACCESS TO TEST RECORDS. Invited Address to the Association of Test Publishers. New York, New York, August 14, 1995.

THE ROLE OF PSYCHOLOGISTS IN EMPLOYMENT DISCRIMINATION CASES (with Jane Goodman-Delahunty). A workshop sponsored by the American Academy of Forensic Psychology.

Philadelphia, Pennsylvania, April 27, 1995; Seattle, Washington, January 18, 1996.

PSYCHOLOGICAL ISSUES IN CLIENT/ATTORNEY COMMUNICATION (with William Carpenter, J.D.). New Mexico Bar Association Meeting: 1994 New Mexico Practice Skills Course. October 12, 1994; November 18, 1995.

**INVITED PRESENTATIONS (cont.)**

PSYCHOLOGICAL EVALUATION OF RESPONDENTS IN DISCIPLINARY CASES. Invited presentation to the National Organization of Bar Counsel, at the meeting of the American Bar Association. New Orleans, Louisiana, August 5, 1994.

DOMESTIC VIOLENCE. Workshop for New Mexico Public Defenders Department. Albuquerque, New Mexico, July 12, 1994.

EVALUATION OF ALLEGED VICTIMS OF CHILD ABUSE: THE CURRENT RESEARCH. Workshop for Mental Health personnel, sponsored by Mesilla Valley Hospital. July 11, 1994.

EVALUATION IN SEX ABUSE CASES: THE ALLEGED PERPETRATOR. Workshop for Lawyers, New Mexico Bar Association. Albuquerque, New Mexico, June 4, 1994.

NEW MEXICO MENTAL HEALTH LAW WORKSHOP FOR PSYCHOLOGISTS. Albuquerque, New Mexico, May 20, 1994.

PSYCHOLOGICAL DISABILITY IN SOCIAL SECURITY: REAL, IMAGINED, MALINGERED. Workshop for Social Security Administrative Law Judges. Albuquerque, New Mexico, April 16 and 17, 1994.

THE "HOW TO'S" OF CLIENT/ATTORNEY COMMUNICATION (with Julianne Lockwood, Ph.D.). New Mexico Bar Association workshop "New Mexico Practice Skills Course." November 19, 1993.

MENTAL ISSUES IN CRIMINAL DEFENSE (with Barbara Bergman). Workshop for the National Legal Aid and Defender Association. November 12, 1993.

SECRETS OF EFFECTIVE CROSS EXAMINATION OF THE PSYCHOLOGICAL EXPERT - THE QUESTIONS THE EXPERTS HATE MOST . . . (with Frank Spring, J.D., Ph.D.). Presentation for the New Mexico Trial Lawyer's Association. November 5, 1993.

PSYCHOLOGICAL EVIDENCE IN THE POST-DAUBERT/ALBERICO ERA. Workshop for the New Mexico Public Defender Department. September 30, 1993.

ETHICAL AND LEGAL ISSUES IN PROFESSIONAL PRACTICE. Workshop for staff of Lea County Guidance Center. Hobbs, New Mexico, August 4, 1993.

PROFESSIONAL AND ETHICAL ISSUES IN FORENSIC ASSESSMENT. Panel presentation as part of the Southwest Conference of the Law and Psychology. February 6, 1993.

THE PSYCHOLOGICAL IMPACT OF RAPE UPON THE VICTIM. A presentation presented as part of: "Privacy vs. the Public's Right to Know - First Amendment Issues." Panel for the New Mexico Bar Association and New Mexico Press Association. Albuquerque, New Mexico, January 23, 1993.

**INVITED PRESENTATIONS (cont.)**

SEXUAL MISCONDUCT AND THE LAW: THE MANDATE FOR A CRIMINAL STATUTE.  
Psychiatry Grand Rounds presentation. December 19, 1992.

THE ASSESSMENT OF DANGEROUSNESS IN A PROBATION/PAROLE POPULATION. Inservice training for New Mexico Probation and Parole officers. University of New Mexico School of Nursing, June 10, 1992.

THE ASSESSMENT OF MALINGERING. Workshop for the Bernalillo County Forensic Evaluation Team. April 15, 1992

MALPRACTICE FROM PATIENT SUICIDE/HOMICIDE: RISK MANAGEMENT AND CASE CONSULTATION. Workshop for The American Academy of Forensic Psychology. February 27, 1992.

COMPETENCY TO WAIVE RIGHT TO SILENCE AND COUNSEL. Seminar for University of New Mexico School of Law. February 18, 1992.

PSYCHOLOGISTS IN THE COURTROOM: A SURVIVOR'S MANUAL. Workshop for psychologists and students sponsored by Francis Marion College. Florence, South Carolina, October 25, 1991.

MADNESS AND MURDER-VIOLENT BEHAVIOR A MENTAL ILLNESS. Public program for Francis Marion College. Florence, South Carolina, October 24, 1991.

WORKING WITH PSYCHOLOGISTS IN CIVIL CASES. Workshop for Paralegal sponsored by the New Mexico Trial Lawyer's Association. October 15, 1991.

THE USE OF PSYCHOLOGISTS IN CRIMINAL CASES. Half-day workshop for the New Mexico Public Defender's Office. September 12, 1991.

SUICIDE PREDICTION AND INTERVENTION-IMPACT OF DRUG ABUSE; ISSUES WITH ADOLESCENTS. Inservice for staff of Heights Psychiatric Hospital. May 1, 1991.

SUICIDE PREDICTION AND INTERVENTION-USE OF DEMOGRAPHICS, HISTORICAL AND CLINICAL FACTORS WITH ADULTS. Inservice for staff of Heights Psychiatric Hospital. April 10, 1991.

ADVANCES IN THE RORSCHACH. Workshop for IHS psychologists. Santa Fe, New Mexico, October 4, 1990; December 13, 1990.

SEX, LIES & VIDEOTAPES: ISSUES OF FALSE ALLEGATIONS AND FORENSIC ASSESSMENTS. Workshop for Mesilla Valley Hospital. Albuquerque, New Mexico, September 10, 1990.

**INVITED PRESENTATIONS (cont.)**

OFFENDER PSYCHOLOGY AND RECIDIVISM. Workshop for the New Mexico District Attorney's Association. Angel Fire, New Mexico, August 8, 1990.

WHAT IS PSYCHOLOGY? Presentation to Mitchell Elementary School "Career Day." Albuquerque, New Mexico, May 1, 1990.

THE SLOTHFUL PSYCHOLOGIST'S GUIDE TO SPECIFIC INTENT. Workshop for the Bernalillo County Forensic Evaluation Team. April 9, 1990.

CIVIL COMMITMENT UNDER NEW MEXICO'S NEW CIVIL COMMITMENT STATUTE. New Mexico Psychological Association Annual Meeting. April 7, 1990.

PSYCHOLOGISTS RESPONSE TO NATURAL DISASTER: THE NEW MEXICO EXPERIENCE. American Psychological Association State Leadership Conference. Washington, DC, March 4, 1990.

THE PSYCHOLOGIST AS AN EXPERT WITNESS. Workshop for the New Mexico Trial Lawyers Association. January 19, 1990.

MADNESS AND MURDER. Presentation to the Medical Staff of Santa Fe Indian Hospital. Santa Fe, New Mexico, April 1989.

HOMICIDE AND MENTAL ILLNESS. Presentation to the Staff of Presbyterian Hospital. Albuquerque, New Mexico, March 1989.

CHILD AND ADOLESCENT SUICIDE: MORE QUESTIONS THAN ANSWERS. Presentation to Survivors of Suicide. March 1989.

PARAMETERS OF PSYCHOLOGICAL EXPERTISE IN FORENSIC SETTINGS. Workshop for psychologists and lawyers. September 1988.

ALCOHOL AND CRIME: PREDICTION AND PREVENTION. Inservice training for Presbyterian Northside Treatment Center Staff. Albuquerque, New Mexico, May 1988.

MENTAL HEALTH AND THE LAW IN NEW MEXICO: THE EFFECT UPON PSYCHOLOGICAL PRACTICE. Discussion for psychologists. November 15, 1987.

NEW CONCEPTS IN PSYCHOPATHY. Discussion for Albuquerque Police Department sex crimes detectives. Albuquerque, New Mexico, May 21, 1987.

PERVERTS ON THE PHONE: THE PSYCHOLOGY OF PERVERSION IN A "HOTLINE" POPULATION. Albuquerque Contact. Albuquerque, New Mexico, April 23, 1987.

**INVITED PRESENTATIONS (cont.)**

DUTY TO WARN: THE PERILS OF PRACTICE TEN YEARS AFTER TARASOFF. Grand Rounds for Charter Hospital of Albuquerque. Albuquerque, New Mexico, May 2, 1987.

THE PSYCHOLOGICAL EVALUATION OF SEX OFFENDERS. Presentation at Conference on the Sexual Abuse of Children sponsored by the New Mexico Department of Health and Social Services and University of New Mexico Psychology Department. Albuquerque, New Mexico, March 1986.

THE VOCATIONAL CONSEQUENCES OF PSYCHIC AND PHYSICAL INJURIES. Workshop in Tucson, Arizona, March 1986.

ADVANCED ASSESSMENT TUTORIAL. For students and faculty of the Psychology Department, University of New Mexico. Albuquerque, New Mexico, November 1985-May 1986.

PSYCHOLOGICAL ETHICS: A NEW LOOK AT AN OLD PROBLEM. New Mexico Psychological Association Workshop. February 1986.

PSYCHOPATHOLOGY IN PRISON POPULATIONS. Training conducted for correctional officers from the Penitentiary of New Mexico. August 1985.

DEPRESSION AND SUICIDE: DIAGNOSIS AND TREATMENT. Workshop for mental health and hospital staff, Santa Fe Indian Hospital. Santa Fe, New Mexico, January 1985.

PSYCHOLOGICAL OVERLAY IN LOW BACK INJURIES: RECENT RESEARCH AND CURRENT PERSPECTIVES. Continuing education for Vista Sandia Hospital. August 1984.

THE PSYCHOLOGY OF PERSUASION. (For lawyers) Sponsored by New Mexico Trial Lawyers Association. June 1983.

POST-TRAUMATIC STRESS SYNDROME. (For lawyers and psychologists) Sponsored by the New Mexico Trial Lawyers Association and the New Mexico Psychological Association (NMPA). February 1982.

THE NEUROPSYCHOLOGY OF ALCOHOLISM. (For the medical staff) Sponsored by the Santa Fe Indian Hospital. Santa Fe, New Mexico, July and August 1981.

TRAUMATIC NEUROSIS AND PHYSICAL INJURY. For physicians of the Santa Fe Indian Hospital. Santa Fe, New Mexico, June 1981.

INTRODUCTION FOR THE COMPREHENSIVE SYSTEM FOR THE RORSCHACH. (For psychologists) Sponsored by the New Mexico Division of Vocational Rehabilitation. Albuquerque, New Mexico, February 1981.

**INVITED PRESENTATIONS (cont.)**

NEUROPSYCHOLOGY AND VOCATIONAL REHABILITATION. Sponsored by New Mexico Division of Vocational Rehabilitation. Albuquerque, New Mexico, January, 1981.

COPING WITH ON-THE-JOB STRESS. Sponsored by New Mexico Division of Vocational Rehabilitation Continuing Education. January 1979.

EVALUACION PSICOLOGICO DE NIÑOS: ASPECTOS INTELLECTUALES. Sponsored by New Mexico Division of Vocational Rehabilitation and Partners of the Americas. Albuquerque, New Mexico, December 1978.

DESAROLLO NORMAL Y ABNORMAL DE NIÑOS. Sponsored by New Mexico Division of Vocational Rehabilitation and Partners of the Americas. Morelia, New Mexico, September 1978.

ASSERTIVENESS IN THE OFFICE. Sponsored by New Mexico Division of Vocational Rehabilitation Continuing Education. July 1978.

REHABILITATION OF THE PSYCHOSOCIALLY DISABLED CLIENT. Sponsored by the Arkansas Rehabilitation Continuing Education Program. Monroe, Louisiana, February 1978; Baton Rouge, Louisiana, March 1978; Hot Springs, Arkansas, April 1978.

## **PAPERS**

*Vicarious Traumatization: Are Forensic Psychologists Vulnerable to Trauma Exposure?* American Psychology Law Society Annual Meeting, Miami, Florida, March 5, 2011.

*A Hypothetical: Sexual Harassment in Sydney—What Price?* Panel member. American Psychology Law Society Annual Meeting, Miami, Florida, March 5, 2011.

*A Model for Evaluation of Damages in Sexual Harassment Cases.* Paper presented at the Meeting of the International Psychology-Law Society Meeting, Adelaide, Australia, July 7, 2007.

## **PAPERS, (contd.)**

*Sexual Harassment: What the Forensic Psychologist needs to know from social scientists.* Paper presented at the Annual Meeting of the Society of Organizational and Industrial Psychologists. April 16, 2005.

*Informed Consent for Forensic Psychological Evaluation: Rethinking the Roles of the Psychologist and the Lawyer.* Paper presented at the Annual Meeting of the American Psychology-Law Society. April 5, 2005 [Dr. Foote was unable to attend this conference because of an injury. Paper was presented by Dan Shuman.]

*The Inuit Project: Forensic Evaluation of a Large Group of Sex Abuse Survivors,* American Psychological Association Annual Meeting, Chicago, Ill., August 23, 2002.

*MMPI Stability within and across forensic settings.* (Discussant) American Psychological Association Annual Convention, San Francisco, August 26, 2001.

*Ten rules for effective psychologist-lawyer interactions.* American Psychological Association Annual Convention, San Francisco, August 25, 2001.

*Running over a Broken Leg: Psychological Damages in Psychotherapist Sexual Misconduct Cases.* Paper presented at the American Psychological Association Annual Meeting, Washington, DC, August 7, 2000.

*Law, Psychology and Violence in the Workplace.* Chair of symposium as part of the Presidential Miniconvention at the Annual Meeting of the American Psychological Association, Washington, DC, August 6, 2000.

*Prior Trauma and Sexual Harassment: You Gotta Check it Out. Law, Psychology and Gender in the Workplace.* Paper read at symposium as part of the Presidential Miniconvention at the Annual Meeting of the American Psychological Association, Washington, DC, August 5, 2000.

*Daubert as Gatekeeper—Attempts to Quantify Enjoyment of Life. My paper: Damages—Issues on Reliability and Prejudice.* Symposium at American Psychological Association Annual Meeting, Boston, Massachusetts, August 1999.

*Competency to Stand Trial—MacArthur Foundation Research and Neuropsychology.* (Chair) American Psychological Association Annual Meeting, Boston, Massachusetts, August, 1999.

**PAPERS, (contd.)**

*SPPAs Versus Their Regulatory Boards--An Essential New Advocacy Role.* (Discussant). American Psychological Association Annual Meeting, Boston, Massachusetts, August 1999.

*Americans with Disabilities Act and Psychological and Psychiatric Disabilities*, My presentation: *Psychological Evaluation and the ADA: Between Qualification and Disability*. Symposium presentation, American Psychological Association 106<sup>th</sup> Annual Convention, San Francisco, California, August 18, 1998.

*Discussion: American Psychological Association and the Amicus Process*, My presentation: *COLI's Perspective*. Paper presented at American Psychological Association 106<sup>th</sup> Annual Convention, San Francisco, California, August 15, 1998.

*Addictions and Family Law*. Symposium presentation, American Psychological Association 106<sup>th</sup> Annual Convention, San Francisco, California, August 14, 1998.

*Immodest Proposal: Should Treating Professionals be Banned From the Courtroom?* Symposium presentation, Psychology-Law Society Bi-Annual Meeting, Redondo Beach, California, March 7, 1998.

*Coping with Patient Suicide or Homicide*. Paper presented at the Annual Meeting of the American Psychological Association, August 16, 1997.

*Reacting to Attorneys in Distress*. Discussion as part of Symposium at the Annual Meeting of the American Psychological Association, August 16, 1997.

*Practical Advice to Practitioners on Privileged Communications*. Symposium presentation, American Psychological Association Convention, Toronto, Canada, August 10, 1996.

*Clinicians' Interests in Maintaining Test Confidentiality*. Symposium presentation, American Psychological Association Convention, New York, New York, August 14, 1995.

*Male Victims of Clergy Abuse: A Preliminary Assessment*. Paper presented at the CHASTEN Conference on Clergy and Therapist Sexual Abuse, Toronto, Canada, October 14, 1994.

*Criminalization in New Mexico*. Paper presented as part of a symposium at American Psychological Association meeting, Los Angeles, California, August 15, 1994.

**PAPERS.** (contd.)

*Therapy and Testimony: A Dual Relationship?* Paper presented at American Psychological Association, Los Angeles, California, August 14, 1994.

*How Do Rural Practitioners Practice?* Paper presented as part of American Psychological Association Practice Directorate Miniconvention: Rural Practice: New Opportunities for Interdisciplinary Collaboration. American Psychological Association Annual Convention, Toronto, Canada, August 22, 1993.

*Psychological Evaluation in a Case of Double Filicide.* Society for Personality Assessment Annual Meeting, March 18, 1993.

Symposium chair: *Sexual Misconduct Malpractice-Standard of Care, Proximate Cause and Damages, My presentation: Determining the Long-term Impact of Sexual Misconduct on*

*Psychotherapy Patients.* Presented at American Psychological Association Annual Conference, Washington, DC, August 1992.

*An Interdisciplinary Study of Cultural Bias: Hospitalization of a Blackfoot Indian, 1882-1914.* American Psychological Association Meeting, Washington, DC, August 1986.

*The Role of the Forensic Psychologist in Wrongful Discharge Cases.* Paper presented for the American Board of Forensic Psychology, American Psychological Association Meeting, Los Angeles, California, August 1985.

*Disability evaluation with Hispanic Clients in North America.* Delivered at the XX Inter-American Congress of Psychology in Caracas, Venezuela, July 1985.

*The Psychological Aspect of the Inconsistent Personality Defense.* The International Conference for Psychology and Law, Swansea, Wales, United Kingdom, July 1982.

*The Emotional Responses of Psychopaths and Non-psychopaths to Contradictory Communications.* Rocky Mountain Psychological Association, April 1982.

*A Daily Alternation Procedure for Altering Sexual Arousal in a Pedophile.* The Ghost Ranch Conference on Behavior Therapy, November 1979.

*Transfer of a Discrimination Along a Drug Stimulus Continuum.* Southwest Psychological Association, May 1974.

*Discrimination of Temporally-related Stimuli of Delta-9 THC in Monkeys.* Rocky Mountain Psychological Association, May 1973.

*Effects of Delay of Reinforcement and Post-reinforcement Interval on Response Duration Differentiation.* Rocky Mountain Psychological Association, May 1970.

**PUBLICATIONS** (Asterisk denotes peer reviewed)

Goodman-Delahunty, J., Saunders, P., & Foote, W. (2012, in press) Evaluating claims for Workplace Discrimination: A five-stage model. *Proceedings of the 2011 APS Forensic Psychology Conference*, Sydney, AU: The Australian Psychological Society Ltd (APS).

Foote, W.E. & Larue, C.R. (2012, in press) Psychological Damages in Personal Injury Cases. In R. Otto and I. B. Weiner (Eds), *Comprehensive Handbook of Forensic Psychology, Volume Eleven: Forensic Psychology, Second Edition*. New York: John Wiley & Sons, Ltd.

Foote, W. E. (2012, in press). Forensic Evaluation in Americans with Disabilities Act Cases. In R. Otto and I. B. Weiner (Eds), *Comprehensive Handbook of Forensic Psychology, Volume Eleven: Forensic Psychology, Second Edition*. New York: John Wiley & Sons, Ltd.

\*Younggren, J. N., Fisher, M. A., Foote, W. E., & Hjelt, S. E. (2011). A legal and ethical review of patient responsibilities and psychotherapist duties. *Professional Psychology: Research and Practice*, 42(2), 160-168. doi:10.1037/a0023142

\*Goodman-Delahunty, J. & Foote, W.E. (2011) *Workplace Discrimination and Harassment*. London: Oxford Press

\*Drogin, E.Y., Connell, M.A., Foote, W.E., & Sturm, C.A. (2010) The American Psychological Association's Revised "Record Keeping Guidelines" *Professional Psychology: Research and Practice*, 41, (3) 236-243

\*Goodman-Delahunty, J., & Foote, W. E. (2009). Forensic evaluations advance scientific theory: Assessing causation of harm. *Pragmatic Case Studies in Psychotherapy*, 5(3), 38-52.

Foote, W. E. (2008). Evaluations of individuals for disability in insurance and Social Security contexts. In R. Jackson (Ed.), *International perspectives on mental health. Learning forensic assessment* (pp. 449-479). New York: Routledge/Taylor & Francis Group.

Foote, W.E. (2007) Fitness for Duty Evaluations. In: Cutler, B. (ed) *The Encyclopedia of Psychology and the Law*. Thousand Oaks, CA: Sage Publications.

## **PUBLICATIONS, (contd.)**

Foote, W.E. (2007) Disparate Treatment and Disparate Impact Evaluations. In: Cutler, B. (ed) *The Encyclopedia of Psychology and the Law*. Thousand Oaks, CA: Sage Publications.

Foote, W.E. (2007) The Americans with Disabilities Act (ADA) In: Cutler, B. (ed) *The Encyclopedia of Psychology and the Law*. Thousand Oaks, CA: Sage Publications.

\*Foote, W.E. & Shuman, D. W. (2006) Consent for forensic psychological evaluation: rethinking the roles of psychologist and lawyer. *Professional Psychology: Research & Practice* 37 (3)

Foote, W.E. (2006). Psychological evaluation and testimony in cases of clergy and teacher sex abuse. In: Alan M. Goldstein (Ed.) *Forensic Psychology: Advanced Topics for Forensic Mental Experts & Attorneys*. Hoboken, NJ: John Wiley & Sons

Foote, W. E. (2006). Ten Rules: How to Get Along Better with Lawyers and the Legal System. In S. N. Sparta and G. P. Koocher (Eds), *Forensic Assessment of Children and Adolescents: Issues and Applications*. Oxford, United Kingdom: Oxford University Press

\*Foote, W.E. & Goodman-Delahunty, J. (2005). *Evaluating Sexual Harassment: Psychological, Social, and Legal Considerations in Forensic Examinations*. Washington, DC: American Psychological Association Press.

Foote, W. E. (2003). Forensic Evaluation in Americans with Disabilities Act Cases. In D. Goldstein and I. B. Weiner (Eds), *Comprehensive Handbook of Forensic Psychology, Volume Eleven: Forensic Psychology*. New York: John Wiley & Sons, Ltd.

\*Foote, W. E. (2002). The Clinical Assessment of People With Disabilities. In E. Ekstrom and J. Smith (Eds), *Individuals with Disabilities in Educational, Employment and Counseling Settings*. Washington, D.C.: American Psychological Association Press.

\*Foote, W. E. (2000). A Model for Psychological Consultation in Cases Involving the Americans with Disabilities Act. *Professional Psychology: Research and Practice*, 31(2), 190-196.

\*Foote, W. E. (2000). Commentary on "The Mental State at the Time of the Offense Measure": Should We Ever Screen for Insanity? *Journal of the American Academy of Psychiatry and the Law*, 28(1), 33-37.

**PUBLICATIONS, (contd.)**

\*Shuman, D. & Foote, W. E. (2000). *Jaffee v. Redmond's* Impact: Life After the Supreme Court's Recognition of a Psychotherapist-Patient Privilege. *Professional Psychology*, 30 (5), 479-487.

Foote, W. E. (1999). (Book Review) Fatal Families: The Dynamics of Intrafamilial Homicide by Charles Ewing. *Journal of Psychiatry and Law*, 27, 729-730.

\*Foote, W. E. & Goodman-Delahunty, J. (1999). Same-Sex Harassment: Implications of the *Oncale* Decision for Forensic Evaluation of Plaintiffs. *Behavioral Sciences and the Law* 17, 123-139

Foote, W. E. (1998). Police Assisted Suicide Probed. *The Forensic Echo*, II(8), 23.

Foote, W. E. (1998). Abused: Can You Tell? Testimony on Sex Abuse Victims Challenged. *The Forensic Echo*, II(7), 5-6.

Foote, W. E. (1998). Faking Intellectual Problems After Whiplash. *The Forensic Echo*, II(7), 28-29.

\*Shuman, D. W., Greenberg, S., Heilbrun, K., and Foote, W. E. (1998). An Immodest Proposal: Is It Time to Bar Treating Mental Health Professionals From the Courtroom? *Behavioral Sciences and the Law*, 16, 509-523.

Foote, W. E. (1997). So Why Don't You Visit? Court Helps Daughter Overcome Stepfather's Block. *The Forensic Echo*, I(11), 21-22.

Foote, W. E. (1997). Police Can Be Incited to Violence: Profanity to Cop Are Fighting Words. *The Forensic Echo*, I(11), 21-22.

Foote, W. E. (1997). History of Pill Overdose Means Adios Amego: Therapist's Suicide Method Danger to Vulnerable Clients. *The Forensic Psychiatry Echo*, August, 5-7.

Foote, W. E. (1997). Was Death of Depressed Worker Causally Related: Court Raps Presumption of Ten-Year Link. *The Forensic Psychiatry Echo*, July, 7-8.

Foote, W. E. (1997) Male Boss Behaving Badly, But No Sex Harassment: Complaint Made by Male Employee. *The Forensic Psychiatry Echo*, May, 19-20.

**PUBLICATIONS, (contd.)**

\*Foote, W. E. (1996). Victim-precipitated Homicide. In H. Hall (Ed.), *Violence 2000*, Kamuela, HI: Pacific Institute.

\*Goodman-Delahunty, J. & Foote, W. E. (1996). Compensation for Pain, Suffering and Other Psychological Injuries: The Impact of *Daubert* on Employment Discrimination Claims. *Behavioral Sciences and the Law*, 13, 183-206.

\*Foote, W. E. (1994). An Interdisciplinary Agreement for Psychologists and Lawyers. In L. Vandecreek, S. Knapp, & T.L. Jackson (Eds.), *Innovations in Clinical Practice* (pp. 255-262). Sarasota, FL: Professional Resource Press.

Foote, W. E. (1990, Winter). On the Ethics of Advertising Mental Health Services. *The New Mexico Psychologist*.

Foote, W. E. (1990, July). Criminal Laws Fails to Deal with Mentally Ill Defendants. *The New Mexico Trial Lawyer*, 2.

Foote, W. E. (1988) Psychological Disability and Testimony Under the 1987 New Mexico Workers' Compensation Statute. *New Mexico Trial Lawyer*, 16, 1, 22, 23.

Foote, W. E., & Word, T. (1984, Fall). The Role of the Vocational Expert in Workers' Compensation Cases. *New Mexico Law Review*. Reprinted in Field, T., Grimes J., and Wees, R. (1985). *Vocational Expert Handbook*, Tucson, AZ: Valpar International. Reprinted in *Workmen's Compensation Law Review* (1986).

\*Roll, S. & Foote, W. E. (1984). Psychological Aspects of the Inconsistent Personality Defense. In D.J. Muller, D. G. Blackman, & A. J. Chapman (Eds.), *Perspectives in Psychology and the Law*. New York: John Wiley & Sons.

\*Foote, W. E., & Laws, R. (1981). A Daily Alternation Procedure for Altering Sexual Arousal in a Pedophile. *Journal of Behavior Therapy and Experimental Psychiatry*, 12, 267-273.

Waybright, E., & Foote, W.E. (1978). *The Vocational Rehabilitation of the Psychosocially Disabled Client: A Sourcebook*. Hot Springs, AR: Arkansas Rehabilitation Continuing Education Program (limited distribution).

## **HOSPITAL PRIVILEGES**

Presbyterian Hospital, Albuquerque, New Mexico.

## **HONORS**

Recipient, with Jane Goodman Delahunty, AMERICAN PSYCHOLOGY-LAW SOCIETY BIENNIAL BOOK AWARD for *Evaluating Sexual Harassment: Psychological, Social, and Legal Considerations in Forensic Examinations*. 2005, Washington, DC: American Psychological Association Press. Of this award, the APLS states: "The American Psychology-Law Society Book Award is given for a scholarly book devoted to psychology and law issues. The award is intended to recognize outstanding scholarship in psychology and law."

Fellow, American Psychological Association, January 2002.

PRESIDENTIAL CITATION FOR EXEMPLARY SERVICE TO THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN PSYCHOLOGY AND THE LAW. Awarded by Patrick DeLeon, President of the American Psychological Association, August 6, 2000.

THE HUGO MUNSTERBERG AWARD. Sacramento, California Forensic Psychological Association, May 1998.

1996 AWARD FOR SPECIAL ACHIEVEMENT, American Psychological Association Division 31, Toronto, Canada, August 11, 1996.

PERSISTENCE AND PERFORMANCE AWARD, New Mexico Psychological Association, April 1995.

Invited Participant: National Invitational Conference on Education and Training in Law and Psychology. Villanova University, Philadelphia, Pennsylvania, May 25-28, 1995.

Karl F. Heiser Award for Advocacy From The American Psychological Association, August 12, 1994.

Special Recognition Award, New Mexico Contact. 1990.

Fellow, New Mexico Psychological Association. November 1987.

## **EDITING AND PEER REVIEW OF PROFESSIONAL PUBLICATIONS**

Consulting Editor, Professional Psychology Research and Practice, 1998-present

Reviewer, Journal of Psychiatry and the Law.

Reviewer, Psychology, Public Policy and the Law

Member, Editorial Board, The Forensic Echo 1998-2005  
Reviewer, Behavioral Sciences and the Law Reviewer, American Psychological Association Books, 1997-present.

Reviewer, Guilford Press, 1999-present.

## **PROFESSIONAL ASSOCIATIONS**

American Academy of Forensic Psychology

American Psychological Association: Division 41 (Psychology and the Law) Division 42  
(Independent Practice)

New Mexico Psychological Association

Society for Personality Assessment

## **PROFESSIONAL ASSOCIATION ROLES AND ACHIEVEMENTS**

American Psychological Association:

Chair, Committee on Professional Practice & Standards, 2005

Member, Committee on Professional Practice & Standards, 2002-2005

President, Division 31, 1999

Program Chair. Joint American Psychological Association/American Bar  
Association Conference: Psychological Expertise and Criminal Justice.  
Washington, DC, October 14-17, 1999

Board of Governors, National College of Professional Psychology, 1998-2001

Joint American Psychological Association/American Bar Association Conference:

Psychology and Family Law. Program committee member. Los Angeles, California, April, 1997.

Member, Test User Qualification Task Force, 1997-2000

Chair, American Psychological Association Ad Hoc Committee on Legal Issues (COLI) 1996

Member, American Psychological Association Ad Hoc Committee on Legal Issues (COLI) 1994-1996

Member, American Psychological Association/American Bar Association Liaison Committee, 1995-1998

Chair, State Association Caucus, American Psychological Association Council, 1995-1996

Executive Board Member, State Associations Caucus, American Psychological Association Council, 1993-1995

Executive Board Member, Division 31, 1994-1996

Secretary, Rural Health Caucus, American Psychological Association Council of Representatives, 1992-95

American Psychological Association Council Liaison--1985 to 1992.

American Psychological Association Council Representative, 1992-1997

American Board of Forensic Psychology:  
President, 2003-2004

Vice President, 2002-2003

Member, Board of Directors, 1998-2004

National Chair of Examinations, 2001-2003

Recording Secretary, Board of Directors, 1998-2001

Appeals Chair, 1996-1998; 2006-Present

Division 41, the American Psychology-Law Society

President Elect 2012 (President August 2012-August 2013)

Executive Committee Member 2008-2114

Representative to the Council of Representatives of the APA, 2008-2011

New Mexico Psychological Association

American Psychological Association Council Representative--1992-1996

Executive Board Member--1985-1996

Judicial Relations Committee Member--1984-89

Ethics Committee Chair--1987

President- 1986

Board Member, New Mexico Council on Crime and Delinquency, 1997-Present.

Vice Chair, New Mexico Council on Crime and Delinquency, 2001-2009

Chair, Southwest Conference on the Law and Psychology, Santa Fe, New Mexico, Feb. 4-7, 1993

Chair, Task Force for the study of legislation concerning the criminalization of psychotherapist sexual misconduct. (A subcommittee of the Governor's Sex Crimes Prevention and Prosecution Committee) 1990-93

Chair, planning group for forensic conference (February, 1992) of the American Academy Forensic Psychology

Member, planning committee for the American Psychological Association sponsored National Leadership Conference, 1988-90

Secretary/Treasurer, American Academy of Forensic Psychology, 1986-88

Member, Mental Health Code Study Committee--1988

Member, Executive Board, Charter Hospital of Albuquerque- 1987-1988

Chair, Interprofessional Meeting Committee 1987-88

Co-chair, 1985 and 1987, Southwest Conference for the Law and Psychology

Member, Planning Committee for Rehabilitation, New Mexico Workers' Compensation  
Administration--1986-87

Secretary/Treasurer, Clinical Staff of Charter Hospital of Albuquerque, 1986-1987

Revised June 26, 2012

## **APPENDIX B**

## References

- Bargai, N., Ben-Shakhar, G., & Shalev, A. Y. (2007). Posttraumatic stress disorder and depression in battered women: The mediating role of learned helplessness. *Journal of Family Violence, 22*(5), 267-275
- Briere, J., & Runtz, M. (1993). Childhood sexual abuse: Long-term sequelae and implications for psychological assessment. *Journal of Interpersonal Violence, 8*(3), 312-330.
- Classen, C., Field, N. P., Koopman, C., Nevill-Manning, K., & Spiegel, D. (2001). Interpersonal problems and their relationship to sexual revictimization among women sexually abused in childhood. *Journal of Interpersonal Violence, 16*(6), 495-509.
- Cotney, L. C. (1997). Child sexual abuse and learned helplessness as predictors of revictimization of young adult women. *Dissertation Abstracts International: Section B: The Sciences and Engineering, 58*(6-B), 3311.
- Field, N. P., Classen, C., Butler, L. D., Koopman, C., Zarcone, J., & Spiegel, D. (2001). Revictimization and information processing in women survivors of childhood sexual abuse. *Journal of Anxiety Disorders, 15*(5), 459-469.
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STATE OF WASHINGTON  
2012 OCT 15 11:57

NO. 69390-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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

SECOND DECLARATION OF  
JAMES E. LOBSENZ

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

1. I have personal knowledge of the facts set forth here.
2. I am petitioner Mockovak's counsel of record in this PRP proceeding and also in his direct appeal.
3. On September 28, 2011, I sent an e-mail to Ms. Andrea Crabtree, the legal secretary for trial counsel, asking that she send me a copy of "The Carr Memorandum." I had seen references to it in the transcripts that I had been reading in connection with the direct appeal. In the transcripts it was described as a memo stating the reasons why law enforcement felt it was better to file charges in state court rather than in federal court. From what I read in the transcripts, it appeared to me that

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“The Carr Memorandum” had been provided to trial counsel as part of the discovery furnished to trial counsel by the state court prosecutors.

4. Ms Crabtree sent me a copy of “The Carr Memorandum” on September 30, 2011, along with a summary of the discovery materials which trial counsel had been provided by the state court prosecutors.

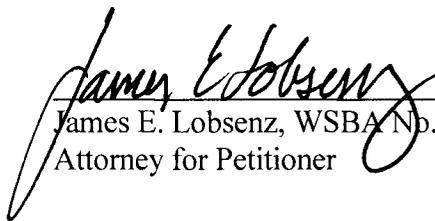
5. Attached to this declaration as Appendix A is a true and correct copy of The Carr Memorandum which Ms. Crabtree sent to me.

6. Trial counsel for Petitioner Mockovak filed a *Defendant’s Sentencing Memorandum* in the Superior Court prior to sentencing. It is sub number 104 in the Superior Court docket, and it was designated as part of the clerk’s papers to be sent to the Court of Appeals in connection with the direct appeal. It can be found at CP 670-705.

7. The *Defendant’s Sentencing Memorandum* refers to several exhibits. However, when the Superior Court prepared the clerk’s papers, it did not include the exhibits which are referred to in the body of the *Defendant’s Sentencing Memorandum*. Apparently, that is because trial counsel forgot to attach them to the original of the memorandum which was filed with the court clerk. From the transcript of the sentencing hearing, it seems fairly clear that the copy of the memo which the sentencing judge was using did have the exhibits attached.

8. I contacted Ms. Crabtree and asked her to send me a set of the exhibits to the sentencing memo, and she did so. A true and correct copy of those exhibits is attached to this declaration as Appendix B.

DATED this 5th day of October, 2012.

  
James E. Lobsenz, WSBA No. 8787  
Attorney for Petitioner

**APPENDIX A**

**(The Carr Memorandum)**

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**FEDERAL BUREAU OF INVESTIGATION**

Precedence: ROUTINE

Date: 11/17/2009

To: Seattle

From: Seattle

C -1

Contact: SA Lawrence D Carr 206-262-2063

Approved By: Dean Steven M  
Maeng J Sung

Drafted By: Carr Lawrence D: ldc

Case ID #: 166C-SE-95743 (Pending)

Title: MICHAEL MOCKOVAK;  
JOSEPH KING (victim);  
MURDER FOR HIRE

Synopsis: ASAC approval for continued investigative efforts in regard to captioned case.

Details: On April 10, 2009, DANIEL KULTIN (KULTIN), a permanent US Citizen who emigrated from Ulyanovsk, Russia, at age 18, believed one of his employers, Michael MOCKOVAK (MOCKOVAK), intended to hire someone to murder a former business associate, Brad KLOCK (KLOCK). KULTIN confided this to a family member who KULTIN knew to have law enforcement contacts with the Portland Division of the Federal Bureau of Investigation (FBI). KULTIN's family member, an Oregon resident, introduced KULTIN to Special Agent George STEUER, Portland Division of the FBI.

KULTIN was subsequently interviewed by STEUER at a restaurant in West Linn, Oregon. KULTIN provided the following information:

KULTIN is the Director of Information Technologies for a Seattle-based business known as Clearly Lasik. The business has eight venues in which they perform Lasik procedures (eye surgery). Said venues are located in Washington, Oregon, Idaho, British Columbia and Alberta Canada. KULTIN has been employed with Clearly Lasik for approximately four years, beginning in early 2006 or late 2005. KULTIN's home office is in Renton, Washington; though he would on occasion travel to the company's

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To: Seattle From: Seattle  
Re: 166C-SE-95743, 11/17/2009

other locations to service the computer systems.

The business was founded and owned by two doctors, Dr. JOSEPH KING (KING) and Dr. MICHAEL MOCKOVAK (MOCKOVAK) themselves. KULTIN stated that, in early 2007, Doctors KING and MOCKOVAK fired the former president of the company, BRAD KLOCK (KLOCK). KLOCK had been a former professional hockey player from Vancouver, British Columbia.

According to KULTIN, KLOCK has disputed his firing for approximately the past two years, and has filed a wrongful termination suit. A records search revealed that KLOCK filed a suit in King County Superior Court on 01/13/2009, cause number 09-2-03018-9, in which Clearly Lasik, MOCKOVAK and KING are named as defendants. The case is still active and has a scheduled court date in June 2010.

KULTIN described in detail certain conversations that MOCKOVAK had initiated with him some time in the spring of 2008. Dr. MOCKOVAK approached KULTIN while they were both at the Renton, Washington, office and jokingly asked if he (KULTIN) had any contacts with the Russian mafia who might resolve his problems with KLOCK's lawsuit. KULTIN dismissed the conversation, believing MOCKOVAK was joking about the matter.

However, in early 2009, MOCKOVAK approached KULTIN again at work and asked if he had any Russian mafia connections that could take care of KLOCK. KULTIN believed the doctor was only half-serious and told MOCKOVAK that doing that sort of thing in the United States was risky business.

The following day, MOCKOVAK approached KULTIN in the office's break room and advised that he had learned that KLOCK would be traveling to Germany within the next month, and that it would be the perfect time and place to have KLOCK "eliminated." KULTIN had the distinct impression that MOCKOVAK seriously wanted to have KLOCK killed.

Because the subjects in this investigation reside and work within the state of Washington, the matter was referred to the Seattle Division of the FBI. Special Agent Lawrence D. Carr was provided KULTIN's contact information by Special Agent George Steuer, Portland Division.

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On or about May 8, 2009, Agent CARR met with KULTIN to discuss the information he had earlier provided to the Portland Division. KULTIN stated that since MOCKOVAK'S early 2009 inquiry about eliminating KLOCK in Germany, MOCKOVAK has not again broached the subject. SA Carr advised KULTIN not to bring up the matter and if MOCKOVAK did, only listen to what he had to say, and provide no direction or contribution to the conversation.

On or about June 11, 2009, SA Carr met with KULTIN. KULTIN said MOCKOVAK still has not brought up any conversation about eliminating KLOCK. He did say he has had many conversations with MOCKOVAK about life in Russia and Russian organized crime. KULTIN seemed to think MOCKOVAK is overly interested in these topics as they are a precursor for many of their conversations.

In this same meeting, KULTIN shared with Agent Carr that he was traveling to Los Angeles to visit some friends. Since MOCKOVAK had asked KULTIN if he had Russian Mafia connections, SA Carr directed KULTIN to share with MOCKOVAK that his friends in Los Angeles might have mafia connections.

On or about August 3, 2009, KULTIN contacted Agent Carr and advised that MOCKOVAK called him to request a meeting to discuss "that thing they had talked about." KULTIN, because of the unusual cryptic tone MOCKOVAK used, took this request to be about their discussions about MOKOVAK's intended murder for hire..

On August 4, 2009, Agent Carr met with KULTIN and formally opened him as an FBI source.

On August 5, 2009, KULTIN met with MOCKOVAK at his (KULTIN's) office, Clearly Lasik, 900 SW 16th Street, Renton, Washington. On August 6, 2009, Agent Carr met and debriefed KULTIN regarding the meeting.

KULTIN reported the following:

He met with MOCKOVAK at approximately 2:30 PM on Wednesday, August 5, 2009. When he arrived at the office, MOCKOVAK stated he wanted to take a walk around the parking lot. KULTIN agreed and the two went outside. Nobody was in the vicinity while the two talked. KULTIN stated that as they walked, MOCKOVAK began to tell him about plans to split the business in the fall of 2009. He stated that he was upset with

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To: Seattle From: Seattle  
Re: 166C-SE-95743, 11/17/2009

his current business partner, Dr. JOSEPH KING, and felt there would be problems when the split occurs.

MOCKOVAK told KULTIN that he was angry with the way things have been going for him, and said, "I hate people taking advantage of me, like Joe [Dr King], he is a greedy snake." MOCKOVAK told KULTIN there is a \$5,000,000 life insurance policy on Dr. KING, should something happen to him. He followed by adding, "If Joe becomes a stumbling block maybe we can look at him."

KULTIN said the conversation then turned to the original target, BRAD KLOCK. MOCKOVAK stated, "I don't know how these things work? What do I do? Do we just have someone follow him?" KULTIN said he responded by telling MOCKOVAK he would make contacts with his friend in Los Angeles.

KULTIN said MOCKOVAK was being guarded and careful with his words but the tone of the meeting was clear -- that MOCKOVAK wished to move forward in developing a plan to have BRAD KLOCK murdered, and that MOCOAVAK was also considering whether to have KING murdered. MOCKOVAK told KULTIN that KLOCK will be in Seattle on September 16-17, 2009, for mediation in regard to his lawsuit against MOCKOVAK's business, Clearly Lasik. (KULTIN knows from conversations at work that KLOCK resides in Vancouver, British Columbia, and is a Canadian citizen.)

KULTIN said that, at the end of their meeting, he and MOCKOVAK agreed that he (KULTIN) would make contact with his people in Los Angeles. KULTIN said he told MOCOAVAK that he would make inquiries as to how to proceed with eliminating KLOCK, and that they would meet again to discuss what he had learned. KULTIN added that he believed MOCKOVAK was moving away from wanting KLOCK killed and starting to focus on his business partner, Dr. Joe KING.

SA Carr told KULTIN that, for the next meeting between he [KULTIN] and MOCKOVAK, he should relay the following story to MOCKOVAK:

That his [KULTIN's] contact in Los Angeles was a boyhood friend that KULTIN grew up with in Russia. The friend had become an associate of a Russian Crime group headed by Sergei Mikhailov. That his friend would be able to arrange a murder of any target and conceal the murder as a street crime. The cost would be \$10,000 up front and another \$10,000 upon completion.

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The only thing that is needed is as much intelligence on the target as possible, the first installment and date of intended "hit."

From August 11th until MOCKOVAK's arrest on 11/12/2009, KULTIN met or called MOCKOVAK eight different times and wore a wire for seven of these encounters. During this four month period, MOCKOVAK'S intended target did switch from KLOCK to his business partner KING. MOCKOVAK was very unhappy with regard to the way KING was proposing a split of the Clearly Lasik business.

Beginning in August, SA CARR briefed AUSA Vince LOMBARDI with regard to the case and investigation to date. SA CARR utilized federal process for approval of recorded conversations, per FBI/DOJ guidelines. SA CARR fully believed from conversations with AUSA LOMBARDI (although nexus was never discussed) that this case would end in a federal prosecution.

During the last week of October, SA CARR provided AUSA LOMBARDI with transcripts and documents to support what SA CARR had previously briefed AUSA LOMBARDI. SA CARR advised AUSA LOMBARDI that he believed MOCKOVAK was ready to make a down payment to further the plot.

AUSA LOMBARDI stated he had concerns with whether or not we had proven a federal nexus. It was then decided that in an abundance of caution, SA CARR would seek a state court order allowing the source to record the payment. SA CARR was left with the impression that the case was still going to be a federal prosecution and the state court order was merely relief should a strong federal nexus not avail itself.

From August 4th (date of state court order was signed) until payment on August 7th there were three recordings made. In these recordings, SA CARR believed a strong federal nexus was discovered: 1) the transfer of funds from a Canadian bank account to a US bank account and 2) Travel by MOCKOVAK from Seattle to Portland and from Portland to Seattle. In this trip, MOCKOVAK recovered a King family photo from a Vancouver office and transported it to the source for the "hitmen" to use in their efforts to locate the King family in Australia.

On 11/10/2009, this information was relayed to AUSA LOMBARDI and AUSA Todd GREENBERG. Both agreed that with some follow-up investigation, there appears to be a federal nexus and the crime a violation of federal law. They, however, felt that

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due to sentencing guidelines and the fact that King County had shown an interest in the case, the best course of action was to continue a state prosecution.

On 11/10/2009, SA CARR, A/SSA COTE, ACDC BENNET, CDC JENNINGS and ASAC DEAN met to discuss how this case should proceed. ASAC DEAN was briefed by ACDC BENNET on DIOG section 12.5.C.1 and how this investigation would apply. After consideration, ASAC DEAN approved continued FBI involvement in the captioned matter as outlined by 12.5.C.1

On 11/12/2009, Michael MOCKOVAK was arrested by members of the PSVCTF and a state search warrant executed at his residence. Assistance was provided to state authorities per DIOG chapter 12.5.C.1. On 11/16/2009, MOCKOVAK was charged in Washington State Court with Criminal Conspiracy to commit Murder in the 1st Degree and Criminal Solicitation to Commit Murder.

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**APPENDIX B**

**(Exhibits A through H attached to  
Defendant's Sentencing Memorandum)**

# EXHIBIT A

# MURDER OR ATTEMPTED\* MURDER FIRST DEGREE

(RCW 9A.32.030)

CLASS A - SERIOUS VIOLENT

## I. OFFENDER SCORING (RCW 9.94A.525(9))

**ADULT HISTORY:**

Enter number of serious violent felony convictions..... \_\_\_\_\_ x 3 = \_\_\_\_\_  
 Enter number of violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent felony dispositions..... \_\_\_\_\_ x 3 = \_\_\_\_\_  
 Enter number of violent felony dispositions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score**  
 (Round down to the nearest whole number)

## II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL XV)	240* - 320 months	250 - 333 months	261 - 347 months	271 - 361 months	281 - 374 months	291 - 388 months	312 - 416 months	338 - 450 months	370 - 493 months	411 - 548 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 24 to 48 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- D. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- E. Statutory **minimum** sentence (*\*excludes convictions for an attempt*) is 240 months (20 years) and shall not be varied or modified under RCW 9.94A.535 (RCW 9.94A.540).
- F. Multiple current serious violent offenses shall have consecutive sentences imposed per the rules in RCW 9.94A.589(1)(b).
- G. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.
- H. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).

- *Statutory maximum is a term of life imprisonment in a state correctional institution (RCW 9A.20.021(1))*

*Although the Washington Sentencing Guidelines Commission does all that it can to assure the accuracy of its publications, the scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Sentencing Guidelines Commission.*

**THEFT, FIRST DEGREE**  
*(Excluding Motor Vehicle Theft)*  
 (RCW 9A.56.030)  
 CLASS B - NONVIOLENT

**I. OFFENDER SCORING (RCW 9.94A.525(7))**

**ADULT HISTORY:**

Enter number of felony convictions..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x 1/4 = \_\_\_\_\_

**OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)**

Enter number of other felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score**  
 (Round down to the nearest whole number)  

**II. SENTENCE RANGE**

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL II)	0 - 90 days	2 - 6 months	3 - 9 months	4 - 12 months	12+ - 14 months	14 - 18 months	17 - 22 months	22 - 29 months	33 - 43 months	43 - 57 months

- B. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- C. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.
- D. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).
  - *Statutory maximum sentence is 60 months (5 years) (RCW 9A.20.02(c))*

**III. SENTENCING OPTIONS**

- I. First-Time Offender Waiver; for eligibility and sentencing rules see RCW 9.94A.650
- II. Alternative to Total Confinement; for eligibility and sentencing rules see RCW 9.94A.680.
- III. Community Restitution Hours; for eligibility and sentencing rules see RCW 9.94A.680.
- IV. Work Ethic Camp; for eligibility and sentencing rules see RCW 9.94A.690.
- V. Drug Offender Sentencing Alternative; for eligibility and sentencing rules see RCW 9.94A.660.

*Although the Washington Sentencing Guidelines Commission does all that it can to assure the accuracy of its publications, the scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Sentencing Guidelines Commission.*

# EXHIBIT B

February 26, 2011

Judge Palmer Robinson:

My name is Paul Mockovak, age 51 and the brother of Michal Mockovak. The following is a brief summary of events and environment that have had a major impact on my life as an adult and also affected my 3 brothers and 2 sisters.

My story is nothing new; I was born in 1959 the 2<sup>nd</sup> of six children. We grew up Catholic and moved to 9 different locations until I was 18 and left the home. We averaged moving every 2 years with our longest stay in Evanston, Illinois for 4 ½ years. This constant moving never gave me the chance as a child to form any long term friendships and feel connected in a community.

I grew up in an alcoholic family, my father was a heavy drinker in my formative years and my mother was very depressed and emotionally unavailable.

My uncle, Bruce, on my mother's side of the family began to molest the boys when we were living in Madison Wisconsin and I was about 7 or 8 years old. I don't have many memories as a child and have often felt that the abuse may have begun before that.

The sexual abuse of me went on for 10 years until I was 16 and affected my life in many ways. This was also combined with the fact that my father was an alcoholic and was also very angry and often took out his rage on the children. There was always the threat of being yelled at or afraid that you would be hit. We were not hit or spanked that much as a child but there was always the fear that you would be which was far worse.

I always remember that none of us as kids ever knew what it was going to be like when we came home after school. There was an awareness that was necessary in order to know when you had to leave and go up to your room so as not to be the target of a rage full rant that looking back had nothing to do with any of us.

So, we were all leaving in a constant state of fear and never really fit in or felt safe growing up.

With this type of environment going on at home it was easy looking back to see how our uncle could easily sexually abuse all the boys. We were all neglected and here was someone paying attention to all of us. The sexual abuse went on for about 9-10 years until I was 16 years old. There were well over 100 incidences just with me, so I don't know the overall effect on my other brothers.

I was the one who told my parents when I was sixteen and nothing was done about it. They did not report it to the authorities.

I had already seen 2 therapists – none had reported it and one viewed it as me having an affair on my current girlfriend at the time.

A teacher in my school knew – they didn't report it.

I saw another therapist with my father and mother together and he viewed it as something that just happened. – Again did not report it.

So, now the sexual abuse had stopped and nothing was done about it. We had 3 sessions with an incompetent family therapist and my father told me that I was not allowed to bring up the topic again. I could only deduce that what happened was over and that it

was my fault and go back to denying the feelings since no professional wanted to acknowledge them anyways.

For some reason as a child I was singled out by my father as the "the sick child" and most of his verbal tirades were aimed at me. There were times when he was drunk and would corner me somewhere in the house where he would tell me I wasn't his kid and that I was just some piece of --- that he got out of the gutter. Other times he would threaten to break my nose because he could. These events would go on for sometimes up to ½ hour and I would be terrified to even move or respond.

As a result there was always a deep wanting to belong somewhere and to be appreciated in some way. Unfortunately there was no one to talk to about anything that was going on and we as children didn't really talk about what was happening to each other. There was no adult to go to who was safe and the common theme was to shut out the feelings and to deny the reality of what was really happening.

The immensity of the feelings and not feeling loved was unbearable to even consider when it was happening. Denial of what was happening and shutting out the feelings was the only coping mechanism that I had at the time. It is what we all did as children in order to survive, because it truly felt as though it was a constant life and death situation.

I left home at 18, and moved to upstate New York with my girlfriend at the time. Michael had already gone off to college. And I only saw him a couple of times over the next few years.

When I was 20 years old, I moved back to Minnesota to go to college. It was at this time that I started some therapy that addressed the fact that I was severely sexually abused and neglected throughout my childhood. Up until then I found it difficult to connect with people on an emotional and intimate level. I also became aware of a sadness that was always there and was unaware as to what it was. It was here that I began to accept the level of the abuse I experienced as a child and young adult and also allow the feelings of pain and anger surface from so long ago. The journey of accepting what had happened, letting go of the shame and also realizing that it was not my fault was not easy. The only way I know is to go through and experience what I had been blocking out for so many years. Because even though I was not currently being abused, I was still living in a survival mode and those traits and techniques were not serving me as an adult.

I remember that I had started therapy while in college and was living with Michael-he had returned after doing his undergrad and was doing pre-med work. He worked very hard, and while I lived with him for 2 years in college while he was doing his pre-med courses, his coping mechanism was to study, study and study. He wanted to achieve success and not just be really good at something- he would accept nothing but being the best. He was ultra focused and career driven.

I don't know to what degree of if he did any therapy, but I know that he wanted to be successful and attain stature. He went to med school the following year. I saw him sporadically over the next decade.

When in 2008 Heather (his ex) locked him out of their house and had him served with divorce papers he literally emotionally came apart. It was like he was having a nervous breakdown. There were times when he would call me in the fall of 2008 and the winter of 2009 and he would just start crying over the phone. His business was in danger of failing and he was going through a divorce. All of a sudden he was possibly looking at bankruptcy and being alone. Everything he thought he had achieved, he possibly might lose. He would cry without consolation, and I would ask him how old he felt and he would say like a little boy. I tried to talk to him to let him know that all that was happening to him seemed to be triggering earlier memories. His depth of pain always seemed too much deeper than what was happening.

Over the next 2 years, the stress he was under and his emotions just got worse. He seemed to be unable to look at himself and look at decisions that he made that caused him to be in this situation. His thoughts and conversations with me became more fragmented. If you asked him to do some reflective work or seek out professional help, he would just end the conversation.

He had avoided dealing with the abuse most of his life and built a business and finally started a family. Now, he was looking at possibly losing everything. To my knowledge he had never dealt with those feelings of abandonment as a child, and as a result didn't have any skill sets for coping with what was happening to him.

I have 5 brothers and sisters.

Anne, Edie and I have sought out therapy and different types of counseling to address the abuse and learn how to let go and forgive in order to move our lives and families forward.

My brother Eric struggled with a suicide attempt in 2008, alcoholism and had been diagnosed with Borderline Personality Disorder. He has never really addressed the abuse and sought counseling. He is single and has struggled in relationships.

Neil- lives in New Orleans and as far as I know is still a practicing alcoholic and workaholic he also rarely visits the family. He has not sought out any type of counseling to deal with the levels of abuse that he experienced as a child. His survival method has been to constantly work and avoid the family. He is married.

Michael is where he is right now.

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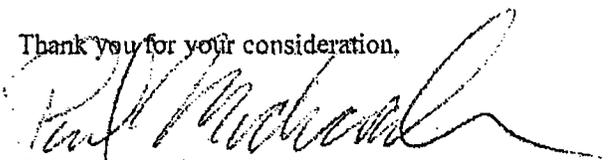
In spite of all Michael's trials and tribulations he has a lot of positive qualities. In all the time from Michael going to Medical school and to building his businesses, I experienced him as the happiest when he became a father. It was during this time that the family members began to have regular contact with him.

We all went on a family vacation in the summer of 2009 and I witnessed Michael spend a lot of time taking care of his daughter. Spending time with her and keeping with a regular schedule, night time reading, making sure she was being cared for and loving her. It was wonderful to watch and Marie-Claire was a joy to be with. I felt that he was beginning to experience the joy of being a father and it gave him a new sense of purpose in his life.

I believe that now Michael has begun to realize that his errors have led him to where he is now. I will be offering him support by staying in communication with him during his term. It is my hope that upon his release he will hopefully relocate either to Minnesota or closer to his family so that we can support and be there for him as he begins building his life again.

To what he will eventually do only time will tell. It is important that he know that there are family and friends that will be there for him.

Thank you for your consideration.



Paul Mockovak

March 4, 2011

Judge Palmer Robinson

I am Michael Mockovak's mother and in this letter would like to give you some background on my son's early life, which I think may shed some light on how he has come to be in the tragic situation he is in today.

Michael is the first of the six children that his father and I had during the course of our marriage. Michael was born in 1958 and his youngest sibling, Edie, in 1966. In his formative years, we made many moves, following job opportunities for his father Milan.

When he was 16 months old and our second son, Paul, was two months, we moved from Chicago, Illinois, to the Navajo Reservation in Arizona, where his father took a job with the Bureau of Indian Affairs. We lived in a very remote area, consisting of a boarding school where his father worked as guidance counselor, a dozen or so one-story duplexes to house teachers and staff, and across a wash, a trading post. We were there for three years, during which time our third child, Anne was born.

Then we moved a little farther south and east to Fort Apache, on the White Mountain Apache Reservation. We stayed there for two years. Near the end that time, our fourth child, Eric, was born. Our next move took us off the reservation to the town of Mesa, Arizona. Michael's father took a job working on the Pima Indian Reservation to establish a community action program. We lived in town so that the children could start school. Michael began first grade in Mesa. There had been no kindergarten program where we had been living. We lived in Mesa for three years, where the last two of our children were born.

After eight years in Arizona, we moved to Madison, Wisconsin, where Michael's father worked for the University. Michael was in school there for two years and then we bought a house in Deerfield, a small town outside Madison. We stayed in Deerfield for three years, and then made another move, this time back to Illinois, where his father began working for the Department of Corrections.

We bought a house in Evanston, Illinois, and Michael, Anne and Paul went into Chute Middle School, an environment they found very difficult to adjust to – it was a hard transition for them. At this point, this was the fourth school Michael had attended since starting first grade. When he finished middle school, he entered Evanston Township High School.

During these many moves, which didn't give Michael or his brothers or sisters a chance to put down deep and lasting roots, there was one constant. They were living in an alcoholic family system. Their father was an active alcoholic, although during those years, I did not know what that term meant. Struggling with the alcoholic pattern, many young children born so close together, and the many upheavals in our lives, I was often depressed and not able to be fully present to the children's needs.

When Michael was a senior in high school, his brother Paul was in a fight on the beach. In the aftermath of that incident, it came out that my brother, his Uncle Bruce, had been sexually molesting Paul during the times that we had visited the home he shared with my mother in Minnesota and when he came to visit us in Wisconsin and Illinois. We took Paul to a counselor in Chicago, who was not very helpful. In a nutshell, his comments were 'life is hard, move on.' He did not tell us it was the law to report Bruce's behavior to law enforcement.

Michael's father lost his job with the Department of Corrections and for a short time went into business with a friend, which turned out very badly. We were forced to sell our home in Evanston and decided to move to Minnesota, where I had grown up and Milan had gone to college. When we moved there, Michael started his freshman year at Oberlin College. We rented a house in Brooklyn Center and began working in real estate.

My mother was still living in the house I grew up in -- as was my brother, Bruce. She was a diabetic and developed an infection in her foot, which required her to go into the hospital for an amputation of her leg below the knee. We had told her about what we had learned about Bruce's abuse of Paul, which disturbed her very much. When she was in the hospital, she talked to the social worker about the situation, and the social worker reported it to the authorities. Bruce was arrested at his place of work and brought to trial in Hennepin County. It was then we found out that he had abused all four of the boys in our family. He did not want the boys to have to testify in court, so pled guilty. None of us went to the court proceedings. He was sentenced to a year in the workhouse. There was some counseling with the family after the case went to trial, but again, it was not extensive or very helpful.

Michael finished school at Oberlin, and after some time traveling and teaching in South America, returned to Minnesota, where he worked as a waiter and went to pre-med at the University of Minnesota. Just before he was to enter medical school in Minnesota, he was accepted into Yale from the waiting list.

Over the years, Michael has worked very hard to establish his career as a physician. He has worked in Chicago; in his own private practice in Sacramento, California; for a corporation in San Francisco; and in Tennessee. He had high hopes when he and Dr. King began their partnership in Seattle that they would be able to create a viable and successful business.

Michael has been generous with his family, even during times of stress in his own life, and set up ongoing funds for the children of his brother, Paul, and sisters, Anne and Edie. After his marriage to Heather, he invited me and his brother Neil and his wife to join him on a trip to Italy. Mike picked up all the major expenses for what became a wonderful holiday. When Michael married Heather, he anticipated living a long and happy life with her. He was devastated by the divorce, but has continued to be a loving and devoted father.

He has made some strong friendships with people who are stepping forward now in this terrible time to offer support and help. In the last year, he has found a wonderful community at First United Methodist Church. The people there are providing a circle of rich love and support for him.

But although Michael has been in some short-term therapy, the surface of his life simply covers over what I think are deep wounds that were never treated properly -- wounds inflicted from living in an alcoholic family system and suffering sexual abuse for many years.

In the fall of 2009, Michael visited our family in Minnesota with Marie Claire for the Halloween weekend. We had seen him that same year in June for a family vacation trip, and we remarked on how different he was acting in October. He was very tense. He seemed very distracted and didn't sit down to talk at length with us, clearly preoccupied. At one time, when he was at his sister Edie's house, he said he was going to go out for a walk, and then suddenly stood up, walked out the door and drove away from Edie's house. She was stunned since Marie Claire was at a neighbor's house playing with Edie's daughter and a friend. Edie did not know what to think. The stress showed in his face and the tone of his voice. There was a marked change in his demeanor that was concerning to his family. Looking back, that behavior was consistent with the devolving state of mind that Michael was in at that time.

When the stresses in his life kept mounting higher and higher, starting with the traumatic ending to his marriage and building with all the problems with the business -- money losses and a lawsuit from the former manager, and then disputes between him and his partner, Michael was not able to make good, rational and ethical decisions. For Michael, I think the situation became the perfect storm -- one that had been brewing for years.

Thank you for reading this letter,



Carol Mockovak

March 7, 2011

Judge Palmer Robinson  
King County Superior Court  
516 Third Avenue  
Seattle, Washington 98104

Dear Judge Robinson,

My name is Anne Marie Mockovak. I am one of Michael Emeric Mockovak's sisters and I am writing to tell you how proud I am of my brother as a father.

Michael and Marie Claire came to visit family in Minnesota five or six times in the past few years. They most often stayed with my family in our home. Their visits were always seen as an exciting and happy event for the entire extended family. During these times I observed my brother, Michael, caring for his daughter and my niece, Marie Claire. While Michael and Marie Claire stayed with me I observed Michael frequently tell Marie Claire he loved her, make sure she was fed and ate a variety of foods, read to her before naps and at bedtime, keep her on a schedule for naps and bedtime, play games with her, take her to the park and beach, make sure she had clean clothes, change her diapers and then help her learn to use the potty, give her baths and help her brush her teeth, brush, comb and braid her long hair. From these activities, it was evident they had developed a daily routine that was centered on a young child's needs.

This is difficult for anyone but especially so for a single parent. Even though Michael struggled with understanding why his marriage failed, he worked diligently to become a loving and caring father. We spoke often by phone and he frequently asked me for advice or ideas regarding Marie Claire's care. I believe he was successful. I love my brother Michael and am happy to say that through his parenting I have seen him at his best.

The events of the past two years have been a tragedy for our family. My heart is broken. Michael cannot be the father, brother, and son he once was. I am overwhelmed even considering the difficulties he will have to maintain a relationship with Marie Claire. However, I am committed to helping him in this process because I know that Marie Claire needs to continue to be a part of her father's life in whatever way is possible. In fact, our entire family will develop new ways to support and care for each other.

With this in mind, I ask that you consider the goodness of my brother as a father and the support that he will receive from family and friends when you make your decision later this week.

Sincerely,



Anne Marie Mockovak

Honorable Palmer Robinson  
King County Court Superior Court.  
516 Third Avenue  
Seattle, WA 98104

March 1, 2011

Dear Judge Robinson:

My name is Milan Mockovak. I am Michael's father and have known him all his life.

Michael's problems began, I believe, in September, 2007, when he was notified at work that his wife had filed for divorce, and also had obtained a restraining order. He had no clue that this was coming. He phoned me, absolutely distraught and beside himself, and I caught the next plane to Seattle. When he met me at the airport that evening, he began sobbing uncontrollably. All he had on were his scrubs. He couldn't even go to his home for a change of clothes. We stayed in motels until he got his house back several weeks later. This was the beginning of a series of setbacks and emotional crises that led to today's sad state of affairs.

I stayed with him for the next few months as he went through the divorce proceedings. There were many false accusations, outright lies, unwarranted demands, and broken agreements. All this on top of the pressures of maintaining a medical practice and travelling to offices in Seattle, Vancouver, Boise, Tri-Cities, and Medford every week. I became his driver, nanny for Marie Claire, cook, and factotum. I think it's important to note that Michael has no circle of close friends in Washington - many acquaintances and business associates - but no place to go for emotional support.

Finally, the divorce was settled, his home was returned to him, and regularly scheduled visitation with Marie Claire was agreed upon. After several weeks of settling into a stable routine, I returned home, satisfied that the situation was at least bearable and that he could handle things.

In July, 2009, during a week we spent together in Minnesota, Michael was noticeably agitated and nervous. We talked about some of the pressures he was having: loss of income because of the recession, cutting back the practice, a potential suit for back taxes, demands for more money by his partner, problems selling two homes in the down market, the possibility of personal bankruptcy, to name a few. I returned to Washington in August to stay with him until there was some resolution to issues he was facing. At the very least he didn't have to worry about taking Marie Claire to and from Vancouver for his regular visitation, making sure she was well fed and cared for while he worked, as well as the mundane chores of keeping and maintaining a home. Marie Claire was well cared for and he could spend his time with her calmly, quietly, and with total enjoyment. He cares very deeply about her and did everything he could to be meaningfully present in her life. It was noteworthy to me that she often was reluctant to return to her mother's when the time came.

He enrolled her in an excellent pre-school program, which she thoroughly enjoyed. She was well taken care of by Michael.

During the months leading up to his arrest, I became increasingly worried because of Michael's behavior. He slept very little. I'd go to bed and find him in the early morning still curled up on the couch where I'd left him the night before; I'd wake up early in the morning - at 3 or 4 AM - and he'd be awake in bed on his computer. "Couldn't sleep," he'd say. He'd break off speaking in mid-sentence during a conversation and stare off into space; he'd simply be gone. He let bills pile up, mail unopened, forget where he put things. All uncharacteristic behaviors. When I'd try to talk to him about his behavior, he'd get argumentative and defensive - "You don't understand.", "I need your support, not criticism.", "I just don't want to talk about it." Riding with him driving was particularly troublesome. He'd take or make calls on the road, often becoming distracted and came near to having accidents. I finally told him, in no uncertain terms, that he could not talk on the phone while driving. It was obvious that these were trying times for him and he was having a hard time coping.

In spite of these pressures, Michael made sure that Marie Claire was well cared for. He sought out interesting activities that were both fun and stimulating - children's museum, the zoo, participative theater and musical events, playing games - indoors and out, and just hanging out together. Little or no TV, unlike with her mother, who would plop her down in front of the TV while she read her fashion and gossip magazines. He read to her every night they were together and made sure we ate meals together, mindful of presenting her with a well-balanced meal. He was always conscious of his role as a parent and his influence on her growth and development. The loss he feels most today, I believe, is not being in contact with Marie Claire.

I'm convinced Michael made some terrible mistakes. He was too isolated from people who care about him, people from whom he could gain the support and perspective that would give him the strength to work through the crises he faced. He's a caring man. Before he became so successful in his practice, he regularly visited third-world countries and performed eye surgery and taught physicians there. He generously donated to various charities and is a strong supporter of human rights causes.

Whatever happens in the future for my son, I will support him in any way I can. He knows he can count on me to help him during the trials and hardships he faces. I will visit him as often as possible, provide whatever he needs to make his life meaningful and useful to himself and others. He will know that my and our family's doors will be open when he returns to us.

Sincerely,



Milan Mockovak

Honorable Palmer Robinson  
King County Court  
516 Third Ave.  
Seattle, WA

March 5, 2011

Your Honor,

I have known Michael Mockovak since June 1978. We have remained close friends throughout the years, as he completed medical school, practiced medicine in various states, settled in Seattle, and went through the current legal circumstances. I attended Michael's first wedding and I knew his first wife reasonably well. He and his first wife attended the commitment ceremony to my partner in 1989. Michael and I have traveled together to Europe, Mexico, and around the United States. Since his arrest in November 2009, I have visited him in Seattle five times (1/10, 4/10, 6/10, 9/10 and 12/10). Around late December 2009 or the beginning of January 2010, he requested that I maintain daily telephone contact with him. With the exception of a handful of days when my work or travel schedule did not allow this, I have maintained daily contact with him until his recent conviction. Since then, we have spoken by phone regularly, but somewhat less frequently. I describe all this as background to my belief that I know him as well as anyone over the last 33 years

Michael and his three siblings were sexually abused by an uncle. Despite my years of knowing him, Michael has never told me the full story of the abuse; I believe this is because it has always remained a source of serious discomfort for him. I do know from his report that he was the first to be abused, and that he sometimes has blamed himself, feeling that if he had come forward, perhaps his other siblings would not have been abused.

Michael was sexually exploited by a psychotherapist from whom he sought assistance for his abuse history, when he was in college. He disclosed this to me early on, about 1980, and has confirmed it a number of times since. At the time, I encouraged him to file an ethics complaint against the therapist. He refused to do so; I believe because Michael blamed himself. I encouraged him at other times over the years to do so; his response was usually to terminate the discussion, or to express fear that if he made a complaint it might become public and damage his medical career.

Over the years I have encouraged him to consider medication and therapy. He has been concerned that if this were known, his competence as a physician would be questioned. I have always felt that the exploitation by his college therapist also played a significant role in his unwillingness.

He was and has remained gullible and susceptible to influence, especially when he is depressed, lonely, isolated, or stressed. Despite his intelligence and education, his hunger for acceptance, easy answers, and false promises has been an Achilles' heel for him for as long as I have known him.

His self-worth is fragile and inconsistent, and he vacillates between harsh and unreasonable self-criticism and over-estimation of his ability to handle certain situations. Again, for someone so bright, he miscalculates his strengths and weaknesses, engaging in both underestimation and overestimation of them at different times—the worst of both worlds, as it were.

His mood problems have at times been severe. On a trip we took to Mexico in January 1997, he cried for hours on end, day after day, feeling that he was a failure, that relationships would never work out for him, and that he could no longer stand the pain. Another severe depression occurred in the year before he met his second wife Heather, when he was upset about dating relationships that had gone poorly.

As the relationship with Heather deteriorated and eventually ended in divorce, his depression again worsened and he began to show signs I had not seen before. On a number of occasions, he called me from his office, during the work day, wanting me to help him calm down and stop crying. Maintaining his composure and professionalism at work has always been very important to him, so this was a significant departure.

Michael is not the sociopathic and greedy cartoon monster I have seen portrayed in the media. This is not the Michael I have known, and known well for 33 years. The 2008-2009 period was the most amount of stress and the most serious and prolonged depression I have seen in him. Your honor, I do not pretend to understand how he got to so dark a place as to engage in the behavior that led to his arrest. But I can tell you it is not typical of him, and is the polar opposite of his typical character.

Michael is one of the most consistently kind and caring people I know. As I have coped with my cardiac and other medical events, my partner's medical problems, twists and turns of my career, the challenges of being a foster parent, the death and decline of aging parents, and other life stressors, Michael is always there with concern, input, love, support, whether or not I seek it. He is generous with his time and resources. My life is profoundly richer for his being in it, and being my friend.

Michael is deeply devoted to his daughter. I have observed him plan his visits to her in detail, considering what activities she might most enjoy, what books, food, clothes, games and the like. Many fathers would have pulled away from a child when so many barriers were placed on his access to her. These barriers only made him more focused on being as regular and positive presence in her life as he could.

He has repeatedly shown altruism beyond what is typical for established health care professionals. He has gone three times to train physicians in third world countries on modern techniques, during his residency to India, and later in his career once to Albania,

another time to Pakistan. The trip to Pakistan was so dangerous that he was not allowed to leave his hotel, except under armed guard to the medical facility and to a few social events. Since his arrest, he has volunteered at a homeless shelter and discussed with me at length ideas he has to develop sexual abuse prevention programs in churches

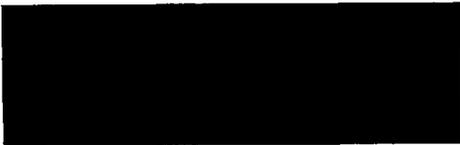
As the 2008-2009 period continued, Michael's depression became deeper and more prolonged than I had ever seen it. This was the way he was when I last saw him before his arrest, in late October 2009, for a lunch with him and his daughter in Minneapolis. His interactions with his daughter were the only time his despondent mood brightened.

I hope my comments have been useful in your deliberations, and do not hesitate to contact me if further information would be helpful. Thank you.

*John C. Gonsiorek 3/5/11*

Respectfully submitted,

**John C. Gonsiorek**



March 02, 2011

Honorable Judge Palmer Robinson

Dear Judge Robinson:

Please allow me to introduce myself before I speak about our good friend, Michael Mockovak. My name is Joan Gorman Porche, a Licensed Clinical Social Worker by profession, practicing in the Chicago Metropolitan Area since 1970 as a school social worker and psychiatric social worker. I am currently in private practice in Homewood, IL, a south suburb of Chicago, working with adults (individuals and couples) and teens.

I became acquainted with Michael, his parents and siblings more than 40 years ago. Eventually, Michael's father became Godfather to our daughter after her birth in 1971. I have always known Michael to be a very intellectually bright, focused, serious, determined, mild-mannered, kind young man, even as an adolescent. Years later, during visits at our home, as a adult, Michael shared with me the terrible, devastating experience of sexual molestation of himself and his younger brothers by a maternal uncle. It is my understanding that this abuse occurred over several years, starting when Michael was about eight years of age. In recent years when Michael has visited me, he has shared his perceptions of his growing up in the Mockovak household: No matter how hard he tried, no matter how successful his efforts and achievements, he thinks he failed to ever gain his parents' affection, recognition or approval. Seeking out and choosing a marriage partner was a tension-packed challenge, according to Michael's description years later. Again, years later while talking with me, Michael asked questions (typical of a teenager) about what to look for in an appropriate mate. Michael has survived two failed marriages.

One child, Marie Clare, (now age five) was born of his second marriage, and he is a devoted parent. He treasures his visitation time with his daughter and delights her with interesting and educational activities. Michael occasionally raises parenting questions, and we discuss issues, such as setting boundaries and building self esteem. Michael requested that his retired father, Milan Mockovak, move to Seattle and reside with him to assist in running the household and caring for Marie Clare. She, truly, has become the center of his life! Michael frequently expressed his concern regarding the securing of an excellent education for Marie Clare. I am also aware that Michael has been generous, sharing his financial achievements with his parents and four siblings.

Michael's father, Milan, during the years he resided with Michael, made me aware through phone calls of Michael's high level of stress. Milan frequently remarked that Michael was working too much, was becoming extraordinarily worried, preoccupied, stressed and typically came home and "crashed," falling asleep in the chair without eating his dinner. Milan also conveyed to me that whenever he asked Michael about the cause of his stress, Michael refused to talk, dismissing his questions because he didn't think he would understand. During a visit with me in 2009, Michael talked at great length about

the increasing pressure at his workplace, expressing his concern in providing continued employment for his employees. He spoke (without being specific) of his mistrust of co-workers. A sense of loneliness and isolation was pervasive, as Michael spoke of his life.

Perhaps out of Michael's own feelings of being inadequate and not validated by others, he has developed, what appears to most, this impenetrable "fire wall" around himself...projecting a sense of arrogance and superiority to those around him, while actually feeling scared and insecure. During his first incarceration at the county facility in this case, Michael phoned me every day during the time he was released from his cell. .

Upon release on bond Michael was beginning to develop an entirely new lifestyle—relocating to a downtown apartment, eating and sleeping properly, exercising daily, seeking out volunteer possibilities, attending church services, meeting new people, finding common interests and making new friends. This new community clearly had a very positive influence on Michael.

I am invested in helping Michael in every way my help might be needed. Certainly, while Michael is incarcerated I am very willing to provide support by phone calls and letters to Michael. After Michael completes his prison sentence he is welcome to reside with me. I would like to help Michael in any way possible to transition back to the community.

Please don't hesitate to contact me if I can be of assistance to you on Michael's behalf.

Sincerely,

*Joan G. Porche*

Joan G. Porche, Ph.D., LCSW



Sarah Taylor, MBA



Judge Palmer Robinson  
c/o Schroeter, Goldmark and Bender  
500 Central Bldg  
810 Third Ave  
Seattle, WA 98104

February 15, 2011

Dear Judge Palmer Robinson,

My name is Sarah Taylor and I have been a very close friend of Michael Mockovak for approximately 14 years. I am writing to give you my experience with Mike, and tell you about who I know him to be.

In all the years I have known Mike, I would describe him as someone who is very optimistic and positive. He would always assume the best outcome, even when others were skeptical. I always admired his determination to assume the best outcome and assume the best in people.

However, over the past few years, I saw Mike go through one of the worst times I've ever seen anyone go through. Psychologists talk about "major life stressors" that can really take a tremendous toll on people, such as death, divorce, moving and lawsuits. Over the course of about 2 years, I saw Mike go through many such stressors:

- **Marriage:** His new girlfriend, Heather, got pregnant and he got married
- **New Dad:** He became a Dad about a year after meeting Heather
- **Large Mortgage:** He bought a new house and took on a large mortgage
- **Bad Economy:** The economy started going south, and business took a huge hit
- **Disagreements with Business Partner:** He and his business partner, Joe, continually disagreed about monetary issues
- **Embezzlement:** His office manager (Klock) was accused (and arrested) for embezzling money
- **Lawsuit:** Klock turned around and sued for wrongful termination
- **Move:** Heather told Michael was extremely unhappy and convinced Mike to move to Vancouver, WA near her friends and family. Mike had no friends there and had to travel more for work.
- **Mortgage #2:** Mike took on another mortgage so they could live in Camas
- **Divorce:** Within 2 weeks or so of moving to Vancouver, Heather files for divorce.

- **Custody:** The child's custody is based out of Vancouver rather than Seattle, resulting in a seven hour roundtrip drive to see his daughter, which he did regularly, even after his arrest.
- **Concern for Child:** Heather remarries and divorces (or annuls?) within 5 weeks. Mike is very worried for the sake of his child.

During this time, I remember how Mike continually worked at fixing each issue slowly - he sold one house, dealt with the divorce, and although he was dejected, he still was optimistic that things would work out.

Mike continually drove to Vancouver to see his daughter, and always posted fun pictures of them on Facebook. He held a birthday party for her 2<sup>nd</sup> birthday at our house while his divorce was going through, and I remember laughing at how easily he took it when she stuck her fingers in her chocolate cake, pulled them out and sucked off the chocolate, getting chocolate *everywhere!* He is an amazing father, perhaps the best I've ever seen at letting kids be kids. We visited him at his Camas house over New Year's while he was going through his divorce, and I remember him making forts using the sofa and chair cushions, and playing in the forts for hours with his daughter.

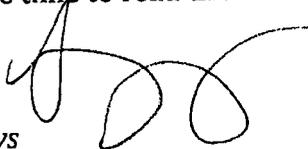
Last year, after he was arrested for conspiracy to commit murder, I spent a lot of time with him. Some people were surprised by this. They felt that he must have been evil all this time, and none of us saw it. However, I saw it very differently. I do not believe he was an evil person in disguise for many years; I believe he is the warm and loving person I have known many years, and was just pushed to the edge and did something unimaginable.

Michael has dedicated his last year to volunteering with the homeless weekly or more, attending two different churches with regularity, and singing in the "Spirit of the Sound" Choir, a spiritual choir. He would not stop in Pierce County to visit us and would never share a glass of wine all year, as he was determined not to violate the conditions of his bail.

Without knowing Mike and only hearing his voice on tapes from the FBI, I can understand how people might have a very different opinion of Mike than I do. However, I have known Mike for about 14 years - not 14 days - and *know* that he is a good person, a very loving father, a talented surgeon and a tremendous friend.

Thank you for taking the time to read this.

Warmly,  
Sarah Taylor, MBA  
Author, *Vegan in 30 Days*



March 4, 2011

Honorable Palmer Robinson  
King County Court  
516 Third Ave.  
Seattle, WA

Your Honor:

I appreciate this opportunity to offer some information on Michael Mockovak that you would likely not otherwise have; thank you for taking the time to read this, and I hope that it may be of some use to you in the fateful decision you must soon make.

I first met Mike in the fall of 1987; he was living in Connecticut attending medical school, I was in Amherst, MA, beginning my predoctoral internship (I am a psychologist by trade). My life partner, John Gonsiorek, was speaking at a conference in New Haven. I drove down to attend the talk; and it was at this time that John first introduced me to Mike. Given the unbroken great closeness that has existed between Mike and John throughout the time I have known them, contact with Mike has been continuous, if episodic, up to the present. By witnessing this dear friendship, as well as, of course, the personal interactions I have had with Mike, many impressions have formed. Others can speak with greater substance and authority to his good works (e.g., *pro bono* ophthalmology, his church's homeless shelter), but it is this very sense of compassion for others, especially those in most need, that I find so salient now, standing as it does in vivid contradiction to the tragic circumstances of late.

This tender-heartedness has expressed itself no more profoundly than in Mike's role as father to his beloved young daughter, Marie Clare. I recall one instance of this with undimmed clarity. Mike was in Minnesota, where John and I also reside, bringing Marie Clare to visit family (he expressed more than once the importance of his daughter growing up knowing her extended family, especially her cousins). Mike brought Marie Clare to our home during this visit, and we had bought a few presents for her. Among these was an inexpensive plastic slinky toy. As children will often do, she bypassed the more pricey gifts and headed straight for the slinky; it fascinated her. Though charming in itself, what I remember with even greater pleasure was watching Mike's response to *her* joy. His pride and affection swelled; he was deeply engaged. I distinctly recall thinking at the time that Mike, as father, had come into his own, that he was a natural at it, his devotion unforced, obvious, even compelling.

It is with much difficulty that I write about this happy memory, as I am sure you can well imagine. And it could not stand in greater contrast to a second memory of recent times. Again, Mike was visiting Minnesota, and he had stayed overnight with us. I leave early for work, so was up at my usual 5:00 am or so preparing for the day. Mike soon joined me in the kitchen, wrapped in a blanket, looking wretched. He said he had not slept much, troubled about the ongoing dissolution of his relationship with Marie Clare's mother. Without lead up, he suddenly became very emotional, emotionally collapsing

really, inconsolable. This went on for some time; it was painful to observe, and I was able to provide little comfort, despite repeated efforts. A similar breakdown occurred either the night before, or perhaps on another visit during roughly the same time period; I cannot recall for certain. John and Mike were having dinner in front of our downstairs fireplace when I arrived home from work. I went to warm myself by the fire, after saying our hellos, when very soon thereafter Mike abruptly began crying, choking out that he needed to buck up as I had been struggling for many years with serious medical problems and had said little. He soon calmed, but the suddenness, intensity, and brittleness of his emotional response suggested he was under exceeding strain; it did not take a psychologist to discern this. To the best of my recollection, the events in this paragraph occurred in the 2008-2009 time frame, although I do not recall the precise dates.

It is not my place to comment on the nature and particulars of the crimes for which Mike has been convicted; I simply do not know them fully, nor do I understand the complexities of litigation they involve. But what I do know is that I am bewildered beyond explanation that Mike stands convicted of behavior that I could not, without exaggeration, ever have imagined. This is simply, without qualification, not the Mike I have known in excess of two decades.

Thank you again, Your Honor, for allowing me the opportunity to share my personal knowledge and impressions of Michael. May this small contribution be of some assistance to you in your grave responsibility.

Respectfully,

  
James Rudolph  


March 5, 2011

Dear Judge Palmer Robinson,

I am a good friend of Michael Mockovak's. We have spent a great deal of time together enjoying music, hikes, meals, events, and many email and phone exchanges.

Although I cannot comment on who Michael was leading up to the events of 2009, I can tell you about who Michael is now, what he cares about, and how he spends his time.

Michael's top priority is his daughter. If you want him to light up, get him talking about Marie Claire. He said in an email once, "She makes my heart sing." He loves to play with her and talk with her. He has shown me pictures of her and also the toys in the trunk of his car that he took with him when he would visit her. He talks about her favorite colors, clothes, and imagines decorating a room for her again someday. He is an advocate for children receiving unconditional love and acceptance and I can see from the smile on her face (in pictures) when she is with him that she experiences unconditional love with him.

Michael also cares about progressive political issues and "social justice". He hosted a neighborhood gathering and pre-election calling party for people with similar political leanings. We also discussed a shared interest in theology and the beginnings of Christianity, having read some of the same authors.

He was excited to find a new church that "practiced what it preached" and he volunteered to cook meals for homeless people. He is a compassionate person who has a practice of engaging homeless people in conversations about what led them to where they are. He strives to understand the problems and seeks solutions.

Michael is a classic lifelong learner who is always seeking to better himself and the world around him. He loves music, playing chess, reading, educational classes and lectures. He also ran his first half-marathon last year.

Michael is someone who offers you his coat if you shiver, offers to buy you dinner if you are hungry, and provides you a place to stay if your car is stuck in the snow. (All real-life examples.) He insisted I take his nice plastic crates for moving, volunteered to help hang curtains, and will wash dishes if you don't stop him. Now he's concerned that his being in jail is hard on his friends and his mother (more so than himself), and last week he was trying to volunteer in the jail's infirmary when the medical staff seemed overworked.

To be honest, I cannot even "connect the dots" between my experience of Michael and the Michael who handed over money to Daniel Kultin in a bathroom 15 months ago. I have never experienced him as greedy or materialistic. (After moving from his big house to a one-bedroom apartment, he says he discovered he didn't need the big house or any of his "stuff" to be happy.) I have also never once experienced him as angry or even impatient or frustrated about anything, not even when fighting record bumbershoot

crowds or running late to an event in traffic. He is peaceful and easygoing. He has a keen perspective on what's important and doesn't sweat the small stuff.

If anything, Michael is like someone who has had an enormous "wake up call," not unlike a near-death experience, that has left him with uncanny clarity about what is "important" and "not important." He sees himself as someone who (he had hoped) was being given a second chance to do life differently. He uses his time wisely and consciously, surrounding himself with good friends and the support of faith and community.

But perhaps the best "window" I could give you to understand who Michael Mockovak is today is through his own words. The following excerpts are from private emails that hopefully he will forgive me for quoting:

(In response to a Nov. 2010 email in which I described challenges as "humility school"):

"You've captured my sentiments exactly. It's in our darkest hours that we learn the most about ourselves. It's also in our darkest hours that we learn who are friends are. And those friendships deepen in tough times. I am blessed to have learned that I have friends that believe in me and have not given up on me."

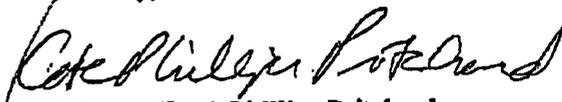
"I have also had the blessing of time. I haven't had this kind of free time for over 30 years. I've enjoyed it tremendously. Yesterday I worked and read and took breaks to watch a civil war documentary by Ken Burns. I enjoyed every minute of the day. I've had time to learn to sing, to read a lot, to make new friends and become involved in my church, to go to the gym."

(In response to a Sept. 2010 email about various theological opinions on resurrection):

"...No matter how difficult our challenges, our pain, our circumstances have become, that even if we feel dead, the truth of the resurrection is that through faith and community we can rise from these difficulties and live a life of love and happiness again. I suppose some would say all that is needed is faith in Christ Jesus. I think that community is needed also.... There are some who are very strong and wise who can go this alone. I'm one who needs community."

I have been writing and visiting Michael and plan on continuing to do that as long as necessary.

Sincerely,



Kathryn (Kate) Phillips Pritchard

# First Church

First United Methodist Church of Seattle

March 4, 2011

The Hon. Palmer Robinson  
King County Superior Court  
c/o Colette Tvedt, Attorney

Dear Judge Robinson,

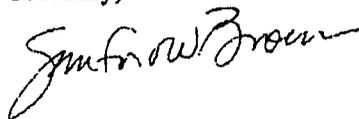
For the last three years I have served as pastor of the First United Methodist Church of Seattle, formerly located just a few blocks from the King County Courthouse. When our church moved to its new location near Seattle Center a year ago one of our new neighbors, Michael Mockovak, began worshipping with us. I was aware of the criminal allegations against Mike and encouraged our congregation to include him in its ministry as someone in need of friendship and care.

As I mentioned in my letter to you last month, over the next months Michael became very involved in church activities, participating in our Saturday Morning Run/Walk Group, our monthly card night, and our weekly Sermon Study Group. In addition to these fellowship opportunities, Michael soon became a key volunteer in our Shared Breakfast, helping to feed over 250 hungry people on a semi-monthly basis. We also asked him to serve on our Third Service Launch Team to receive his ideas for music and worship styles for this new ministry. In October we rejoiced as Michael joined our church as a full member. In short, many participants in the congregation know Mike well, enjoy his company and value his involvement in our network of friendships.

Michael's crime is serious and must result in an appropriate punishment. I hope you will give consideration to the fact that Michael does have friends who care about him and who hope to see him contribute in a positive way to the community during his remaining years. Society has made a significant investment in his training and with the right mixture of punishment and rehabilitation we hope that some of that investment may yet bear fruit. It is my prayer that you will craft a sentence in which Michael makes amends for his crime and then still has enough productive years left to return to the community and contribute to others in a meaningful way.

Thank you for your consideration.

Cordially,



Rev. Sanford W. "Sandy" Brown  
Pastor

March 11, 2011

Dear Judge Palmer Robinson:

I am writing on behalf of Michael Mockovak with regard to his sentencing. I have been acquainted with Mr. Mockovak since April of last year, and got to know him more intimately this past fall. I am the leader of a bible study class at First United Methodist Church and he attended my class on a John Wesley study titled This We Believe. I had seen Mr. Mockovak becoming more involved in our church and he became a member last fall. He was a regular volunteer at our SHARE breakfasts: breakfasts every other week that are cooked and served to an average of 250 homeless men and women. He also became a small fellowship group leader in a group that played cards together and got to know each other.

These two groups he was a part of, I did not participate in, but I was aware in a peripheral way of his involvement with these ministries. I got to know him in a more intimate way when he joined my Wesley study last fall. John Wesley is the founder of Methodism, and the study pertained to his theology and life. Mr. Mockovak was eager to learn about Wesley's life and theology and was particularly interested in the idea of "practical theology" which involved doing acts of mercy for those less fortunate.

His questions and comments in class were reflective of a person who was seeking a deeper truth, and his actions in volunteering with the breakfasts, and in receiving training for volunteering for our homeless shelter next door, the Blaine Center, appeared to correspond with the lessons that we were discussing on practical theology.

I grew to believe based on his involvement with the church, and his insightful comments about the readings on the bible, doing good works and the general tenor of Wesleyan thought, he was in alignment with our practices of compassionate ministry towards our mission in combatting homelessness. One evening he asked a question whether there was any sin that was unforgiveable. Not knowing the trial he was facing or anything about his background, I answered that according to the Bible, the only unforgiveable sin is walking away from God. I then answered that with sin, however, comes the true desire of repentance and that leads to forgiveness. It is my opinion that his question, and the way it was asked, showed a concern toward what he was facing and answer toward redemption.

Since the trial, I have visited Mr. Mockovak on two occasions in the King County Jail. He asked me and my husband Dana for further bible study materials specifically on the Gospel of Luke and Acts. I sent him three weeks' worth of materials which he said he completed in two days. I sent three more weeks' worth this past Friday. According to my faith, I see Mr. Mockovak's desire to be more informed about the bible as a deliberate walk toward God. It is not up to me to judge him, or speculate what is in his heart, I can only state the facts that he voluntarily walked into our church and exhibited behavior that according to our Wesleyan tradition, strived toward a strengthening of his faith while doing good works toward others.

It is my opinion that when he first came to his church it was a rehabilitative act, and an act toward finding a better way. For this reason I humbly ask that you apply a merciful judgment on Mr. Mockovak. He is not the Dr. Evil, as was portrayed by Mr. Joe King, nor am I declaring him a saint. He is a human being that has erred and is actively, currently seeking a higher moral truth. I also in rebuttal to Mr. King's allegations, and write this letter without being coerced or duped by Mr. Mockovak. I have a Cum Laude from Smith College and extensive post graduate work from three other universities. I have taught bible study for 6 years with First United Methodist Church and have been a member of that church for 19 years. My intellect and judgment of what is before us is sophisticated and not given sway to whatever the media or Mr. King may color of Mr. Mockovak. I speak only from my own observation and knowledge of Mr. Mockovak from the last year.

Respectfully submitted,

*Sent without signature to avoid delay.*

Greta M. Birkby

Bible Study facilitator and Lay Pastor

First United Methodist Church of Seattle

February 17<sup>th</sup>, 2011

To: Judge Palmer Robinson  
From: Eric O'del  
Re: Michael Mockovak

Dear Judge Robinson:

I have had the privilege of directing Michael in my community choir Spirit of the Sound for the past year and prior to that for another year in a church choir at Center for Spiritual Living.

I have found Michael to be dedicated, responsible, and possessing a genuine community spirit. He was a hard worker in our bass section, and a really dedicated team player.

I visited him recently at the King County Jail to offer my support and I was very impressed by his maturity, calm and focus regarding his situation. His great concern is maintaining a relationship with his daughter, and I know that being out of jail awaiting sentencing will allow him to get his affairs in order prior to beginning his sentence and help prepare his child for the coming separation.

Upon his release, I will happily welcome him back to the choir and the spiritual encouragement our 40 singers share is available to support him in getting his life on the right track. Choirs are really like family, and the weekly rehearsals and monthly performances are a great excuse to connect people and help them through the struggles of life, something we do all the time.

Thank you for your thoughtful consideration of this letter in your deliberations about Michael's future.

Sincerely,

*(Sent without signature to avoid delay)*

Eric O'del

Montreal, 04 March 2011

TO: The Honorable Judge Palmer Robinson

FROM: Sybil Murray-Denis (Née Sybil F. Murray)

BRIEF BIO: Born in Kingstree, South Carolina on 29 January 1937. Married Jean-Émile Denis in Chicago in 1966; moved to Quebec City with him that same year and, in 1967, there gave birth to our daughter, Emmanuelle. Living as a paraplegic since an automobile accident in 1974. Residing at 6254 Monkland since 1975. Still actively employed as an independent translator.

RE: In support of optimal corrective sentencing for Michael Mockovak

Your Honor:

Michael's mother—Carol Mockovak (née Vikre)—and I met and became friends at St. Catherine's College in St. Paul Minnesota. I was present at her marriage to Michael's father, Milan Mockovak. And I was honored and gladly accepted when asked to be the godmother of the couple's first born, Michael.

Though I am Michael's godmother and so have known him since his childhood, my contacts with him as an adult have been intermittent, except for his time at Yale, when he visited me quite often here in Montreal.

I received a call from Michael at Christmastide 2008 when I was in hospital awaiting plastic surgery to close a deep paraplegic ulcer. He poured out his heart to me ("grain and chaff together") about what he was going through. Based on what I heard, I can say that he was deeply wounded and distraught and I detected in his reactions the traits of vulnerability, trusting naïveté, and perplexity that I had sensed in him on other occasions when he was under stress and confided in me. What turmoil he was in!

Naturally, I am heartbroken and still somewhat stunned that his turmoil has resulted in the need to write you this letter. Yet I do firmly believe that in this sad need there is room for a greater and better hope. — What all spiritual traditions from Zen to Christianity teach, I know from hard experience: we learn through suffering. So, no matter what the sentencing outcome, I am wholeheartedly committed to doing all in my power to help Michael live by the baptismal promises I made for him as his godmother.

Respectfully yours,



Sybil Murray-Denis

Sybil Murray-Denis





February 23, 2011

The Honorable Judge Palmer Robinson:

We are Dr. Thomas and Ms. Shirley Mikel, retired school administrators from the Highline School District just south of Seattle. We are friends of Michael Mockovak's parents and have known Michael for about four years. We observed how happy he was when he was married, moved into a beautiful home and then became a father to a baby girl, Marie Claire.

From our observations, Michael was totally dedicated to being a kind and loving father, even after the marriage failed and he was given joint custody and had his daughter on his own. He made every effort to learn good parenting skills and we often heard from his father, Milan, how Michael effectively used these skills with her. We know that one of his top priorities during his parole has been to continue seeing and nurturing his daughter.

Michael's father often shared with us the stress Michael was under regarding his business and his inability to resolve partnership issues. In addition, his divorce was extremely painful, especially as it affected his daughter.

Michael was in our home only a few times but we observed how attentive and affectionate he was with his father as he came to pick him up or make arrangements for him to fly back and forth from Minneapolis to Seattle.

Michael's mother, Carol, tells us Michael has become active in a church close to his current home where he does volunteer work, and she indicates

he has been getting counseling on a regular basis. We saw how Michael reached out to his mother and kissed her on the forehead when the jury read the verdict. It was obvious that he is a compassionate son and is very concerned for her well being.

Michael's intelligence is obvious. He is a graduate of Yale University Medical School and is a highly regarded ophthalmologist. It certainly took significant dedication and effort to accomplish this level of education having come from rather modest means.

We will write to Michael if he continues to be incarcerated, send him information and materials that he may need or request and support him in any way we can. We believe he is a good and decent man and needs to know that we and others believe in him.

Sincerely,

Dr. Thomas Mikel

A handwritten signature in cursive script, appearing to read "T. Mikel".

Ms. Shirley Mikel

A handwritten signature in cursive script, appearing to read "Shirley Mikel".

March 4, 2011

Judge Palmer Robinson  
King County Courthouse  
516 3rd Ave # E340  
Seattle, WA 98104-2389

Dear Judge Robinson,

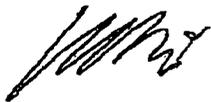
I am writing on behalf of Dr. Michael Mockovak. I am a medical doctor trained at University of Washington and I have been practicing medicine in Puget Sound area since my graduation. I have known Dr. Mockovak since 2003 after meeting him in social networking. I have found him to be an honest, kind, simple, compassionate, hard-working and good person with moral integrity. I am very sorry that he has gotten into a terrible situation. Life is not always fair and bad things happen to good people. Dr. Mockovak was going through a bad divorce in the end of 2007. I could sense his distress, bitterness and depression from an ugly divorce. He was in tears and couldn't sleep for months and months. Unfortunately he turned to the wrong people for support.

Dr. Michael Mockovak is not a greedy or evil person. He is a loving father to his daughter. He has a soft and giving heart and is generous to others. We can see his kindness and generosity from charity work he has done when he was in practice and when he was out on bail. He has provided free Lasik care to our veterans and has done volunteer work for our homeless people and homeless shelters as well as community services. He has also donated clothes and gloves to keep the less fortunate people warm during cold winter season. He would give money to the homeless people when he passes them. He has obeyed all the rules when he was out on bail and was not dangerous to the society and community but kept contributing and giving to the community and society that may not know him. I wish the jury had a chance to hear from his family, friends, colleagues, church, neighbors, divorce lawyer, doctors and therapists about who he is and what he has gone through. He is a kind and generous person with a soft heart. He was down and needed help but didn't have a chance to get the help he deserved.

Michael is a very special person. He has shown good human nature: kindness, honesty, loyalty, integrity and compassion. I will support him and help him to get through the tough time. I will pray for God to guard his safety and spirit. I will help him to rebuild his life when he is released from prison. His daughter needs him. His parents, brothers, sisters and friends need him. He is a very talented and dedicated surgeon. He is a giving and generous person. He has so much to give to our society and community.

Thank you so much for reading this letter.

Sincerely yours,



Michelle Zhong, M.D.

# EXHIBIT C

HC 3312  
9/67

Court No. A-68,153

**DISTRICT COURT  
FOURTH JUDICIAL DISTRICT**

**STATE OF MINNESOTA**  
County of Hennepin  
**STATE OF MINNESOTA**

**FILED**

**REPORT OF PROBATION OFFICER  
AND ORDER TERMINATING  
PROBATION SUPERVISION**

1985 DEC - 8 11:35 AM '85

- vs -

BY A. Otter DEPUTY  
HENN. CO. DISTRICT  
COURT ADMINISTRATOR

BRUCE MORTON VIKRE

Defendant.

To the Honorable ALLEN OLEISKY, one of the Judges of the above-entitled Court:  
On the 11th day of July, 1977, BRUCE MORTON VIKRE the  
above-named defendant pleaded guilty to \_\_\_\_\_ the crime of CRIMINAL  
SEXUAL CONDUCT IN THE FIRST DEGREE upon COMPLAINT FILED BY COUNTY ATTORNEY  
of Hennepin County, Minnesota, on the 16th day of May, 1977; and thereafter on  
the 11th day of July, 1977, imposition of sentence was stayed to  
July 10, 1987;  
And thereafter on July 11, 1977, the imposition \_\_\_\_\_ of sentence was  
duly stayed by said Court until the 10th day of July, 1987, and defendant was  
placed on probation under the supervision of the Probation Office during said stay;

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

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

DATED: November 19, 1985

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

Mara Widseth  
MARA WIDSETH (x8904), Probation Officer

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

DATED: November 2, 1985

Dec

By The Court:

Allen Oleisky

ALLEN OLEISKY

Judge.

STATE OF MINNESOTA FILED DISTRICT COURT  
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

77 MAR 13 AM 11:13

State of Minnesota, **COMPLAINT-WARRANT FOR**  
Plaintiff, **FELONY OR GROSS MISDEMEANOR**  
vs. **COL. ADMINISTRATOR**

District Court File No. 68153  
County Attorney File No. 77-0997  
Control No. 77-290560

BRUCE MORTON VIKRE  
Defendant.

**COMPLAINT**

The Complainant being duly sworn, makes complaint to the Court and states that there is probable cause to believe that the Defendant did commit the offense of (SEE BELOW) in violation of the Minnesota Statutes, 1974, (SEE BELOW) Maximum Sentence, (SEE BELOW) The Complainant states that the following facts establish probable cause:

Your complainant, Tom Grega, is a Detective with the Hennepin County Sheriff's Office, and in that capacity has investigated the facts and circumstances of this matter by interviewing witnesses, victims, and the defendant, whose statements are attached hereto and hereby incorporated, and whose statements and representations he believes to be true and accurate to the best of his information and belief.

Complainant has learned that defendant named herein, DOB 11-14-40, has four nephews. Two of these nephews, Neil Matthew Mockovak, DOB 10-3-64, and Eric Francis Mockovak, DOB 7-26-62, engaged in anal and oral sodomy with defendant named herein. Complainant has learned from victim Neil that on and between June 1, 1975 and August 30, 1975, defendant herein, on numerous occasions, did put his, defendant's, penis into Neil's mouth and anus, and on numerous occasions had Neil do the same to him, defendant. At the time of these acts, Neil was 10 years old, which age was known to defendant, according to defendant's own statements. On and between June 1, 1975 and July 26, 1975, defendant did place Eric's penis in his mouth and put his penis in Eric's anus on numerous occasions, according to both Eric and defendant. At the time of these incidents, Eric was 12 years old, which age was known to defendant, according to defendant's statements. Complainant has also learned from defendant that all of the foregoing incidents did in fact occur.

O F F E N S E

COUNT I: CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE  
(M.S. 1976, §609.342[a])  
PENALTY: 0-20 years

That on and between June 1, 1975 and August 30, 1975, within the corporate limits of the County of Hennepin, State of Minnesota, BRUCE MORTON VIKRE, whose date of birth is November 14, 1940, then and there being, did wilfully, unlawfully, wrongfully, knowingly and feloniously have sexual contact with a male, one Neil Matthew Mockovak, whose date of birth is November 3, 1964, and whose age was at that time 10; Bruce Morton Vikre then being more than 36 months older than Neil Matthew Mockovak.

CONTINUED ON THE NEXT PAGE . . . .



FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant's arrest or other lawful steps to be taken to obtain Defendant's appearance in Court, or detention, if already in custody, pending further proceedings. The Defendant is therefore charged with the above-stated offense.

WARRANT

TO: The Sheriff of the above-named County, or any other person authorized by law to execute this warrant. NOW, THEREFORE, in the name of the State of Minnesota, I hereby order that the above-named Defendant, be apprehended and arrested without delay and brought promptly before the above-named Court (if in session, and if not before a Judge or Judicial Officer of such Court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon thereafter as such Judge or Judicial Officer is available) to be dealt with according to law.

Conditions of Release

Amount of Bail: \$3,000

This Complaint-Warrant was sworn to, subscribed before, and issued by the undersigned authorized

Issuing Officer this 11th day of May 1977.

Issuing Officer Signature

Print Name

Title

Sworn testimony has been given before the Issuing Officer by the following witnesses:

**RETURN OF SERVICE**  
**STATE OF MINNESOTA**  
 COUNTY OF \_\_\_\_\_

I HEREBY CERTIFY and return, that I have served a copy of this COMPLAINT-WARRANT upon the defendant herein named.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

(Person Authorized by Law to Make Service)

Page \_\_\_\_\_ Line \_\_\_\_\_  
 File No: \_\_\_\_\_

**STATE OF MINNESOTA**  
 COUNTY OF \_\_\_\_\_  
 COUNTY COURT  
 Division \_\_\_\_\_

**STATE OF MINNESOTA**  
 vs. *See Attached*

COMPLAINT-WARRANT  
 FOR FELONY  
 OR GROSS MISDEMEANOR

Filed \_\_\_\_\_  
 Clerk of \_\_\_\_\_  
 by \_\_\_\_\_  
 Returned and filed \_\_\_\_\_  
 Clerk of \_\_\_\_\_  
 by \_\_\_\_\_

## FOLLOW-UP REPORT

Case No. 77-9-0260

Name of Complainant: \_\_\_\_\_

Address: \_\_\_\_\_

Offense: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

This is a follow-up report dictated by Detective Thomas Grega on 05/10/77. Steno Carolyn A. Latour typing on 05/11/77 at 0750 hours.

On 05/09/77, this Detective and Detective Archie Sonenstahl met Detective Ron Harrington at the Brooklyn Park City Hall. Detective Harrington stated that a social worker, Peg Garbarini, for Unity Hospital had informed him of possible criminal sexual misconduct by Bruce Vikre with his nephews, the sons of Carol and Milan Mackovak, 7908 North Mississippi Lane, Brooklyn Park. He stated he had talked with Mrs. Carol Mockovak and her son, Paul, age 17. He learned that Bruce Vikre had sexual relations with Paul and possibly the two younger brothers, Neil and Eric. The sexual activity took place in Excelsior, Minnesota, so the Hennepin County Sheriff's Department was contacted.

Neil Mockovak was present at Brooklyn Park Police Department and was interviewed by this Detective and Detective Sonenstahl and a statement was obtained.

Neil stated that he and his brother, Eric, resided in Evanston, Illinois, in 1975. During the summer school break, they came to Minnesota and stayed with their Grandmother Edith Vikre and their Uncle Bruce Vikre at 823 Excelsior Boulevard, Excelsior, Minnesota. Shortly after they arrived in Minnesota during the latter part of June, he started having sexual relations with his Uncle Bruce. He would sleep with his Uncle Bruce and their sexual activity started with each playing with each others penis. It progressed to each performing oral sex upon each other and each having anal sex with the other. He stated he had oral and anal sex with his Uncle Bruce several times, almost every night from the latter part of June all of July and part of August in 1975. All these acts occurred at Bruce's residence in Excelsior, Minnesota. He, further, stated that his older brother, Eric, was present on many of the occasions and could recall one occasion when all three were involved in a sexual act at the same time. He stated he was performing anal intercourse on Bruce while Bruce was performing oral sex on his brother, Eric. He stated that his Uncle Bruce knew how old he and his brother Eric were when this sexual activity took place.

On 05/09/77 at approximately 1:30 a.m., this Detective and Detective Sonenstahl proceeded to Crystal Marine, 5712 Lakeland Avenue North, the place of employment of Bruce Vikre. Mr. Vikre was placed under arrest by Detective Archie Sonenstahl for Probable Cause Criminal Sexual Conduct. He was read his constitutional rights per Miranda by Detective Sonenstahl. He stated he understood these rights and wanted to get this problem resolved. He was then transported to the Hennepin County Courthouse, Criminal Division, Room 8, where he again was read his rights per Miranda and consented to give a written statement. ret

Mr. Bruce Morton Vikre, DOB 11/14/40, 823 Excelsior Boulevard, Excelsior, stated that his first sexual activity with his nephews started with Paul approxi-

DEPUTY'S SIGNATURE, DIVISION, AND BADGE NUMBER

## FOLLOW-UP REPORT

Case No. 77-0560

Name of Complainant \_\_\_\_\_

Address \_\_\_\_\_

Offense \_\_\_\_\_

Date \_\_\_\_\_

Time \_\_\_\_\_

Page Two

mately five years ago. Paul is now 17 years of age. He stated it started when Paul was approximately 11 years old. The sexual intimacies began when they would sleep together and involved playing with each others penis. In approximately 1972, at his residence in Excelsior, they started masturbating each other and at that time, Bruce performed oral intercourse with Paul. Paul was approximately 13 years old at the time. Sexual activity with Paul which included oral intercourse and anal intercourse performed on and by Bruce lasted until the Spring of 1976. After returning from a ski trip in Lutsen, Minnesota, Paul spent the night at Bruce's home in Excelsior. This was in the Spring of 1975 according to Bruce. Bruce stated he begged Paul to have sexual relations with him. Paul did have sexual intercourse with Bruce that night which included anal and oral intercourse performed by each upon the other. This was the last homosexual contact Bruce had with Paul.

Bruce then stated he became sexually involved with Neil in the Summer of 1975. Neil was approximately 10 years old at the time. Bruce stated that through the Summer of 1975 at his residence in Excelsior, Minnesota, on several occasions, had sexual relations with Neil which included oral and anal intercourse performed by each upon the other. This lasted all summer. He stated Eric was present on many occasions but could not recall sexual conduct with Eric, then age 12, other than masturbating each other. He stated there was probably more activity but could not recall any specific sexual activity with Eric.

Bruce also stated he had sexual activity with Mike Mockovak. This started when Michael was approximately 13 years old and continued until Michael was approximately 16 years old. Michael now is approximately 19 years old. This sexual activity included masturbation, each upon the other, but never progressed any further. This occurred in Canada while on a fishing trip with Paul and Michael and then two or three times after that at his home in Excelsior.

Bruce Vikre stated he felt he was a homosexual, at first bisexual but now completely homosexual. He has sought consulting from a psychologist, Dr. Sigurd Hoppe from the Minnetonka Mental Health Center. He has discontinued this consulting. He stated that indirectly he informed Mr. Hoppe of his sexual activity with his nephews, but did not state specifically that he was having homosexual sexual intercourse with them. He also informed Mr. Hoppe of the approximate ages of the children.

On 05/09/77 at approximately 7 p.m., Detective Richard Good proceeded to the Mockovak residence, 7908 Mississippi Lane, Brooklyn Park. With the permission of Mr. and Mrs. Mockovak, Detective Good interviewed Paul and Eric and obtained written statements from them. Paul, DOB 07/22/59, stated that his sexual involvement with his Uncle Bruce began during his freshman year in high school, through the Summer of 1974, and continuing to the Spring of 1975.

DEPUTY'S SIGNATURE, DIVISION, AND BADGE NUMBER

## FOLLOW-UP REPORT

Case No. 77- -0560

Name of Complainant \_\_\_\_\_

Address \_\_\_\_\_

Offense \_\_\_\_\_

Date \_\_\_\_\_

Time \_\_\_\_\_

Page Three

This activity mostly took place at 823 Excelsior Boulevard in Excelsior. It started by each playing with the other's penis and progressed to where each would perform oral and anal intercourse with the other. This happened on several occasions. He stated the last time he had sexual contact with his Uncle Bruce was after a ski trip to Lutsen, Minnesota, and at 823 Excelsior Boulevard. This occurred in the Spring of 1976. He stated that Bruce furnished him with hard liquor and marijuana and he became intoxicated. That evening Bruce performed oral intercourse on him and masturbated him.

Eric Mockovak stated that he had sexual relations with his Uncle Bruce starting approximately three years ago while staying at his grandmother's home in Excelsior. He and his brother, Neil, came to Minnesota for the summer vacation (1975). While sleeping with his Uncle Bruce, Bruce played with his penis and performed oral intercourse with him. They would masturbate each other. Through the summer, this activity continued and included each performing anal intercourse upon the other. On several occasions, Neil would be in bed with them and do the same things that they did. The last time he had sexual contact with Bruce was the summer of 1976 while staying at 823 Excelsior Boulevard. At that time, they masturbated, had oral and anal sexual intercourse, each upon the other.

Mrs. Gaubay from the Welfare's Child Protection Agency was notified by Detective Sonenstahl at 4:15 p.m. on 05/09/77.

TG/ta1  
05/11/77,

DEPUTY'S SIGNATURE, DIVISION, AND BADGE NUMBER

Statement of Mr. Bruce Morton Vikre taken at 2:45 p.m., May 9, 1977, in Room of the Hennepin County Sheriff's Department, Minneapolis, Minnesota. Questioned by Detective Archie Sonenstahl and in the presence of Detective Tom Grega. Steno Carolyn A. Latour typing.

- Q. What is your full name and date of birth?
- A. Bruce Morton Vikre, November 14, 1940.
- Q. What is your home address and phone number?
- A. 823 Excelsior Boulevard, Excelsior, MN, is where I did live but I now live at 53 something at the Brookdale Ten Apartment Buildings, apartment building 3305, apartment 110. No telephone number.
- Q. Mr. Vikre this afternoon you were arrested at your place of employment in Crystal Minnesota for the charge of probable cause sexual conduct. You were advised of your rights via the Miranda warning by this Detective which you stated you understood and would talk to us. In the conversation that followed you admitted your sexual involvement with your three nephews, Paul, Eric, and Neil Mockovak. It is our intent at this time to obtain a written statement from you relative to this matter. Is it your intent to give such a statement?
- A. Yes, I intend to cooperate.
- Q. Prior to the taking of this statement, I will again advise you of your rights via the Miranda warning which are as follows: you have the right to remain silent, anything you say will be used in court as evidence against you, you have the right to an attorney and have one present now or at anytime during questioning, if you cannot afford an attorney, one will be appointed for you without charge. Do you understand these rights?
- Yes.
- Is it still your intent to give such a statement?
- A. Yes.
- Q. Mr. Vikre, which one of your nephews did you first become sexually involved with?
- A. Paul.
- Q. How old is Paul?
- A. Approximately 18 now.
- Q. When did you first become sexually involved with Paul?
- A. I would estimate maybe five to six years ago.
- Q. Where did this occur?
- A. It started in a place they lived in Madison, Wisconsin, I would guess that is where it started.
- Q. Would you describe, in your own words, what has taken place between you and Paul sexually in the last approximately six years?
- A. When the families first started seeing a lot of each other, don't didn't know at that time, but since I went to see Siggie Hoppe and analyst for Minnetonka Mental Health Center, Minnetonka, Hennepin County, I understood alot about what had happened and why it happened. The basic relationship was Paul's father, Milan, told me once that Paul was all over me like a blanket. At the time, I didn't really understand why, there was more than one kid, why he should single, why that one should single me out that strongly. I never ever really asked him for sure but he mentioned a couple of times, Paul said once that you're a homo and coming from anybody else it would have been different but coming from him, it was okay because he didn't much care. So the original relationship was always experiencing this sexual experience with me. Paul was about 11 or 12 at the time and he was experience very minor at the beginning sexual relationships with me. When I would be staying at my sisters or they would be staying up here, he would always manage to be on my lap or next to me or with me or sleeping in bed with me at night.

B.M.V.

(Con't)

- At the beginning, he would just sort of crawl up next to you and sleep as time progressed, the sexual intimacies connections became more involved. He was growing up and he liked it.
- Q. What did he like?
- A. Contact, playing with each other. One time when we were in Wisconsin in Deerfield, Wisconsin, I was going to take a bath and he just come marching in there and jumped in there with me, jumped in the bathtub with me.
- Q. What happened in the bathtub?
- A. Just felt each other's private parts.
- Q. Then what happened?
- A. Next, I would say was in Excelsior in about 1972, the third floor or the attic of the house is partially finished off and when my sister came up, they would stay there. There's an old hideabed type up there. I couldn't remember but we both went, ended up in the same bed. Guess that's when it really started to get bad. We were playing with each other, jacking off each other, masturbating and Paul wanted me to give him oral sex, wanted me to give him a blow job without saying it. And I did it and I liked it and I would guess so did he for awhile and that was the end of that incident.
- Q. Approximately how old was Paul at the time?
- A. I was say more close to 13ish.
- Q. What happened next?
- A. It got worst and it just kept continuing, every time we would be together it would be a little more involved.
- Q. What are some of the things you have done with Paul at your mother's home in Excelsior in the last three years?
- A. During the last year that we were together doing stuff, skiing trips, hunting, stuff like that, rather than try and sort it out, just the whole thing, when we were around together, Paul he loved me all right, there's no question about that, he was also making a transition that I never made totally when I was his age and he would go along with I wanted, I'm not positive about this but I think because the kid really did love me I'd beg him to get in bed with me and I've never done this kind of stuff we did or never felt that way about anyone the way we did even though I have had other sexual experiences and contacts. I am in love with him.
- Q. When is the most recent time you have had sex with Paul?
- A. That would be the skiing trip, not this spring but the spring before, a year and a half ago, the first week in April, the second week, we were up north on a skiing trip at Luthson, we had come back from there to the house and I told him that I was going to go back to work so Paul was going to fly home from there to Chicago and the last homosexual contact I had with Paul was the night before he flew home. I in a way I forced him and in a way I didn't. I begged him for it, completely.
- Q. What sex acts took place?
- A. I gave him blow jobs, he would he would almost give me one but he would always stop before I had an ejaculation, it was a halfways blow job. There was anal intercourse, both directions. He was very capable of starting something, but the last couple of years he didn't really particularly wanted to, he just would.
- Q. When was the last sexual act you had with Paul in Excelsior?
- A. In April of 1975, the one I just told you about, just before he flew home from the ski trip.
- Q. Which one of your nephes did you next become sexually involved with?
- A. That what have been Niel, it was like the kid was waiting *on line M. O.*

Statement of Mr. Bruce Morton Vikre taken on May 9, 1977

Page Three

- Q. When did this occur?  
A. Summer of 1975.
- Q. Where?  
A. At Excelsior.
- Q. How old was Niel at the time?  
A. Ten.
- Q. What happened?  
A. Mostly just feeling each other up, it wasn't like it ended up with Pa. It wasn't like you just went from one to the other.
- Q. Did you and Niel masturbate each other?  
A. Niel wasn't old enough to masturbate, he wasn't old enough to have an ejaculation. But we did masturbate each other.
- Q. Did you have oral sex with Niel?  
A. I know that he didn't do that for me, I would say attempted to.
- Q. Did you put Niel's penis in your mouth?  
A. Yes, I'm sure.
- Q. Did Niel put your penis in his mouth?  
A. I don't remember it happening.
- Q. Did Niel insert his penis into your rectum?  
A. I would say effectually that if it would have been bigger he would have the attempt was there.
- Q. Did you insert your penis into Niel's rectum?  
A. Yes.
- Q. What did you use for ~~the~~ lubricant?  
A. Handlotion, or coco butter, masseuge lotion or whatever.
- Q. Did this occur during the summer of 1975?  
A. Yes.
- Q. Where did it occur?  
A. In my bedroom where I lived in Excelsior.
- Q. On how many occasions?  
A. The kids stayed up there about two months, it was more than once, several times, Niel liked to sleep in bed with me.
- Q. Approximately how many times did you have rectal intercourse with Niel?  
A. I honestly don't know, several times.
- Q. While you were having sexually relationships with Niel, did your nephew Eric also become involved?  
A. Yes, but I couldn't give you the amount of times or details or like that, but ~~a~~ yes he did?
- Q. In what way was Eric involved?  
A. I honestly can't remember, that sounds stupid, but I can't.
- Q. How old was Eric in the summer of 1975?  
A. I would guess about 12, he's older than Niel.
- Q. Did you give Eric a blow job at your residence in Excelsior in July of 1975?  
A. I'm sure I did but I can't remember the particular incident.
- Q. Did you, during the same period of time, have rectal intercourse with Eric?  
A. I would say yes, whether I can remember the incident or not.
- Q. Why would you say yes if you don't recall the incident?  
A. I think I did but I don't recall specifically when.
- Q. Do you recall an incident in July of 1975 when Niel was having intercourse retally with you while you were giving Eric a blow job?  
A. No, I don't recall that.
- Q. Do you recall any incident involving both Niel and Eric at ~~the~~ time?  
A. Yes, they were both

- Q. What type of sex acts did you have with Niel?
- A. Masturbating each other, I gave Niel a blow job but I don't remember the other way, I had rectal intercourse with him several times and he had rectal intercourse with me, an attempt at it.
- Q. What type of sex acts did you have with Eric?
- A. As far as I can remember, mostly masturbating each other.
- Q. And these acts occurred at your home in Excelsior in the summer of 1975, is this correct?
- A. Yes.
- Q. Have you ever had any other sexual relationships with any of your other nephews?
- A. Michael, there was just masturbation.
- Q. How old is Michael?
- A. Right now, I would guess about 19.
- Q. When did this occur?
- A. It had had to be three years ago this coming summer, me and Mike and Paul went to Canada for fishing.
- Q. Did this ever occur at your home in Excelsior with Mike?
- A. Yes, I would say maybe two other times and again it was just straight masturbation, nothing else.
- Q. When did this occur?
- A. Before the fishing trip, when they came up for the holidays and I went down there.
- Q. How old was Mike at the time?
- A. That would be maybe sixteen when the last incident occurred and maybe thirteen when it started.
- Q. Are you familiar and have you been familiar with the ages of your nephews at the time these acts occurred?
- A. Yes, I knew how old they basically were.
- Q. How are they related to you?
- A. They are my sister's children.
- Q. How did you get these boys to commit these homosexual acts with you?
- A. I didn't twist their arm or drag them off, it just happened.
- Q. Are you a homosexual?
- A. Yes, I would say yes now, at the time, at the end especially, I considered myself bisexual now I really feel that it's gone all the way over to the homosexual side.
- Q. When you consulted with Dr. Hoppe, did you tell him of these homosexual acts with these children?
- A. I never told anybody what all we said here, fragments, bits and pieces of information, he knew enough that I had homosexual and had other contacts.
- Q. When did you see Dr. Hoppe?
- A. Probably two or three months after the ski trip with Paul, that was the first time I saw him.
- Q. Why did you go see Dr. Hoppe?
- A. At the time, I was getting a lot of phone calls from Paul and his girlfriend who had been told by Paul about the relationship that we were having. I was tried to think that Paul was just doing what his girlfriend demanded he did and they were pushing me to the limits, I wouldn't sleep for four or five days, and then they called me one day and said that there was somekind of program where we could go and get some help, but they needed some money for it and they had some complicated system where I was suppose to send them some nontraceable money, but I said no, I wouldn't do that, but I did send them the \$60 they wanted and the phone calls keep up, they had learned how to reverse charge calls and they would call me at work and charge the calls to my house. The calls kept coming and I had weekends where I went home and I almost literally,

(Con't)

stayed in the middle of the living room floor. And, they would call me at home sometimes in the middle of night until I turned the volume down on the phone till I couldn't hear it when I was sleeping. They had called one day and said that they had talked to Susie's mother. Sue is Paul's girlfriend, and she was going to check with some friends and get an analyst that I was suppose to go to and I thought of a lot of things to do but an analyst has never ever crossed my mind, but they had a system set up that in about a week or so the person was suppose to get ahold of me and Paul felt that it was going to be very expensive. In other words, they were just bothering me and harrassing me, trying to get me to commit suicide, that's what they were doing, I can't blame them for doing it, but that's what they were doing. Paul's girlfriend, I think she was making Paul do it to, they had a regular system, it would always be Paul ;making the call and then he would break up and then Paul's girlfriend would get on the phone and she is as cold as ice and her I couldn't handle at all at that time. He did not want me to tell his folks.

- Q. Did you tell Dr. Hoppe that you were having sexual relationship with your young nephew?
- A. You mean Niel, I would say the way I phrased it he would assume something was going on but not the way we talked about here. He knew my feelings but not without a great amount of detail.
- Q. Did you specifically tell him that you were having sexual relationship with someone under the age of 16?
- No, I didn't specifically tell him that I was having sexual relationship but I indicated that I was having sexual intercourse with him.
- Q. Did Dr. Hoppe know how old Niel was?
- A. Yes, basically, generally, he knew the general age of all of them.
- Q. Mr. Vikre, is this a true and correct statement given by you without any promise or threat on our part?
- A. Yes.
- Q. After you have had an opportunity to read this five page statement and you find it to be true and correct as given, are you willing to sign it?
- A. Yes, I'll sign it.
- Q. Is there anything you wish to add or subtract from this statement?
- A. Just the fact that I would like to get help with my problem and the violence that is inside my family is just unreal and if it keeps up someone's liable to get hurt.

X Bruce Morton Vikre  
Bruce Morton Vikre

Witnessed by:

[Signature]

[Signature]

I hereby certify that I have received a true, full, and exact copy of the foregoing statement consisting of five (5) typewritten pages.

X Bruce M. Vikre  
Bruce Morton Vikre

This is a statement of Neil Matthew Mockovak given with the permission of his parents Carol and Milen Mockovak in the presence of Det. Tom Grega. Questioned by Det. Archie Sonenstahl at the Brooklyn Park Police Station at 11:15 AM, May 9, 1977. Typing by Ruth Fleming.

Q. What is your full name?

A. Neil Matthew Mockovak.

Q. What is your DOB?

A. Oct. 3, 1964.

Q. What is your home address? And phone?

A. 7908 Mississippi Lane, 560-8436.

Q. What school do you attend?

A. Monroe Elementary.

Q. Neil, this morning we were requested by Det. Harrington to meet with you regarding an investigation of sexual assault that occurred in Excelsior in 1975. We have discussed this sexual assault with you wherein you stated you were sexually abused by your Uncle Bruce Vikre. It is our intent at this time to obtain a written statement. Is it your intent to give such a statement?

A. Yes.

Q. Where were you living in 1975?

A. Evanston, Illinois.

Q. When did you come to Minnesota?

A. Sometime in June.

Q. Why did you come to Minnesota?

A. To visit my grandmother, Edith Vikre, and my Uncle Bruce.

Q. Did you come alone?

A. No, I came with my brother, Eric.

Q. How old is Eric?

A. He is 2 years older than I.

Q. When you came to Minnesota and stayed with your grandmother and your Uncle Bruce, where did they live?

A. 823 Excelsior Blvd., Excelsior.

Q. When you arrived in Minnesota and while you were staying in Excelsior, did someone get sexual with you?

A. Yes, my Uncle Bruce.

Q. How soon after you arrived did your Uncle Bruce begin to get sexual with you?

A. A few days.

Q. What did he do?

A. He started by playing around with my penis and then he had me play with his penis. Then he made me give him a blow job and then he gave me a blow job.

Q. Did your Uncle insert his penis in your mouth?

A. Yes.

Q. Did you insert your penis into your Uncle's mouth?

A. Yes.

Why?

He put it there.

Q. Did your Uncle Bruce insert his penis into any other part of your body?  
A. Yes.

Q. What portion of your body?  
A. My butt.

Q. Did he get inside of your butt?  
A. Yes.

Q. Did he use any type of lubricant?  
A. Yes, it was some greasy stuff - I think it was cocoa butter.

Q. Did your Uncle Bruce have you insert your penis inside his butt?  
A. Yes.

Q. Did you use a lubricant?  
A. Yes, he put it on my penis.

Q. Approximately how many times did he play with your penis?  
A. Several.

Q. Approximately how many times did he have you play with his penis?  
A. Several.

Q. Did you play with each other's penis' at the same time?  
A. Yes, most of the time.

Q. Approximately how many times did he give you a blow job?  
A. Several.

Q. Approximately how many times did he have you give him a blow job?  
A. Several.

Q. Were you giving each other blow jobs at the same time?  
A. Yes, most of the time.

Q. Approximately how many times did your Uncle Bruce put his penis inside of your butt?  
A. Several.

Q. Approximately how many times did you put your penis inside his butt?  
A. Several.

Q. Where did these acts take place?  
A. In his bedroom, at the house on Excelsior.

Q. Whose idea was it?  
A. His.

Q. How long did you stay in Minnesota during the summer of 1975?  
A. Most of the summer.

Q. Did these acts continue all summer while you were staying here?  
A. Yes.

Q. To your knowledge did your Uncle Bruce do things like these that you have just told us about with anyone else?

A. Yes, with my brother Eric.

Q. How do you know he was doing these things with your brother Eric?

A. Because all 3 of us did it at the same time.

Q. What do you mean all 3 of you were doing it at the same time?

A. I was screwing Bruce in the butt, while he was giving Eric a blow job. There may have been other times but I cannot remember the positions that everybody was in.

Q. Were these sexual acts just between you and Bruce and Eric?

A. Yes.

Q. Was Bruce present and involved in each one of the sexual acts?

A. Yes.

Q. Have you ever been sexual with your brother when Bruce was not there?

A. No, I have never been sexual with my brother even when Bruce was there, but he was sexual with both of us at the same time.

Q. Whose idea was it to have all this sexual activity?

A. Bruce's.

Q. Did he force you?

A. No, he just started it and then it kept going.

Q. How old were you at the time?

A. 10.

Q. How old was your brother Eric at the time?

A. I think he was 12.

Q. How old is your Uncle Bruce?

A. Somewhere in his 30's.

Q. Is he married?

A. No.

Q. How long were you here in the summer of 1975?

A. The latter part of June, July, and possibly part of August.

Q. How often would these sex acts occur?

A. Just about every night.

Q. Neil, is this a true and correct statement given by you of your own free will without any promise or threat on our part?

A. Yes.

Q. After you have had an opportunity to read this 3-page statement, and you find it to be true and correct as you have given it, will you sign it?

A. Yes.

Neil Mockovak

[Signature]

WITNESS

[Signature]

WITNESS

I have received a copy of this 3-page statement.

FIRST PERSON STATEMENT

PAGE 1 OF 1

Name: Eric Mockford 5/11/71 1945  P.M. 14 7/26/86  
 ADDRESS: 2908 N. Mississippi Ln. MARITAL STATUS:  MARRIED  SINGLE  DIVORCED  SEPARATE  
 EMPLOYER: \_\_\_\_\_ ADDRESS: \_\_\_\_\_ BUS. PHONE: \_\_\_\_\_ HOME PHONE: 560-8436

STATEMENT OF EVENTS

about 3 years ago I came to Minn. to visit  
 My uncle Bruce and my Gramma. At  
 there house in excelsior. While sleeping  
 with my uncle Bruce, he played with  
 penis and put it in his mouth and  
 would come in his mouth. He would  
 put his penis in my mouth and would  
 come in my mouth. We would pack  
 each other <sup>EM</sup> off until we would  
 come. There were times during that  
 summer when my Uncle Bruce would  
 put his penis in my rear end,  
 until he came, he would know me  
 do the same thing to him. Sometimes Neil  
 younger brother, would be in bed  
 with us, and he would do the same  
 things with my uncle Bruce that I did.  
 This happened over the last 3 years  
 and the last time was about last  
 summer when I stayed at my Uncle  
 Bruce in Excelsior. This last time we  
 packed each other off, gave each other blow-  
 jobs and put <sup>EM</sup> penises in each other rear ends,  
 until we came. Neil was not with us the last time.

The above voluntary statement is true and correct to the best of my knowledge. SIGNATURE: E.M.  
 WITNESS: \_\_\_\_\_ WITNESS: \_\_\_\_\_ INVESTIGATING DEPUTY: Det. R. J. Flood BADGE NO.: 387

FIRST PERSON STATEMENT

NAME (First, Middle, Last) <i>Eric Markovak, F.</i>		DATE	TIME	<input type="checkbox"/> A.M. <input type="checkbox"/> P.M.	AGE	DATE OF BIRTH
ADDRESS			MARITAL STATUS		<input type="checkbox"/> MARRIED	<input type="checkbox"/> SEPARATED
			<input type="checkbox"/> SINGLE		<input type="checkbox"/> DIVORCED	
EMPLOYER	ADDRESS		BUS. PHONE		HOME PHONE	

*CONTINUED*

STATEMENT OF EVENTS

*I haven't been there since last summer since my parents found out about it, and we have been kept away from my uncle Bruce. My uncle Uncle Bruce saw how old it was during all those times. I was 11 years old when it started and it stopped when I was 14 years old. I know my Uncle Bruce did the same things to my brother Neil because I saw it happen. Every time it happened it happened at my uncle's house in Excelsior.*

The above voluntary statement is true and correct to the best of my knowledge.		SIGNATURE <i>Eric Markovak</i>	
WITNESS	WITNESS	INVESTIGATING DEPUTY <i>Det. Harold J. Hood</i>	BADGE NO. <i>251</i>

FIRST PERSON STATEMENT

NAME (First, Middle, Last) PAUL Benedict Mochowak		DATE 5-9-77	TIME 7:10	<input type="checkbox"/> A.M. <input checked="" type="checkbox"/> P.M.	AGE 17	DATE OF BIRTH 7-22-59
ADDRESS 7908 W. Mississippi Lane, Brooklyn Park, Minn.				MARITAL STATUS <input checked="" type="checkbox"/> SINGLE <input type="checkbox"/> MARRIED <input type="checkbox"/> DIVORCED <input type="checkbox"/> SEPARATE		
EMPLOYER	ADDRESS			BUS. PHONE	HOME PHONE 560-8431	

STATEMENT OF EVENTS

My sexual involvement with my Uncle, Bruce Morton Vikre began approximately during my freshman year in high school during summer vacation - 1974, when I would visit my Uncle and Grandmother in their home in Excelsior Minnesota. My Grandmother's Address is 823 Excelsior Blvd. Excelsior, Minn.

The sexual contact began with sleeping together with my Uncle. He would fondle me then masturbate himself to ejaculation.

As I remember this happened once or twice before it got more serious. Next it began with Him (my uncle) fondling my genitalia and would guide my hand with his hand to do the same thing. Soon After, during our full

sexual contacts over the years, we would masturbate one another to ejaculation, the

next step was, with his guidance, was fellatio (Blowjob) to each other - until ejaculation.

Then Again with his guidance, ~~with his~~ <sup>with his</sup> we committed anal sodomy upon each other with the use of hand lotion as lubrication. I recall doing this to him only twice - ejaculating once.

The above voluntary statement is true and correct to the best of my knowledge.		SIGNATURE Pli	
WITNESS	WITNESS	INVESTIGATING DEPUTY Det. K.T. Storch	BADGE NO. 281

FIRST PERSON STATEMENT

CASE NUMBER

PAGE 2

NAME (First, Middle, Last)

ADDRESS

DATE

TIME

A.M.  P.M.

AGE

DATE OF BIRTH

EMPLOYER

ADDRESS

MARITAL STATUS  SINGLE

MARRIED  DIVORCED

BUS. PHONE

HO

STATEMENT OF EVENTS

Continued:

I recall him doing this to me several times, <sup>3 P.M.</sup> He would ejaculate each time.

The above sexual acts between my Uncle Bruce and me took place between the summer of 1974 and the spring of 1976, when we went on a skiing trip to Lotsewski Resort, Lutsen, Minn. I had stayed overnight with my Uncle Bruce at his home in excelsior the night before leaving on the skiing trip. During this overnight stay, my Uncle Bruce furnished me with hard liquor to the point where I became heavily intoxicated. He also furnished me with marijuana. As I recall my Uncle Bruce gave me a Blowjob during the night and to be truthful I don't recall whether I ejaculated or not. I do know that during that evening that he was fondling and masturbating me. During the entire ski trip we were involved in all the above sexual acts mentioned, I was enticed by my uncle to submit to these acts while under

The above voluntary statement is true and correct to the best of my knowledge.

WITNESS

SIGNATURE

P.H.

INVEST

FIRST PERSON STATEMENT

NAME (First, Middle, Last)		DATE	TIME	<input type="checkbox"/> A.M. <input type="checkbox"/> P.M.	AGE	DATE OF BIRTH
ADDRESS				MARITAL STATUS		<input type="checkbox"/> MARRIED <input type="checkbox"/> DIVORCED <input type="checkbox"/> SEPARATE
EMPLOYER	ADDRESS			BUS. PHONE	HOME PHONE	

STATEMENT OF EVENTS

Continued:

the influence of Alcohol and/or Drugs, which he furnished to me.

After coming back from the sti trip and realizing what had happened, I discussed the situation with my girlfriend - and in turn talked to a friend<sup>of mine</sup> adult friend of her family who is a psychological counselor. This person didn't want to get involved but referred me to John Bair - Crisis Intervention, Evanston Hospital, Evanston, Illinois. Shortly after this contact with Mr. Bair, I had a discussion with my parents and told them about the whole situation with my uncle Bruce. Since I've moved to Minnesota I have not had any counseling with anyone in relation to this matter.

As I recall this situation with my Uncle Bruce began when I was approximately 14 years old, and concluded when I was 16 years old. During all this time my Uncle Bruce was aware of my age. My brother Neil told me incidences that have taken place between him and my Uncle Bruce.

The above voluntary statement is true and correct to the best of my knowledge.

SIGNATURE *Paul Benedict*

INVESTIGATING DEPUTY *Det. Harold [Signature]* BADGE NO. *387*

WITNESS

# EXHIBIT D

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

STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL MOCKOVAK,

Defendant.

No. 09-1-07237-6 SEA

DISCLOSURE OF EXPERT  
OPINION – DR. JON R. CONTE

I am a Professor at the School of Social Work at the University of Washington, Seattle, WA and have been a member of that faculty since 1990. I teach courses on social work practice and clinical social work (psychotherapy). Between 1979 and 1990, I was on the faculties of the University of Illinois at Chicago and the University of Chicago, where I taught similar courses. I am the author of approximately fifty scientific and academic publications in peer-reviewed journals or book chapters and I serve as editor or scientific reviewer for a number of journals including the *Journal of the American Medical Association*; the *Journal of Interpersonal Violence*; *Trauma, Violence, and Abuse: A Review Journal*; and *Child Abuse And Neglect: The International Journal*. I also conduct forensic evaluations of victims of sexual assault in a part-time private practice. I have evaluated thousands of victims over the past three decades. I have testified over ninety times in nine states and Canada as an expert witness on child abuse or psychological trauma.

I have been asked to summarize my opinion as to the harms and impacts associated with childhood sex abuse.

There is simply no question that knowledge about the harmful impact of sexual assault has expanded greatly since the late 1890s when Freud first suggested that sexual use of children was associated with mental health problems in adults. While it is true that the decades from Freud's original discovery until modern times had relatively little research on sexual assault, since the late 1970s there has been an explosion of research. As this disclosure is being prepared there are literally thousands of research and other reports on the impact of sexual assault.

In general, several observations are important about this large body of research. First, no single study stands alone. Methodological issues, including weaknesses that limit generalizability, are common in science. No matter how powerful the methodology or famous the researcher, new findings from innovative studies with new samples or different measures may raise doubt or add power to the previous studies. Knowledge, especially knowledge about complex subjects, is based on findings over time from different studies using different methodologies including different measures and samples.

One of the problems reflected in this large body of research is that different definitions of sexual assault have been used. Unless the distinction in definition is important I am going to use the term sexual assault to refer to any unwanted, forced, tricked, or manipulated sexual contact between an initiator of the contact (offender) and the target of the behavior (victim). Terms such as childhood sexual abuse, molestation, rape, sexual assault, and trauma are used to define the event that is being studied. Different studies examine different samples; for example, in a study of the effects of childhood sexual abuse, some children in the study will be sexually assaulted by fathers or stepfathers (incest), some by neighbors or teachers and some by strangers. Separation or segregation of the effects of sexual assault by type of offender is not possible in these studies unless methodological efforts were undertaken to compare harm or damage by type of offender (see discussion below of risk factors).

Different measures of harm or damage are used in different studies. Many studies are based on clinical samples such as victims who are seen at emergency rooms or in mental health service organizations. Such studies raise questions about how similar these victims are to those who have not disclosed or who are in the community. Studies often group victims abused by a wide range of offenders including strangers, relatives, romantic partners and the like. Many studies are cross sectional, examining victims at one point in time, and do not follow the victim over extended periods of time after the assault to see how the harms and damages may change over time. Few studies have examined victims before they were victimized. Most studies examine victims at one point in time and not over extended periods of time. Harms seen or not seen at one point in a lifetime may differ, disappear, or appear for the first time at some later point over a lifetime. Some types of damage may well not appear until years after the assault. For example, assaulted young children may not present with sexual performance problems until later in their development as older teenagers or as adults when sexual behavior is a normal part of life.

Many studies do not examine other factors in a victim's life that may be associated either with resiliency (less impact of the sexual assault due to characteristics of the victim or victim's environment such as social support) or increased risk for more negative reactions to sexual assault (e.g. a history of a prior sexual assault). It is increasingly recognized (as noted below) that victims of one type of trauma may be at risk for others so that what is often studied are victims with a number of different types of trauma exposure.

It should also be understood that sexual assault occurs to individuals (victims) who have had many positive and negative experiences which in part account for who they are at the time of the assault. These factors mediate the impact of the sexual assault. In a sense these experiences interact with the sexual assault and in part determine the impact of the assault. This statement

does not alter who is responsible for the assault nor the fact that had there been no assault there would be no impact of the assault for the victim to have to deal with. Nonetheless research has begun to identify these moderating variables, including personality characteristics of the victim, nature of events preceding (e.g. a history of prior victimization) and taking place at the time of the abuse (e.g. negative reactions of significant others to the sexual assault such as blaming the victim), and the meaning associated with the assault after it has taken place.

Notwithstanding these limitations, taken as a corpus of research and other evidence, there is simply no question that sexual assault can be a profoundly negative experience for the victim with significant immediate and long term impact on virtually every aspect of life.

Science by its very nature proceeds as individual factors (variables) are examined. Conclusions from one study may be rendered less meaningful depending on the variables that are examined. For example, in a well-designed study as part of the Americans Changing Lives longitudinal survey conducted by the Survey Research Center at the University of Michigan, the impact of childhood adversity on long term depression was examined. Eight forms of childhood adversity were examined, including early death of a mother or father, family violence, serious family drinking problems and others. Child abuse and specifically childhood sexual abuse or assault was not examined even though it is a relatively common adverse childhood experience (Kessler and Magee, 1994).

This document will focus primarily on published reviews of research. Much of this research is of a clinical and cross sectional nature. In some sections of this disclosure, when reviews of research are not yet available, I will present some findings from illustrative research addressing that specific harm or damage. I will present individual reports of studies taking place in the general community as these do not have the same level of concerns that clinical studies have and shed light on the impact of sexual assault. I will also discuss some research on specific areas of particular relevance to understanding the harm and damages flowing from sexual assault. Finally, I am going to insert various tables from some studies because I believe the actual data, especially when it compares victims with non-victim in the general population, may be of interest to the Court.

On a final note, as stated above there is not one consistent way that the research has used the terms childhood sexual abuse, sexual assault or rape. Some studies of childhood sexual assault, whether involving children or adults abused in childhood, include victims of stranger rape or victims meeting the legal definition of rape who were assaulted by individuals known or related to them. I am going to typically refer to these events as childhood sexual abuse (CSA) if the focus has been on the assault in childhood and sexual assault (SA) if the focus is on assaults taking place in adult years. If there is a reason that a particular study has used a specific term I will use the term employed in that research or review of research.

**Reviews of research.** There is a large body of individual research reports over many decades. This research has been periodically reviewed. Most of this research consists of clinical studies in which a specific population (e.g. victims in treatment, prostitutes, or drug abusers) is studied. There is always a question about how this special clinical sample may reflect the general

community. Nonetheless, over a large body of research a range of harms and damages have been identified with sexual assault.

A 1992 review by Beitchman, Zucker, Hood, DaCosta, Akman, and Cassavia (1992) summarized a large body of research available by the early 1990s. Their review noted CSA to be associated with adult symptomatology including sexual disturbances, homosexuality (a small but significant association based on a handful of studies), anxiety, fear and depression, suicide, and re-victimization.

In a 1993 review, Kendall-Tacket, Williams, and Finkelhor (1993) reviewed studies on the effects of childhood sexual abuse (abuse before age 18). The first table below shows the differences between sexually abused and non-sexually abused children in clinical and non-clinical comparison groups and the number of studies finding vs. not finding differences. Table 2 below shows that CSA accounted for the largest variation in seven major symptom groups when comparing CSA and non-abused comparison children. The subsequent table shows that sexually abused children have more significant problems than do children who are not sexually abused in non-clinical studies (column two in the table) and in most studies (see column four) comparing clinical samples of abused and non-abused children (but in a clinical sample for some reason other than abuse). A number of studies have found that among clinical samples abused and non-abused children do not show different symptoms. Table 2 from the study shows the range of effect sizes for seven major symptoms. As can be seen in the table the effect sizes are the greatest for **aggression and sexualized behavior**.

**It should be noted that an effect size is a measure of the strength of the association between two variables. The larger the number the greater the effect size.**

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Table 1  
Sexually Abused (SA) Versus Nonsexually Abused (NSA) Children, Nonclinical and Clinical Comparison Groups

Symptom	Nonclinical		Clinical			Total no. studies
	Total no. studies	SA > NSA <sup>a</sup> / no. studies	No. studies in which SA > NSA <sup>a</sup>	No. studies in which there was no difference	No. studies in which SA < NSA <sup>b</sup>	
Anxiety	14	5/8	1	2	0	3
Fear	6	5/5	1	0	2	3
Posttraumatic stress disorder						
Nightmares	3	1/1	1	—	—	1
General	5	1/1	1	0	0	1
Depression						
Depressed	17	10/11	1	2	2	5
Withdrawn	14	11/11	1	1	3	5
Suicidal	7	0/1	—	—	—	—
Poor self-esteem	11	3/0	—	—	—	—
Somatic complaints	16	9/11	1	3	3	7
Mental illness						
Neurotic	3	2/2	0	2	2	4
Other	12	6/7	0	4	2	6
Aggression						
Aggressive antisocial	15	10/11	0	1	6	7
Cruel	2	2/2	0	1	0	1
Delinquent	7	6/6	0	1	3	4
Sexualized behavior						
Inappropriate sexual behavior	21	8/8	6	2	0	8
Promiscuity	2	—	—	—	—	—
School/learning problems	13	5/6	0	1	2	3
Behavior problems						
Hyperactivity	9	5/7	0	1	4	5
Regression/immaturity	7	2/2	1	0	1	2
Illegal acts	4	—	—	—	—	—
Running away	6	1/1	—	—	—	—
General	5	2/2	—	—	—	—
Self-destructive behavior						
Substance abuse	5	—	—	—	—	—
Self-injurious behavior	4	1/1	—	—	—	—
Composite symptoms						
Internalizing	10	8/8	0	2	1	3
Externalizing	11	7/7	0	1	2	3

Note. The numbers in column 2 do not necessarily add up to the number in column 1 because column 1 includes some studies in which only the percentage of children with symptoms was specified.

<sup>a</sup> SA > NSA = SA children were more symptomatic than NSA children. <sup>b</sup> SA < NSA = SA children were less symptomatic than NSA children.

Table 2  
Average Effect Sizes for Seven Symptoms of Sexual Abuse

Symptom	No. studies	Effect sizes		
		Range of $\eta^2$	Average $\eta$	Average $\eta^2$
Aggression	4	.37-.71	.66	.43
Anxiety	3	.01-.28	.39	.15
Depression	6	.06-.68	.59	.35
Externalizing	5	.08-.52	.57	.32
Internalizing	6	.11-.70	.62	.38
Sexualized behavior	5	1.9-.77	.66	.43
Withdrawal	6	.12-.68	.60	.36

Kendall-Tacket, Williams, and Finkelhor (1993).

As noted by the authors, CSA was associated strongly with sexualized behavior and more general problematic behavior (e.g. depression, aggression) but in the case of the latter symptoms not more than other clinical children. Across studies generally 20% to 30% of victims exhibited a particular symptom except for PTSD, which most victims exhibited.

Also noted by the authors, certain symptoms appear to be more consistent within age groups than across ages. The most common symptoms for preschoolers, for example, were anxiety, nightmares, general PTSD, internalizing, externalizing, and inappropriate sexual behavior. For school age children the most common symptoms were fear, neurotic and general mental health behaviors, aggression, nightmares, school problems, hyperactivity, and regressive behavior. For adolescents the most common symptoms were depression, withdrawal, suicidal or self-injurious behavior, somatic complaints, illegal acts, running away and substance abuse. Nightmares, depression, withdrawn behavior, neurotic mental illness, aggression, and regressive behavior were most common across age groups (p. 167).

The authors note that previous studies have reported that between 21% and 49% of children thought to have been abused are asymptomatic at the time they were examined for the research.

Children who do not appear to be negatively impacted by CSA are of particular interest in understanding differential impact. A host of methodological issues plagues research in this area. How is negative impact defined and measured? What time frame is studied? As noted above some children who are asymptomatic at the time of disclosure will become symptomatic. Is the definition of asymptomatic limited to easily observable behaviors? Is there a "sleeper" effect that would be detected if subjects were followed for a long enough time period?

Spaccarelli and Kim (1995) address one of the most commonly asked questions, which is how symptoms vary over time. The authors note that seven studies have reported a reduction in symptoms over time, although some sexually abused children get worse. Follow up periods in these studies are relatively short; most 12 to 18 months and a few ranging from 2 to 5 years (p. 171). The authors note that 10% to 24% of children get worse over time and that some of these are children were asymptomatic at the time of intake.

Additionally, the authors note that studies in their review report 6% to 19% re-abuse rate over follow-up periods of 5 years or less.

In a 1995 review, Jumper examined twenty-six studies selected by rigorous criteria. The author notes, "This information provides evidence confirming the link between child sexual abuse and subsequent problems with depression in adulthood" (p. 721). In addition CSA was noted to be linked to self esteem problems in adulthood.

Also in 1995, Polusny and Follette reported on a review of published research available to them. Studies reviewed employed a wide range of methodologies including differing samples and measures. As reported by the authors, studies of non-clinical student samples point to CSA being associated with general psychological distress including various symptoms and psychiatric diagnoses. Studies report CSA associated with depression although rates range from 4% to 66% for non-abused and 13% to 88% for abused subjects. Differing methodologies may account for

the large range. Studies also report CSA to be associated with self-harm behaviors including suicidal behaviors and self-mutilation. Anxiety, substance abuse, eating disorders, dissociation and memory impairment, somatization, and personality disorders are also reportedly associated with CSA.

The authors also reviewed research pertaining to social and interpersonal functioning. As noted by the authors, studies point to increased hostility, fear, and distrust of others in CSA survivors. Limited research available at the time points to relationship problems in couples where one of the dyad is a survivor. Also, limited research points to parenting problems in adult survivors (e.g. reported feelings of inadequacy as a parent). More research has pointed to problems in sexual satisfaction and sexual functioning in CSA survivors. High-risk sexual behaviors (e.g. a high number of sexual partners, or unprotected sex) and re-victimization are also noted.

A 1999 review (Weiss, Longhurst, and Mazure, 1999) of seven studies using community-based samples examining the link between CSA and depression noted that "childhood sexual abuse is associated with adult-onset depression in both men and women..." (p. 816). The following table shows for each study the percent of abused (column 9) and non-abused subjects (column 10) with depression. The authors also report that four of five studies with non-clinical college student samples found a link between CSA and depression. They also note that in nine clinical studies, all studies found a similar link.

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TABLE 1. Community Studies Examining the Relationship of Childhood Sexual Abuse and Adult-Onset Depression in Women

Study	Year	N	Country	Diagnostic Tools		Depression Assessment Period	Childhood Sexual Abuse			Chi-Square Analysis <sup>a</sup> (df=1 unless otherwise specified)		Definition of Child Sexual Abuse
				Depression Measures <sup>b</sup>	Childhood Sexual Abuse Assessment		% of Subjects	With Abuse	Without Abuse	$\chi^2$	p	
Bifulco et al. (12)	1991	286	Britain	PSE	Two screening questions and additional questions for positive responses	3 years	9	64	25	14.48	<0.001	Any sexual contact before age 17 years, excluding willing contact in teens and with nonrelated peers
Andrews et al. (13)	1985	101	Britain	PSE	Two screening questions and additional questions for positive responses	12 months	12	29	13	4.48	<0.05	Any sexual contact before age 17 years, excluding willing contact in teens and with nonrelated peers
Mullen et al. (14)	1988	374	New Zealand	GHC; PSE	Two screening questions and semistructured interview for positive responses	Lifetime	13 <sup>c</sup>	20.7	5.3	6.92	<0.01	Some form of genital contact before age 12 years
Mullen et al. (15)	1993	526	New Zealand	GHC; PSE	Semistructured interview with detailed questions about childhood sexual abuse	Lifetime	32	13	5	7.70	<0.01	At least genital contact before age 16 years, excluding noncoercive actions with peers, intrafamilial
Bushnell et al. (16)	1992	301	New Zealand	DIS-3A	Five questions about childhood sexual abuse	Lifetime	13	— <sup>d</sup>	—	—	—	At least genital contact before age 16 years, excluding noncoercive actions with peers, intrafamilial
Bagley and Rennie (17)	1985	377	Canada	CES-D; Middlesex	Modified Finkelhor Childhood Sexual Abuse Survey	Current	22	18	3	16.48	<0.001	Before age 16 years
Peters (18)	1988	119	United States	SADS-L; DIS-Beck	Childhood sexual abuse semistructured interview	Lifetime	— <sup>e</sup>	—	66	8.88	<0.05	Noncontact abuse before age 18 years or contact abuse before age 18 years involving intentional, unambiguous behavior of physical nature with perpetrator who was more than 5 years older or used coercion

<sup>a</sup> PSE=Present State Examination; GHC=General Health Questionnaire; DIS=National Institute of Mental Health Diagnostic Interview Schedule; DIS-3A=National Institute of Mental Health Diagnostic Interview Schedule, version 3A; CES-D=Center for Epidemiologic Studies Depression Scale; Middlesex=Middlesex Hospital Questionnaire; SADS-L=Schedule for Affective Disorders and Schizophrenia—Lifetime Version; Beck-Beck Depression Inventory Short Form.

<sup>b</sup> Values corrected.

<sup>c</sup> General population estimate, 2.5%.

<sup>d</sup> Childhood sexual abuse examined as a function of depression, odds ratio=2.0.

<sup>e</sup> Noncontact abuse, 11%; contact abuse, 48%.

<sup>f</sup> Noncontact abuse, 56%; contact abuse, 85%.

Weiss, Longhurst, & Mazure (1999).

Paolucci, Genuis, & Violato (2010), in the most recent review, reviewed studies from 1981 to 1995. Thirty-seven studies met their stringent criteria for inclusion in the meta-analysis. Six major abuse effects were examined: PTSD, depression, suicide, sexual promiscuity, victim-perpetrator cycle, and poor academic achievement. These 37 studies included 88 samples comprising 25,367 subjects, of which 36% reported childhood sexual abuse. This major review employed an effect size analysis in which a positive effect indicates that CSA had a negative impact on functioning and a negative effect size indicated that CSA had a positive consequence to the examined outcomes (p. 26). As can be seen in the table (column seven), all effect sizes are positive.

The results of this recent meta-analysis indicate the following: A substantial effect of childhood sexual abuse was found for PTSD, depression, suicide, sexual promiscuity, and academic achievement. The largest effect sizes were for suicide (.44), depression (.44) and PTSD (.40).

Interestingly, an analysis of mediating variables (e.g. age at time of abuse, contact vs. non-contact offense, etc.) did not find an increased risk for negative outcomes based on any of these potential mediating variables. Also of interest and similar to an early review by Jumper (1995) there were no differences in negative outcomes by gender.

CSA Outcome Measures and Effect Sizes

Outcome	No. of incidents	N	$d_{unw}$	SD	CI (95%)	$d_{av}$	SD	CI (95%)	File drawer	BESD <sub>av</sub>	% Increase
PTSD	26	6,860	.50	.56	-.06 to 1.05	.40	.03	.37 to .43	73.40	r = .20 59.85 48.14 40.14 59.85	.20
Depression	25	6,417	.63	.73	-.11 to 1.36	.44	.03	.41 to .47	95.30	r = .21 60.73 39.26 39.26 60.73	.21
Suicide	10	4,008	.64	.47	.17 to 1.11	.44	.04	.40 to .48	39.18	r = .21 60.66 39.33 39.33 60.66	.21
Sexual promiscuity	14	4,386	.59	.79	.20 to 1.38	.29	.04	.25 to .32	49.29	r = .14 57.66 42.93 42.93 57.66	.14
Victim-perpetrator cycle	7	2,513	.41	.30	.10 to .71	.16	.05	.11 to .21	14.88	r = .03 54.03 45.96 45.96 54.03	.08
Academic performance	6	1,103	.24	.51	-.26 to .75	.19	.07	.12 to .26	5.70	r = .10 54.78 45.21 45.21 54.78	.10

Note: CSA = child sexual abuse;  $d_{unw}$  = average unweighted effect size;  $d_{av}$  = average weighted effect size; CI = confidence interval; BESD<sub>av</sub> = average weighted binomial effect size display

Paolucci, Genuis, Violato (2001).

It should be noted that these reviews tend, to some extent, to review the same body of research with each subsequent review adding research published after the prior review. The reviews represent the analysis of a range of scholars to a large body of individual research studies. While the individual studies reflect the methodological concerns briefly noted above, it is also important to note that a number of scholars have reviewed this body of research and come to generally the same conclusions about what that research tells us about CSA.

**College samples.** A 1998 meta-analysis (Rind, Tromovitch, and Bauserman, 1998) caused a major reaction among child abuse and trauma professionals. This meta-analysis was based on 59 studies using samples made up of college students. Across studies 14% of male and 27% of female students reported CSA (although the definition of CSA varied across studies). Although fondling was the most common form of CSA, 13% of male and 33% of female victims reported intercourse. The table below depicts the effect sizes for 18 symptoms (e.g. depression, anxiety) associated with CSA and indicates for all but one symptom (locus of control) CSA subjects were slightly less well adjusted than non-victims. Subsequent analyses suggest that differences are confounded with family background which better predicted adjustment problems and statistical control procedures tended to eliminate the association between adjustment and CSA.

*Meta-Analysis of 18 Symptoms Associated With Child Sexual Abuse From College Samples*

Symptom	<i>k</i>	<i>N</i>	$r_u$	95% confidence interval for $r_u$	<i>H</i>
Alcohol	8	1,645	.07	.02 to .12	2.97
Anxiety	16 (18)	6,870 (7,365)	.13 (.13)	.10 to .15	4.62 (28.72*)
Depression	22 (23)	7,778 (7,949)	.12 (.13)	.10 to .14	25.71 (49.72*)
Dissociation	8	1,324	.09	.04 to .15	1.86
Eating disorders	10	2,998	.06	.02 to .10	9.92
Hostility <sup>a</sup>	5	1,497	.11	.06 to .16	11.22*
Interpersonal sensitivity	7	1,934	.10	.06 to .15	11.78
Locus of control	6	1,354	.04	-.02 to .09	1.65
Obsessive-compulsive	7	1,934	.10	.06 to .15	5.01
Paranoia	9 (10)	1,881 (2,052)	.11 (.13)	.07 to .16	10.34 (20.07*)
Phobia	5	1,497	.12	.07 to .17	8.08
Psychotic symptoms	10 (11)	2,009 (2,180)	.11 (.13)	.06 to .15	10.13 (23.84*)
Self-esteem <sup>b</sup>	16	3,630	.04	.01 to .07	51.31*
Sexual adjustment <sup>a</sup>	20	7,723	.09	.07 to .11	39.49*
Social adjustment	15 (17)	3,782 (4,332)	.07 (.09)	.04 to .10	20.37 (40.62*)
Somatization	18 (19)	4,205 (4,376)	.09 (.10)	.06 to .12	15.20 (33.21*)
Suicide	9	5,425	.09	.06 to .12	10.94
Wide adjustment	14 (15)	3,620 (3,768)	.12 (.11)	.08 to .15	18.77 (24.25*)

*Note.* *k* represents the number of effect sizes (samples); *N* is the total number of participants in the *k* samples;  $r_u$  is the unbiased effect size estimate (positive values indicate better adjustment for control subjects); *H* is the within-group homogeneity statistic (chi square based on  $df = k - 1$ ). Cutting or trimming outliers was performed when effect sizes were heterogeneous in an attempt to reach homogeneity. Original numbers, before cutting or trimming, are shown in parentheses. 95% confidence intervals are based on final (cut or trimmed) distributions.

<sup>a</sup> Cutting or trimming outliers failed to produce homogeneity; thus, only original numbers are shown.

\*  $p < .05$  in chi-square test.

Rind, Tromovitch, & Bauserman (1998).

A host of methodological problems have been voiced about this meta-analysis. College students who must manage class schedules, studying, and (often) work are probably among the most functional of CSA victims (Ondersma, Chaffin, Berliner, Cordon and Goodman, 2001). This study created a major public and academic debate not just about the findings but about the role of science and professions in public debate of controversial issues (see Lilienfeld, 2002).

**General population studies.** Studies of the general population, especially those based on random samples of subjects, are extremely important. Factors that may account for variation in functioning and are not measured or are unknown are assumed to be in similar proportions in the victim and non-victim samples due to random selection. Subjects are also not selected for some specific factors such as abuse status or mental health condition and thus findings may be more relevant to understanding impact of assault in the general population.

Burnam, Stein, Golding, Siegel, Sorenson, Forsythe and Telles (1988) report on a large cross-sectional probability study of 3,132 households in two Los Angeles communities and compared lifetime diagnoses of nine major mental disorders in those who reported and did not report sexual assault. Just over thirteen percent (13.2%) of the households reported lifetime sexual assault (i.e., a sexual assault at some point over a lifetime). One third of sexual assault victims reported one lifetime assault; two thirds reported two or more. Lifetime assaults were more common in women (16.7%) than in men (9.4%) and in non-Hispanic white women (19.9%) than Hispanics

(8.1%). Eighty percent of assaulted individuals were assaulted between ages 16 and 20. The table from Burnam et al. (1988) duplicates the percent of households reporting each of nine mental disorders between sexually and non-sexually assaulted individuals. Of note, the rate of onset for non-assaulted individuals is relatively constant while for assaulted individuals the onset is higher within the year after the assault.

*Mental Disorders Among Sexually Assaulted and Nonassaulted in Full Household Sample*

Mental disorder	Percentage with disorder	
	Sexually assaulted (n = 432)	Non-assaulted (n = 2,693)
Major depressive episode	17.93 (1.9)	4.68 (0.5)**
Mania	2.51 (0.8)	0.28 (0.1)*
Schizophrenia or schizophreniform	1.63 (0.7)	0.41 (0.1)
Alcohol abuse or dependence	18.38 (2.2)	13.80 (0.7)
Drug abuse or dependence	20.41 (2.6)	5.49 (0.5)**
Antisocial personality	4.64 (1.1)	2.41 (0.3)
Phobia	22.18 (2.1)	9.71 (0.7)**
Panic disorder	4.55 (1.1)	0.82 (0.2)**
Obsessive-compulsive disorder	5.26 (1.0)	1.37 (0.2)**

*Note.* Standard errors of the prevalence estimates given in parentheses.  
\*  $p < .01$ . \*\*  $p < .001$ .

Burnam et al. (1988).

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*Mental Disorders Among Sexually Assaulted and Demographically Matched Nonassaulted*

Mental disorder	Percentage with disorder		Risk ratio Assaulted/ nonassaulted
	Sexually assaulted (n = 432)	Non- assaulted (n = 432)	
Major depression			
Onset after assault	13.43	5.56**	2.4
Onset before assault	5.79	1.39**	4.1
Mania			
Onset after assault	1.93	0.23	—
Onset before assault	0.69	0.23	—
Schizophrenia or schizo- phreniform			
Onset after assault	1.16	0.00	—
Onset before assault	0.93	0.23	—
Alcohol abuse or dependence			
Onset after assault	15.74	6.76**	2.3
Onset before assault	4.86	2.80**	1.8
Drug abuse or dependence			
Onset after assault	18.37	7.48**	2.5
Onset before assault	4.19	1.64**	2.6
Antisocial personality			
Onset after assault	0.69	0.00	—
Onset before assault	4.63	1.39**	3.3
Phobia			
Onset after assault	10.42	2.55**	4.0
Onset before assault	11.57	6.03**	1.9
Panic disorder			
Onset after assault	2.78	0.70*	4.0
Onset before assault	1.85	0.46	—
Obsessive-compulsive disorder			
Onset after assault	3.94	0.93**	4.0
Onset before assault	1.62	0.46	—

Note. Dashes indicate that rates did not differ significantly.  
\*  $p < .01$ . \*\*  $p < .001$ .

Burnam, et al. (1988).

Golding (1996) examined the functional impact of a sexual assault history in two general population surveys (N=6,024) in Los Angeles and North Carolina as part of the Epidemiological Catchment Area study. Results (see the table below) indicate that bed days and restricted activity days were significantly more common for persons with a history of sexual assault than those without. The odds of restrictions in normal activities were one and one-half times greater for those with a history of sexual assault. Repeated assaults, assaults by a spouse, and assaults associated with sexual disturbances were more strongly associated with functional impairment (i.e. repeated assault).

**Table 1. Prevalence of Functional Limitations, Physical Symptoms, and Depression Among Persons With and Without Sexual Assault History**

Functioning and Mediators	Sexual Assault History		$\chi^2$	<i>p</i>	<i>N</i>
	No	Yes			
Bed days	10.1	15.9	7.816	.006	6010
Restricted activity days	11.7	18.9	9.804	.002	6001
Physical symptoms <sup>a</sup>	41.7	67.9	93.647	<.001	6025
Depression <sup>b</sup>	5.9	19.8	53.206	<.001	6024

Note. All chi-squares are on 1 degree of freedom. *N* = 6,025 for each analysis of physical symptoms and *N* = 6,024 for analysis of depression.

<sup>a</sup>Prevalence of more than the sample median number of severe physical symptoms.

<sup>b</sup>Prevalence of any depression diagnosis (major depression or dysthymia).

Golding (1996).

Fergusson, Horwood, and Lynskey (1996) report on a study of New Zealand children studied to the age of eighteen. One thousand nineteen children were interviewed in interviews that ranged from 1.5 to 2 hours. Children were grouped into those who reported no sexual contact and those reporting noncontact, contact or intercourse sexual abuse. The table below presents data on the percentage of children who experienced major mental health problems in each of these groups. The authors also report on analyses to control for confounding variables, family and other background variables (e.g. parental education or family socioeconomic status). Although examining confounding variables reduced the association between childhood sexual abuse and mental health outcomes for six of the measures, the association remained significant. The association between abuse and substance abuse was unchanged by entering the family and background variables and the association with conduct problems and child sexual abuse became stronger when considering family and background variables.

**TABLE 1**  
Rates (%) of Disorder (16 to 18 Years) by Extent of CSA and ORs (95% CIs) for Disorder for Each Type of CSA in Comparison with Nonabused Group

Outcome	Extent of CSA				<i>p</i>	OR (95% CI) for Outcome (in Comparison with Nonabused Group)		
	None ( <i>n</i> = 913)	Noncontact ( <i>n</i> = 24)	Contact ( <i>n</i> = 46)	Intercourse ( <i>n</i> = 36)		Noncontact Abuse Only	Contact	
							Abuse/Not Intercourse	Intercourse
Major depression	18.0	50.0	50.0	63.9	<.0001	4.6 (2.0-10.3)	4.6 (2.5-8.3)	8.1 (4.0-16.3)
Anxiety disorder	14.2	41.7	39.1	44.4	<.0001	4.3 (1.9-9.9)	3.9 (2.1-7.2)	4.8 (2.4-9.5)
Conduct disorder	4.3	0.0	8.7	16.7	<.002	... <sup>a</sup>	2.1 <sup>b</sup> (0.7-6.3)	4.5 (1.8-11.4)
Alcohol abuse/dependence	17.6	29.2	34.8	41.7	<.0001	1.9 <sup>b</sup> (0.8-4.7)	2.5 (1.3-4.7)	3.3 (1.7-6.6)
Other substance abuse/dependence	11.2	8.3	15.2	38.9	<.0001	0.7 <sup>b</sup> (0.2-3.1)	1.4 <sup>b</sup> (0.6-3.3)	5.1 (2.5-10.2)
Suicide attempt (ever)	4.1	4.2	10.9	33.3	<.0001	1.0 <sup>b</sup> (0.1-7.8)	2.9 (1.1-7.7)	11.8 (5.5-25.5)

Note: CSA = childhood sexual abuse; OR = odds ratio; CI = confidence interval.

<sup>a</sup>Unable to estimate OR because of 0% prevalence of conduct disorder in noncontact abuse group.

<sup>b</sup>OR not significantly different from 1 (*p* > .05).

Fergusson, Horwood, & Lynskey (1996).

In a Canadian study, MacMillan, Fleming, Streiner, Lin, Boyle, Jamieson, Duku, Walsh, Wong, and Beardslee (2001) report on the association of a history of physical or sexual child abuse and five major psychiatric illnesses. The 1990 Ontario Health Survey was a comprehensive survey of physical health of provincial residents. For both male and females individuals, the lifetime prevalence of psychiatric disorders was increased by a history of physical or sexual abuse in childhood. For females the association was significant for all disorders. Two disorders (major depression and illicit drug use/dependence) did not show an increased risk for physically abused males vs. non-abused individuals. Men who were sexually abused in childhood had higher rates of psychiatric disorders, but only the association with alcohol problems reached statistical significance. Both physical and sexual abuse were associated with mental illness but more strongly for women than men. Of interest, among females who reported childhood physical abuse, 33% also had a history of sexual abuse (8% of physically abused males also reported childhood sexual abuse).

A recent British study reports on a representative sample of men and women in the United Kingdom (Plant, Plant, and Miller, 2005). Subjects were asked to indicate during the previous twelve months if any of eight possible behaviors had "interfered with daily life." Of the sample, 12.5% of females and 11.7% of males reported having been sexually abused. The following table presents the results. As can be seen, the differences between abused and non-abused individuals' experiences with problems in the previous twelve months are small but several are significant. For example, for women, eating problems were associated with sexual abuse at any age. When the authors combined all problems, sexual abuse before the age of sixteen was associated with having at least one problem behavior. Thirty six percent of abused vs. 20.7% of non-abused adults had at least one problem behavior. For both genders, being abused after age 16 was associated with self report of poorer physical health than non-abused adults. Abused adults reported poorer mental health than non-abused.

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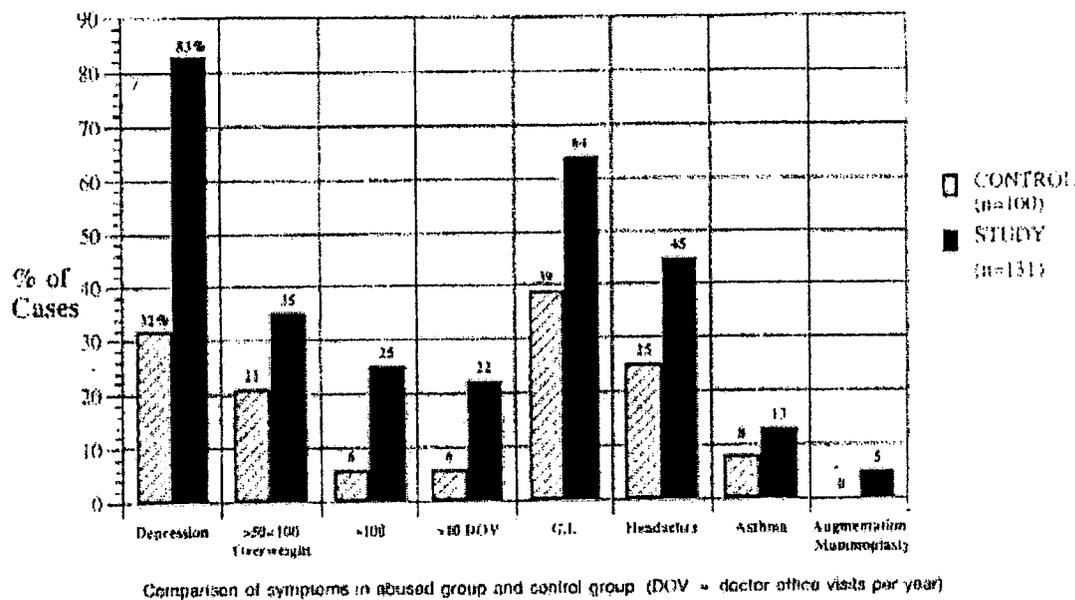
TABLE 1. Sexual abuse and problem behaviours (N, % with the problem)

	Sexual abuse prior to age 16		Fisher exact probability	Sexual abuse post age 16		Fisher exact probability	
	No	Yes		No	Yes		
Women	Gambling	2 (0.2%)	0 (0.0%)	NS	2 (0.2%)	0 (0.0%)	NS
	Exercising	13 (1.5%)	4 (3.3%)	NS	14 (1.6%)	3 (2.9%)	NS
	Working	59 (7.0%)	8 (6.7%)	NS	63 (7.3%)	3 (2.9%)	NS
	Shopping	35 (4.2%)	10 (8.3%)	.060	33 (3.8%)	12 (11.8%)	.001
	Eating too much	53 (6.3%)	15 (12.5%)	.021	54 (6.2%)	14 (13.7%)	.012
	Intense dating	8 (1.1%)	2 (1.7%)	NS	0 (0.0%)	3 (2.9%)	NS
	Sexual activity	3 (0.4%)	3 (2.5%)	.029	4 (0.5%)	2 (2.0%)	NS
	Using the internet	10 (1.2%)	3 (2.5%)	NS	8 (0.9%)	5 (4.9%)	.008
	Any of these problems	148 (17.6%)	34 (28.3%)	.008	149 (17.2%)	30 (29.4%)	.004
	Men	Gambling	16 (2.0%)	2 (1.9%)	NS	18 (2.1%)	0 (0.0%)
Exercising		20 (2.5%)	16 (15.5%)	.001	28 (3.2%)	2 (6.0%)	NS
Working		165 (13.3%)	29 (24.8%)	.003	125 (14.3%)	5 (17.3%)	NS
Shopping		30 (3.6%)	16 (13.5%)	.013	38 (4.3%)	2 (6.0%)	NS
Eating too much		27 (3.4%)	6 (5.7%)	NS	31 (3.5%)	1 (3.4%)	NS
Intense dating		1 (0.1%)	0 (0.0%)	NS	1 (0.1%)	0 (0.0%)	NS
Sexual activity		23 (2.9%)	0 (0.0%)	.008	27 (3.1%)	4 (13.9%)	.015
Using the internet		26 (3.3%)	11 (9.5%)	.002	34 (3.9%)	4 (13.9%)	.030
Any of these problems		190 (24.0%)	47 (44.8%)	.001	224 (25.5%)	12 (41.4%)	.052
Both		Gambling	18 (1.1%)	2 (0.8%)	NS	20 (1.1%)	0 (0.0%)
	Exercising	33 (2.0%)	14 (5.2%)	.001	42 (2.4%)	5 (3.8%)	NS
	Working	164 (10.1%)	34 (15.1%)	.028	188 (10.3%)	8 (5.1%)	NS
	Shopping	65 (4.0%)	20 (8.9%)	.003	71 (4.1%)	14 (10.7%)	.032
	Eating too much	69 (4.9%)	21 (9.3%)	.011	85 (4.9%)	15 (11.5%)	.004
	Intense dating	10 (0.6%)	2 (0.9%)	NS	10 (0.6%)	3 (2.3%)	.057
	Sexual activity	26 (1.6%)	12 (5.3%)	.001	31 (1.8%)	6 (4.5%)	.040
	Using the internet	36 (2.2%)	14 (6.2%)	.002	42 (2.4%)	9 (6.9%)	.007
	Any of these problems	316 (20.7%)	81 (36.0%)	< .001	373 (21.4%)	42 (32.1%)	.006

Plant, et al. (2005).

Elliott, Mok, and Briere (2004) report on a general population study of 941 individuals. Results indicate that adults assaulted in adulthood were more symptomatic on all ten scales of the Trauma Symptom Inventory (TSI) than non-assaulted peers. Assaulted men were more symptomatic than women on Dysfunctional Sexual Behavior and Sexual Concerns. Women were more symptomatic on Tension Reduction Behavior than men. Younger subjects were more symptomatic than older subjects. Men were more angry than women assaulted in adulthood. CSA was higher in ASA adults than non-assaulted subjects (59% vs. 18%).

**Health outcomes.** A relatively new interest is the relationship between traumatic events and health outcomes. In an early but elegant study in its simplicity, Felitti (1991) reports on 131 sequential adult patients from an HMO. Results from the following table present the differences between patients who reported a history of childhood or adult sexual assault and a non-abused comparison group of patients.



Felitti (1991).

Springer, Sheridan, and Carnes (2003) reviewed research on health outcomes associated with CSA. The authors note that previous research has suggested an association with a large number of health related concerns, including psychological and somatic concerns, depression, anxiety, eating disorders, PTSD, chronic pain, fibromyalgia, chronic fatigue syndrome, and irritable bowel syndrome.

Felitti, Anda, Nordenberg, Williamson, Spitz, Edwards, Koss, and Marks (1998) examined the impact of seven categories of adverse childhood experiences. This large study of Kaiser enrollees in San Diego found that 25.6% reported living (as a child) with someone who abused substances followed by 22% reporting having been sexually abused as a child. Eighteen percent reported living with a mentally ill family member or having a family member attempt suicide. The prevalence and risk increased for smoking, severe obesity, physical inactivity, depressed mood, and suicide attempts as the number of adverse childhood events increased. This was also

true for alcoholism, injection of illicit drugs, >50 sexual partners, and history of a sexually transmitted disease.

This 1998 study of 9,508 adults examined the relationship of health risk behaviors and disease in adulthood, exposure to childhood emotional, physical, or sexual abuse and household dysfunction during childhood. Twenty two percent of the sample reported childhood sexual abuse. Childhood exposure was linked to increased risk for health behaviors known to lead to early death (see above). The more childhood exposures the greater the risk for more health risk behaviors. Children exposed to one type of exposure were more likely to be exposed to others and the larger the number of exposures the greater the risk for the leading causes of death. This finding indicates that the more childhood exposure the greater the risk for ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease. The authors note the link to these outcomes appears to be behaviors such as smoking, alcohol or drug abuse, overeating, or sexual behaviors.

Arnow (2004) reports on a review of studies on the relationship between childhood maltreatment and adult health and psychiatric outcomes. Results from one study indicate that 78% of women and 82% of men who report CSA met criteria for one lifetime psychiatric disorder vs. 49% and 51% of subjects without a history. Another study reviewed relative risk for depression and found the risk was 2.4 times greater for those with a history of physical abuse, 1.8 for CSA and 3.3. for those with a combined CSA and physical abuse history. The author concludes, "Overall the evidence is substantial that childhood maltreatment is a risk for a wide range of adult psychiatric sequelae...and with later health problems involving both medically explained and unexplained physical symptoms" (p. 12 and 13).

A 2004 study (Batten, Aslan, Maciejewski, and Mazure, 2004) reports on results from a nationally representative sample of over 5,000 adults. In a controlled analysis, results indicate that childhood maltreatment was associated with greater odds of developing cardiovascular disorders for women and greater odds for depression (more so in men but also women).

**Males.** Although it is generally recognized that research on male victims of CSA is limited, there has been an increasing interest in this topic. Typical of studies in a new area, there has been an interest in descriptive statistics on the nature and extent of the problem (see e.g., Walker, Archer, and Davies, 2005; Sterman, DelBove, and Addison, 2004). Walker et al. report that male victims report anxiety, depression, increased feelings of anger and vulnerability, loss of self image, self-blame, and self harming behaviors.

An early review (Dhaliwal, Gauzas, Antonowicz, and Ross, 1996) points to the relative inattention to the study of male victims of childhood sexual assault. Reviewing a largely clinical research literature, the authors point out that studies report that male victims rate childhood sexual abuse more positively than do female victims. One study noted that males are more likely to exhibit externalizing (e.g. aggression, lack of control over behavior) than internalizing (emotional regulation) coping mechanisms. Reporting on another study the authors note that although victims rated sexual abuse in a positive manner, they still scored lower on scales of well being than non-victims. Other studies report male victims to be more maladjusted using different measures of maladjustment, including the MMPI and TSI. Other studies failed to find

significant differences between male victims and non-victims. Differences in measures may be an important issue here. For example, citing an early 1988 study of the normal population in Los Angeles, Stein, Golding, Siegel, Burnam, & Sorenson (1988) found no differences in the percentage of psychiatric disorders (e.g. major mental illnesses such as schizophrenia) but did find differences in the percent of affective disorders (13.4% vs. 2.4%) and anxiety disorders (20.8% vs. 5.6%). Results for the limited number of studies that examined self esteem were mixed. Three studies reviewed by the authors pointed to victims vs. non-victims reporting problems with intimacy or allowing partners to become abusive.

A number of studies (although methodologically unsophisticated by today's standards) examined the sexual functioning of male victims and report problems with sexual identity, sexual aggression, lower sexual self esteem, fear of emotions that resemble those associated with sexual abuse while being intimate with a partner (e.g. fear or body sensations), and specific sexual performance problems. There is general agreement across the studies reviewed that male victims are at risk for sexual problems. These include sexual identity confusion, homophobia, and a potential link to sexual offending. Other problems reported in the literature include substance abuse and anger.

A year later, Rentoul and Appleboom (1997) also pointed out the lack of research on sexual assault of males. They begin their review by noting that there are many similarities between the reports of male and female victims, including feeling fear at the time of the assault, as well as shock, terror, humiliation, anger and a sense of unreality and disbelief. Males and females react with frozen helplessness and submission. Both sexes are likely to develop PTSD. Men are more likely to be victims of greater physical trauma, multiple assaults and assailants, to be held in captivity longer, to be attacked by strangers, and to be attacked with offenders who use or display weapons. Long term effects include a sense of humiliation and embarrassment, mood changes such as increased irritability, anger and hostility, depression and suicidality, anxiety, and sexual dysfunctions.

In a 1990 review, Urquiza and Capra (1990) review research available on sexual abuse of males and conclude, "There is sufficient evidence to suggest that the sexual victimization of boys has a detrimental effect on the behavior, self-concept, psychophysiological symptomatology, and psychosexual behaviors and functioning. While research suggests problematic sequelae in most areas identified in this chapter, two clusters of problems stand out: disturbances of conduct (e.g. aggressiveness, delinquency, and acting out) and inappropriate sexual behaviors (e.g. confusion about sexual issues, compulsive sexual behaviors, and sexual acting out/offending)" (p. 113).

In a review in 2007, Tewksbury notes that estimates of the number of men reporting sexual assaults vary dramatically across studies. The literature suggests that males are less likely to report, assaulted men who seek out therapy often do not report the assault, men without serious injury are likely to deny the assault, and some rape crisis centers do not see males. Summarizing a number of studies, Tewksbury notes that rape of males is more likely to lead to injury (especially non-genital injury) and involve a weapon than with females, and males are not likely to seek medical attention without injury. While most male victims do not experience injury, the majority of males who are anally penetrated are injured, and male victims often report somatic symptoms including tension headaches, nausea, ulcers, and colitis. No mental health symptom

has been universally reported in male victims but what has been reported includes decreased appetite and loss of appetite; nausea and vomiting; constipation and abdominal pain; fecal incontinence; sleep difficulties; depression; somatic complaints; alcohol, drug and tobacco use; suicide attempts and violence.

Tewksbury, summarizing largely clinical studies, notes males victimized as children are 2.4 times more likely to report psychological disturbance than men abused in adulthood (1.7 times) (see King, Coxell, and Mazey, 2002). Other effects include depression, anxiety, and substance abuse. Also reported are a sense of stigma, shame and embarrassment (see QOL below), self harm, self blame, as well as negative body image and questioning one's sexuality and in some cases an increase in sexual acting out. Suicide attempts are noted in some studies.

In another review of mostly clinical studies, Romano and De Luca (2001) summarize a large research literature on the effects of male sexual abuse noting the following symptoms that have been identified in the clinical studies: in adult males and young men, low self-esteem, depression, guilt, anxiety, anger, substance abuse, interpersonal relationship problems, confusion in male gender identity and sexual orientation, and offending behavior. Also noted are depression, guilt and self-blame, negative self esteem, anger, anxiety, negative impacts of sexuality including avoidance of sex or hyper sexuality.

Noting that there are no previous European studies on male victims and psychological disturbance, King, Coxell, and Mezey (2002) report on a study of male patients seen at English general practice and genitourinary medical services. Men who were abused in childhood were 1.7 times more likely than non-victims to report a psychological disorder and self-harm was the mostly likely to occur. The table below depicts the increased risk for emotional problems for those who reported child sexual abuse, adult sexual assault, and consenting sexual experience under age 16.

Table 1 Prevalence of psychological disturbance

	Child sexual abuse, irrespective of other experiences (n = 150)	Sexual molestation as an adult, irrespective of 'consensual' experiences (n = 69)	'Consensual' sexual experiences as a child (n = 191)	Total population (n = 2698)
Psychological disturbance <sup>1</sup>	50%	35%	35%	32%
Sexual problems	16%	12%	7%	6%
Self-harm	21%	18%	13%	8%
Substance misuse	21%	23%	17%	13%
Any of the above	62%	56%	37%	39%

1. Anxiety, depression and/or sleep disturbance

Table 2 Associations with each type of sexual molestation (odds ratios and 95% confidence intervals)

	Psychological disturbance <sup>1</sup>	Sexual problems	Self-harm	Substance misuse	Any of these problems
Child sexual abuse	2.0 (1.4-2.8)	3.2 (1.9-5.4)	3.7 (2.3-5.8)	2.4 (1.5-3.6)	2.4 (1.7-3.5)
Adult sexual assault	1.0 (0.6-1.7)	1.9 (0.8-4.3)	2.6 (1.3-5.2)	1.6 (0.9-3.1)	1.7 (1.0-2.8)
'Consensual' sexual experiences when aged under 16 years <sup>2</sup>	1.1 (0.8-1.5)	1.5 (0.8-2.6)	1.7 (1.0-2.8)	1.3 (0.8-1.9)	0.9 (0.6-1.2)

1. Anxiety, depression and/or sleep disturbance.

2. No history of sexual molestation as a child or adult.

King, Coxell, & Mezey (2002).

In a study of a stratified random sample of 750 males ages 18 to 27 in Calgary, Canada, Bagley, Wood, and Young (1994) found that 15.5% reported one or more unwanted sexual experiences before age 17. The following table shows the differences on mental health indicators between those not abused and those abused on either a short or long term basis. Males who experienced multiple events of sexual abuse in their own childhood (N=52) were more likely to report ongoing sexual contact with an underage person.

**Table 3. Mental Health Indicator Means within Categories of Child Sexual Abuse**

	No Abuse N = 633	Short-Term Abuse N = 65	Long-Term Abuse N = 52	Eta <sup>a</sup>
Trauma Symptom Checklist (TSC-33)	15.77 (3.8)	18.47 (5.5)	25.14 (7.2)	0.34
CESD Depression Scale	14.31 (3.4)	16.82 (5.1)	25.58 (7.1)	0.32
MHQ Psychoneurosis Measure	37.11 (6.4)	44.69 (8.9)	61.10 (14.7)	0.35
Suicidal Ideas and Behaviour Scale	0.71 (1.3)	1.63 (2.7)	2.36 (2.9)	0.39
Percent Seriously Depressed (28+ score on the CESD depression scale)	6.0%	7.9	19.2% <sup>b</sup>	
Percent Making Suicidal Gesture in Lifetime	4.1%	7.9%	30.8% <sup>b</sup>	
Percent Attempting Suicide in Lifetime	0.3%	1.6%	9.6% <sup>b</sup>	

<sup>a</sup> Eta is a measure of association derived from the analysis variance of the dependent measure across the categories of sexual abuse (Nie et al., 1976). Figures in brackets are standard deviations. All values of Eta are significant at the 1% level or beyond.

<sup>b</sup> Significance testing of percentages calculated by combining no abuse and single-episode groups versus the multiple-episode groups. All comparisons are significant at the 1% level or beyond, according to Fisher's *t*-test for proportions.

Bagley, Wood, and Young (1994).

**Gambling.** A small but recent research literature is pointing to the fact that addictive behaviors associated with CSA go beyond alcohol and drugs. For example, Sherrer, Xian, Kapp, Waterman, Shah, Volberg, and Eisen (2007), using a sample of Vietnam era twins, examined the association between exposure to traumatic events and gambling. Subjects had been exposed to a wide range of traumatic events (e.g. natural disaster, child maltreatment). A test of Vietnam War experiences and gambling indicates no association. Childhood abuse and neglect and witnessing someone badly injured or killed were associated with pathological gambling. Analyses suggest that genetic and family environmental factors are important contributors, except for witnessing. In a study of problem gamblers, Petry and Steinberg (2005) report that childhood maltreatment was predictive of gambling onset, severity, and frequency. In another recent study of problem gamblers, Boughton and Falenchuk (2007) examined a Canadian sample of female gamblers. Based on a review of other research the authors point out that problem female gamblers had co-morbid conditions including depression, anxiety, personality disorders, and histories of trauma. Authors evaluated 364 problem gamblers in treatment. Results indicate that these female problem gamblers had high rates of addiction and mental health problems in their families of origin, histories of emotional and physical abuse as children and adults, and experienced racism. Rates of childhood sexual abuse were higher among compulsive gamblers than found in the general population of Ontario.

**Quality of life.** Quality of life (QOL) is a person's subjective evaluation of the quality of his life. It has been used to evaluate a large number of events such as environmental disasters, terminal illness behavior, post operative functioning, and the aftermath of sexual assault. A person may judge the quality of various aspects of his life such as work, interpersonal relationships, leisure activities, parenting, etc. A recent report (Hanson, Sawyer, Begle, and Hubel, 2010) examined research on the impact of crime on quality of life. Noting that most research has focused on changes in functioning of victims of partner violence, the authors suggest one aspect of QOL can be thought of as social role functioning (parenting, intimate relationships, occupational functioning). A handful of studies are reviewed, noting that a parent's CSA history may be associated with negative parenting. They also note that research has documented an impact of crime on disruptions or dissolutions of intimate partner relationships. And they note that previous reviews of research report that sexual assault victims report impairments in social and leisure activities.

In a sense, QOL describes a basic dimension of freedom. A free society believes that within social limits and responsibilities, a free person should be able to become the best that is possible given inherent talents, limitations, and circumstances. One could argue that the greatest freedom is to be free in one's own mind.

An individual may be assaulted and experience any number of the harms and damages outlined above and still come, through therapy or personal temperament, to judge that his or her life has value, meaning, and quality. Indeed the person who is assaulted and left to die but survives may have a new appreciation for the value of life and how precious is the time we have to live. Nonetheless there is an increasing appreciation that assault and the wide range of symptoms that may result is a major threat to the victim's quality of life.

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**Conclusions.** The data outlined above and the large body of research it summarizes conducted over a number of years by different investigators with different samples using different methodologies points to the clear finding that childhood sexual abuse, sexual assault, and rape can have a devastating impact on the victim. Although I have not reviewed above the small research on the loved ones of victims, this research supports the clinical observation that the loved ones of victims also suffer as the witness and experience the negative impacts of assault on the victim. To the extent that these crimes can be prevented the savings in terms of suffering, financial costs, and life-long emotional and behavior problems would be immense.

The data also point to the fact that not all victims suffer or experience the same problems after being assaulted. The range of emotional problems and behaviors is wide but that some victims are at risk to experience such profoundly negative reactions to what are largely intentional acts of another human being point to the profound importance of preventing or controlling the capacity of offenders to commit acts which result in such devastation.

Dated this 11<sup>th</sup> day of March, 2011

  
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Jon R. Conte, Ph.D.

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# EXHIBIT E

10:30 We got to the room dad was already set up for a Easter egg hunt. Mike hid Easter eggs in Easter grass around the room. Marie Claire started hunting them. She found the eggs and candy he had hidden.

10:45 → They counted the eggs she found there was nine then she made a few ring stands for the eggs to stand up. Dad turn on some music on his computer.

11:00 → Dad brought some puzzles they sat on the floor and put part of the puzzle together but Marie had no interest in the dinosaurs puzzle she said lets just lay down. So they laid down for a second or two. Then she got up and wondered around. Dad asked if she wanted to do the fairy tale puzzle. She said yes and she did the whole puzzle.

11:15 → Dad sat on the couch with Marie Claire and read a book to her. Then it was time for their party. He brought cookies from a bakery and water and a fizzy drink but Marie Claire had water & a shortbread cookie on her egg place mat and with easter napkins.

Janet Bay

Signature

3-29-2010

Date

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Page

Mockovak  
Children's Last Name

11:30 → Dad had a little recorder but Marie didn't want to record yet. Then dad put a kid song on and she sang it to dad. They sat there eating their cookies. Marie Claire fed some to Dad + Dad fed some to Marie Claire.

11:45 → They were hiding under a blanket talking about being a fairy princess. Marie Claire said mommy don't like Obama and she worries all the time about the house being messy. Dad said do you help mom clean it when it's messy? I have to clean my house. They sit and eat another cookie and some truffles. He played this little piggy with her toes.

11:50 - CSS Deb takes over visit. Dad + Marie are sitting on arm of chairs pushed together. CSS asks them not to do that as it breaks down the furniture. Dad sits in one of the chairs + has Marie sit in his lap. A few minutes later Marie gets back on the arm. CSS redirects her off it. The frame falls against the blinds, bending them. CSS asks dad to pick it up so it doesn't break them. Dad does so. Marie tells dad she had a bad dream but mom made it better. Dad tells her he's glad mom made it better. They continue to look at pictures.

Janet Barz  
Signature

3-29-10  
Date

2  
Page

Mockovak  
Children's Last Name

11:55: CSS returns to visit. They look at the pictures a little while longer then Marie Claire said she wants to finish eating her cookie. Dad said he has pictures she made him on his refrigerator and he's gonna put the pictures she made them on the fridge. To remind him that it won't be long till I get to see you again.

12:00 → Dad starts reading the fruit & berry book. He sat next to Marie so she could see the book as he read the book. Dad tied her hair up with a ribbon. Marie continued to eat her frosting off the cookie.

12:15 → They made a tent with a blanket he brought. They open the end so I can see them and they work on the princess puzzle. Marie find a string and plays with the string for a while. Then they hurry put the princess puzzle together again.

12:29 → They lay on the couch and say good ~~bye~~ bye.

12:30 → End of Visit

Janet Bay  
Signature

3-29-10  
Date

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Page

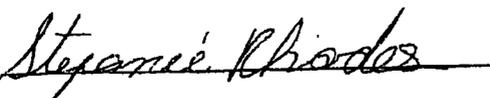
Machovak  
Children's Last Name

10:40am CSS brings Marie Claire upstairs to Dad. Marie Claire tells CSS that she wants to surprise Dad with the card she made him for his birthday. Dad is on his hands and knees, putting together a floor puzzle, he turns around, smiling at Marie Claire and hugs her. Marie Claire hugs Dad back. Marie Claire opens the card that she made for Dad. Dad asks Marie Claire if she is going to show it to him, Marie Claire nods her head yes. Dad has music playing on his lap top. Marie Claire asks Dad if he wants to take his shoes off. Dad says, "Yes I do and then we can sit on the couch together and snuggle." Marie Claire sits on the floor by the puzzle, Dad sits down by her and they work on the puzzle. Marie Claire asks Dad why she has to have two Daddy's and that she has a baby brother and a baby sister. Dad says, "What? What was that honey? Hold on." Dad turns the music off. Dad asks Marie Claire what she was saying. Marie Claire tells Dad that she has to have two Daddy's and that she wants a baby brother and a baby sister. Dad says, "You do huh? Ok."

10:50am Marie Claire asks Dad if he wants to hear a bed time prayer. Dad tells Marie Claire yes and then says that she can teach it to him. Marie Claire seems to get distracted by the puzzle and continues to work on the puzzle instead of the prayer. Marie Claire tells Dad that it is messed up. Dad tells Marie Claire, "That is ok; everyone makes mistakes once in a while." They continue to work on the floor puzzle. Dad claps for Marie Claire and praises her when she finishes the puzzle. Dad pushes the button on a doll that says a goodnight prayer. Dad asks Marie Claire if that is the prayer she says at night. Marie Claire shakes her head no. Dad asks Marie Claire if she will teach him the prayer she says at night. Marie Claire asks Dad to read the Strawberry Shortcake book (Dad brought and has sitting on the table with another book). Dad and Marie Claire look at the pictures that Dad brought. Dad tells Marie Claire that she can take them home with her if she wants to. Marie Claire says yes. Dad reads a Strawberry Shortcake book that he brought, to Marie Claire.

11:00am Marie Claire tells Dad her prayer, Our Father in Heaven, Hallowed be They Name, They Kingdome Come, They will be Done.... Marie Claire and Dad say the entire prayer together. Dad asks Marie Claire if that is the prayer she says before bed, Marie Claire nods her head yes. Dad tells Marie Claire that she knows the Our Father prayer very well. Marie Claire also told Dad her dinner prayer. Dad tells Marie Claire, "I brought a treat for you, birthday cake because Saturday was Daddy's birthday."

11:10am Dad gets out 2 pieces of coffee cake, puts them on plates for each of them and then puts candles 5 candles in each of their pieces. Dad tells Marie Claire that they each get to blow out candles. They sing happy birthday

Signature 

4-13-10

Pg.1/4 (Private Pay)

Mockovak

and then blow out the candles. Marie Claire has a harder time blowing out her candles, Dad encourages her to keep blowing, Dad holds her hair away from the candles because it get close when she leans in. Once Marie Claire gets her candles blown out, CSS asks if they each made a wish. Dad and Marie Claire both say yes. Marie Claire asks Dad if he is going to tell her his wish. Dad tells Marie Claire, "My wish is that you can come to my house sometime soon. I know that is going to happen so that is my wish." Marie Claire tells Dad that her wish is to wear jewelry all the time. Dad laughs. Marie Claire tells Dad that she goes ice skating sometimes, like for her Mommy's birthday.

11:20am Marie Claire asks Dad why she only liked to eat the frosting off from the cup cakes when she was a baby. Dad tells Marie Claire that is because she liked the sugar and sugar is not very good for you, that is why they are having cake without frosting. Dad asks, "It's delicious isn't it?" Marie Claire is showing Dad the card again. CSS tells Dad that she made that for his birthday. Dad says, "Oh you did? You made it for my birthday?" Marie Claire tells Dad, "No... Mom bought it, I just picked it out." Dad laughs and says, "Mom did something nice for Dad, stop the press." Marie Claire says, "Daddy... I'm gonna have a baby brother and a baby sister." Dad asks Marie Claire if Mommy is going to have twins. Marie Claire says yes. Dad says that she must be pretty close if they know that it is a boy and a girl. Marie Claire tells Dad that she saw the baby clothes in the store. Marie Claire asks Dad to play, The Black Eyed Peas. Dad says, "Ok, I know what song you like." Dad has a small voice recorder, like the ones that go inside of Build a Bears. Dad records Marie Claire singing a short part of the song. When Dad plays it back for Marie Claire, she smiles and hides her face in the chair.

11:30am Marie Claire tells Dad, "Let's make a tent!" Marie Claire's voice is very excited. Dad is making the "tent" over the back of two chairs and the couch. CSS can see under the tent, Dad and Marie Claire are visible the entire time. Marie Claire finds the baby monitor and asks what it is. Dad tells her it is an intercom so people can hear what is going on. Marie Claire asks Dad, "You know Java?" Dad says, "Your dog Java?" Marie Claire tells Dad yes and that Java like's people food.. Dad asks Marie Claire if he is brown. Marie Claire tells Dad yes. Dad says, "That is why they named him Java huh, because he's brown like coffee. That's a cute name."

11:40am Dad hides under the blanket, on the couch. Marie Claire lifts the blanket, revealing Dad. Then Marie Claire hides under the blanket on the couch. Dad lifts the blanket, revealing Marie Claire. Marie Claire laughs and then gets off from the couch. CSS has to step out of the room. CSS April stands in the

Signature Stephanie Rhodes

4-13-10

Pg.2/4 (Private Pay)

Mockovak

doorway watching the visitation.

11:45am CSS returns. Dad and Marie Claire have the pink cow and the baby doll, which says a prayer, under the couch. Marie Claire tells Dad that she wants to put them in the toy dump truck she found under a table. Dad puts Marie Claire's shoes in the driver's part of the truck with a ducky toy that was with the dump truck.

11:50am Dad and Marie Claire do another floor puzzle, this one has bigger pieces. Marie Claire tells Dad that she wants to eat her cake down on the floor. Dad tells her she should keep it at the table because he has to clean up the mess when they are done. Marie Claire tells Dad that she will be careful. Dad thanks Marie Claire. Dad claps for Marie Claire when she finishes the puzzle. Marie Claire asks Dad if she had a mess on her face when she was a baby and what did he say. Dad says, "Let's see." Dad looks through the pictures and shows Marie Claire. Marie Claire tells Dad, "No, when I was a baby." Dad tells Marie Claire that he has pictures of her with a mess on her face as a baby.

12:00pm Dad brushes the crumbs off from the place mat, into the garbage and takes the placemat on the floor under their tent. They are going to have a pretend birthday party for her angel doll. Marie Claire gets up to take her piece of cake on the floor, Dad allows Marie Claire to take her cake on the floor this time. They sit under the blanket, put the candles in the cake and sing happy birthday to the angel doll. Dad asks Marie Claire if she misses her cat. Marie Claire tells Dad that the cat is in Heaven now. Dad tells Marie Claire that he knows.

12:10pm Marie Claire asks Dad, "You know God?" Dad says yes. Marie Claire tells Dad that God is a nice person. Dad says, "God is a person, I didn't know that."

12:15am Marie Claire tells Dad that she is going to go to the pet store. She asks Dad if he wants to go to the pet store with her. Dad tells Marie Claire yes. Dad says, "We will be able to go to the pet store together soon. I know it. We will be able to go laces together again." Dad is lying on the couch; Marie Claire is kneeling next to Dad, playing with the candles. Dad tells Marie Claire, "Next time, you should bring your cow, angel and your Easter Bunny and then maybe I will bring something too."

12:25pm Dad picks the place mat up off from the floor. Marie Claire walks across the couch. Dad tells Marie Claire that they can sit down on the couch and he will cover everybody up and then they can snuggle. They are pretending to be

Signature



4-13-10

Pg.3/4 (Private Pay)

Mockovak

in a movie theatre, watching the kitty cat that is on the card that Marie Claire brought for Dad.

12:35pm CSS tells Dad that they have 5 minutes left. Dad puts the cake that is left in a bag, the placemat in the bag and the candles in the bag that Marie Claire wanted (just the pink ones). Dad tells Marie Claire that it is time to go; he gets her socks and shoes on her and asks her for a hug. Marie Claire and Dad hug, Dad kisses Marie Claire on her cheek. CSS and Marie Claire leave the room. Dad calls her name; he forgot to give her the pictures. Dad puts them in the bag and hugs her one more time. End of visit.

\*CSS lets Mom know that there are pictures in the bag, so Mom may look at them as well (per our policy).

Signature



Pg.4/4 (Private Pay)

4-13-10

Mockovak

10:30: Neither parent is present.

10:35: Dad arrives and begins to bring things into the building. CSS calls mom to ask if she's in parking lot. She says she is not. CSS tells her that dad is just coming into building and will call her when dad is settled into the room and let her know.

10:42: CSS calls mom to tell her dad is settled into room. Mom says she'll be here is a few minutes.

10:45: Mom signs Marie Claire into visit. Mom asks if CSS will note that dad was late, not her. CSS tells mom that neither party was at ISNW at 10:30. Mom says she was waiting for CSS to call her back. CSS does not take anymore of dad's visit time up discussing the matter and takes Marie Claire up to room 211 to see dad.

10:49: In the room, dad greets Marie Claire with a hug and kiss. Dad has set up the room with toys, games, music (on his laptop) and the puppet theater. Dad tells Marie Claire that he's going to teach her about music this visit.

11:00: Dad gets out a gyroscope and teaches Marie Claire how to use it and tells her about how it works. Marie Claire says, "I think I'm just a little bit hungry." Dad tells her to have a snack. Marie Claire brings out a large poppy seed muffin and tells dad, "You should have a little snack too." She breaks off a tiny bite, gives it to dad and then eats a tiny bite herself and puts the muffin away.

11:10: Dad and Marie Claire sit on floor and go through some things dad brought her: pen, paper, flavored chap stick, etc. He shows her some puppets he brought for her. Dad brought some 'thinking caps' so they could play School. His is a jester hat, hers is a birthday cake hat. Marie Claire says she's hungry so they sit at the table. Marie Claire gets out a PBJ, chocolate milk, carrot sticks and strawberries and blueberries. She tells dad the "carrots are very yummy and make your eyes better" and gives dad one.

11:20: Marie Claire tells dad he needs to eat some of her sandwich. He says, "Are you sure? I don't want you to be hungry." She smiles big and hands him a piece.

11:25: Food mess cleaned up. Dad and Marie Claire color and dad helps her with the alphabet.

11:35: Marie Claire tells dad that her other food has settled and she wants something else. She gets her muffin and fruit and combines part of the muffin with the fruit. Marie Claire eats and gets a lot of the muffin on the carpet. CSS asks if she can eat over the table better as the muffin will get smooshed into the carpet. Dad says he'll bring plates and placemats next time. Marie Claire gets a napkin and cleans up the majority of the muffin on the floor and tells dad, "You can clean up the rest."

Signature \_\_\_\_\_  
Page 1/2

*DJ Armstrong*

8/19/10 (Thurs)

Mockovak (PP/Supervised)

11:53: Marie Claire is done eating and dad cleans up the mess. Dad gets out a tent to put together and he and Marie Claire do so.

12:10: Tent put together, blanket on floor of tent, dad and Marie Claire pretend to camp. They put a few floor puzzles together to make the 'floor' of the tent. (The tent is completely see through so CSS has good visual at all times on dad and Marie Claire.)

12:25: Still in tent playing. They have out the pizza puzzle and are making 'pizza'. Talking and laughing are plentiful as they make the pizza. While it cools, Marie Claire says they have to go color. "Zip this back up so the bugs don't get in", she tells dad as they get out of the tent. Marie Claire takes the coloring things into the tent, zips it up and they color and work on the alphabet.

12:45: Dad and Marie Claire play in tent. Dad makes a flip card picture for Marie Claire on a sticky note pad. Marie Claire giggles as dad flips the pages to make the man he drew move. He helps her as she draws a girl to go next to his guy.

1:00: Dad and Marie Claire sit in tent and dad reads to her. Dad tells Marie Claire that someday he'll teach her about anatomy (as they've come to a part in the book where kidney's are mentioned) so she can be a doctor if she wants to. Marie Claire grins.

1:10: Marie Claire says a prayer and then she and dad eat the 'pizza' they made earlier. "Mmmmm", they both say as they munch away. A few minutes later dad tells her it's time to get things cleaned up and put away.

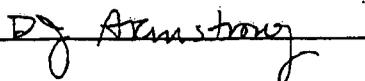
1:20: Marie Claire 'hides' under the round table as dad puts the tent away. Dad pretends to find her. She giggles loudly as he 'finds' her. Dad hides and she finds him.

1:23: CSS tells them "five minutes". Marie Claire hides again. Dad finds her. Marie Claire takes pictures of dad cleaning up. "Smile!!", she says as she jumps around snapping his picture.

1:28: CSS tells dad Marie Claire needs to leave in two minutes. Dad gathers Marie Claire's things, helps put her shoes and sweater on and then tells her he loves her very much. Marie Claire tells dad she wants to stay. He tells her he wishes she could. Dad tells her she will have to ask mommy if she wants to stay longer. Marie Claire nods 'yes', sadly. After final hugs and kisses, CSS takes Marie Claire downstairs.

1:30: Visit ends with CSS taking Marie Claire down and mom signing her back into her care. Marie Claire told mom, as mom was talking to CSS, "I want to stay longer with daddy next time".

Signature  
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8/19/10  
Mockovak

10:30: Dad has called earlier to inform us that he will be about 15 minutes late. Mom is notified and says she is waiting in the mall parking lot next to ISNW and will not be coming to the building until we call her to tell her that dad is in the building and settled in.

10:48: Dad arrives. CSS waits for a few minutes to call mom, to make sure dad is settled into the room. While waiting, mom calls in to see what is happening. April tells her that dad just arrived and we were going to call her as soon as dad was in the room, per her request.

10:52: CSS calls mom. Mom says she'll be here shortly.

10:55: Mom arrives with Marie Claire. CSS brings Marie Claire upstairs. When we get off the elevator, Marie Claire runs to the room where dad is. Dad greets her with a hug and kiss. They sit at table and color. Dad asks Marie Claire what she's drawing. "Art. I'm going to an art class and so I'm drawing art.", she adds. "Oh, good. I'm glad you are going to art class." Marie Claire gives dad a paper she drew on. He compliments her and tells her she learns so fast. Dad sits close to her with his arm draped around the back of the chair. He rubs her arm and back affectionately here and there.

11:10: Dad sits on floor with Marie Claire and plays with Lego's.

11:25: Another CSS comes in and asks if we can turn music down. Dad shows Marie Claire how to turn it down. They go back to playing with Lego's. Dad gets out the puppets and they combine puppets and Lego's to play with.

11:45: Still playing with Lego's. Marie Claire pretends her Lego person hurt himself. Dad pretends to help her person. "Doctor help. I have a hammer stuck in my leg!", he says in a high pitched voice. "You mean a 'pokey thing'.", Marie Claire corrects. Dad chuckles and corrects himself. They continue to build on the story and play.

12:00: "Dr. Marie Claire!", Marie Claire says in a high, dramatic voice as if she's being paged. Dad 'pages' her some more and her Lego person comes out to help the injured person dad has. They continue to interact with the story line and Lego's.

12:09: Dad tells Marie Claire he needs to use restroom. She says she needs to also. Security Steve follows us all to restroom and stands in lobby as we go into prospective rooms. CSS goes with Marie Claire into restroom (not stall) and helps her wash her hands afterwards. Dad comes out shortly after we do and we all head back to room.

12:12: Back in room, dad and Marie Claire sit on couch and dad reads a book to her. They snuggle as he reads.

12:15: Book is done, Marie Claire says she's hungry. They go to the table and dad

Signature  
Page 1/3

*DJ Armstrong*

8/26/10 (Thurs)

Mockovak (PP/Supervised)

shows her pictures that have two pictures in one; old woman, young woman. He takes a marker and outlines the old woman (after she identifies it) and then outlines the young girl, explaining it to her. Dad gets out the lunch; sandwich, bagel and cream cheese, chocolate milk fruit leather. Dad brought a baggie with dried strawberries from Pikes Peak and tells her she can have it when she gets home. "I wrote on it what it is and where it's from so mommy will know, ok?", he says. Dad opens the bagel for Marie Claire and as she eats it he shows her pictures of things to "teach her things"; Obama, George Washington, Abraham Lincoln, and a picture of him and her in the tent (from last visit). Dad then gets out a copy of some currency and says, "Who's on this bill? That's President Washington! See, you saw that picture already.", holds up the picture of President Washington next to the picture on the bill. He goes through a few other bills and then comes to another one and says, "Who's picture is on the hundred dollar bill?". He unfolds it and reveals a picture of Marie Claire. She giggles loudly. Dad shows her another picture of him and her on another bill. Marie Claire shares her bagel with dad. He takes one bite then gives it back to her. Dad asks Marie Claire if she drinks regular milk or just chocolate milk. "I drink both", she replies. "Good, because there's a lot of sugar in chocolate milk", dad says. Marie Claire needs a napkin. Dad looks in bag and finds none. CSS gives them a few baby wipes.

12:32: Marie Claire says her tummy is getting full and asks if she can eat more later. "Of course you can", dad says. Dad cleans up mess and they sit at table and color in a work book that teaches numbers. He helps her count the objects then write the number. Dad kisses Marie Claire's cheek and says, "Good job! You are right! That's four!!" Marie Claire smiles big.

12:50: Marie Claire wants to play Hide and Seek. Dad tells her that they need to clean up first so they can play. Marie Claire tells dad she doesn't want to put the toys away. "Well, what do you want to do? Can't play Hide and Seek with toys out." Marie Claire says she'll put the toys away. Dad takes a few picture of her as she plays with the Lego's more than putting them away. Dad sings the clean up song and they put the Lego's away.

12:55: Toys picked up, Marie Claire asks dad for his camera so they can play Hide and Seek. (Marie Claire hides and dad points the camera under the furniture and takes a picture, looks at the camera and says, "No, not under there", until the picture he takes reveals where she's hiding.) After he 'finds' her the first time, she takes the camera and hides with it. Dad looks everywhere and then 'finds' her.

1: 05: Done playing Hide and Seek, Marie Claire plays with a few block and domino

Signature Dy Armstrong 8/26/10  
Page 2/3 Mockovak

she found. Dad sits and watches. "Oh, I can't do it.", Marie Claire whines. "Yes you can. You're just getting frustrated", dad encourages. "No I can't. I'm not frustrated", she whines. "Really? Then why are you talking in a whiney voice like that? You can do it, Just don't give up.", dad says. Marie Claire continues to stack the items and finally gets it. Dad tells her, "Good job. I told you, you could do it. All you had to do was keep trying." They then go the to couch, lay on it and dad reads to her.

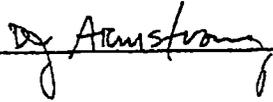
1:18: Still on couch reading books.

1:21: CSS tells them they have about 6 minutes left. Marie Claire wants to color so dad goes and gets the colors and book. Back on couch, Marie Claire sits in dad's lap and colors. Dad helps her identify the letters in the book..."L for Lamp", he says. Marie Claire colors the lamp.

1:28: CSS tells dad it's time. Dad helps Marie Claire put her shoes on and gathers her other things together. He gives her a kiss and hug and tells her he loves her.

1:30: Visit ends with mom signing Marie Claire into her care. Marie Claire shows mom the fruit dad sent with her. CSS lets mom know that Marie Claire didn't eat any during the visit.

Signature \_\_\_\_\_  
Page 3/3



8/26/10  
Mockovak

10:44: Dad arrives. CSS goes downstairs to wait for Marie Claire. Mom is there with her. Mom says she almost ran into dad but Jane (receptionist) put her and Marie Claire in another room until dad was upstairs. CSS tells mom that she is sorry that happened and that she (CSS) would not have called her until dad was upstairs and settled in. CSS tells mom that, in the future, she (mom) can ask the person who calls her (if it's not CSS) if dad's in the room already. Mom says 'ok'.

10:49: CSS and Marie Claire go to room 211 where dad is settled in. Marie Claire goes and gives dad a big hug. Dad tells her how much he's missed her. Dad sits on couch with Marie Claire and shows her a short video on his laptop of the cats he has at home. Princie and Sophie. He tells her they miss her. She waves at them as they meow.

11:00: Dad and Marie Claire sit at table with face paints. Dad gets them out and ready. "Goodie, daddy! Goodie! I LOVE face painting.", she says as she claps her hands. Marie Claire mentions her upcoming birthday party and says, "Can you come to my birthday party, daddy? Please?". Dad tells her that he'd love to come to her birthday party but isn't sure mom would like that. "Well you can come", Marie Claire says. "You need to ask your mom about that, sweetie", dad says. They start painting their faces and chatting as they do.

11:15: Still face painting. Dad has Marie Claire mix all the colors to see what color she gets. They go to the mirror and look. "What do you think?", dad asks. "I think it's... *beautiful!*", she exclaims. They play a bit more with the colors and then Marie Claire wipes her face paint off with baby wipes and then takes dad's off.

11:20: Marie Claire has dad sit at the table and then paints on his face. "Here, I'll start with yellow, for the sun!", she says as she paints a sun on his cheek. Then she paints a flower on her cheek.

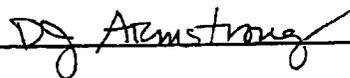
11:40: Marie Claire wants to play with the Lego's. They are on the floor building things and making up stories about what they build.

11:55: Still playing with Lego's. Marie Claire drops a Lego on top of what dad is building and says, "Oops! Sorry, daddy". "That's ok. It's no big deal.", dad replies. "It's no big deal", Marie Claire repeats.

12:10: Building and story telling abounds; a building being built, "Mr. Man" going to work and the park, etc.

12:25: Marie Claire tells dad she just a little bit "a hungry". She gets the PBJ mom sent and takes a bite and then gives dad a bite. She puts the sandwich back in the bag and says, "There you go" and puts it back in lunch bag. Back to playing with Lego's. Dad

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9/23/10 (Thurs)

Mockovak (Monitored)

says, "Ok, but I'm going to get out the new puzzle I got." "Oh! But first you forgot the most important thing! Clean up!!", Marie Claire says in a happy voice. They both clean up the Lego's and dad gets out a mannequin of a man that has all of the insides in it. He takes off the front part of the mannequin/puzzle and shows Marie Claire the lungs, heart, pancreas, liver, kidneys, etc and goes over each one. After they take each piece out and identify it Dad has Marie Claire put them back in the place they go (with his help). Marie Claire has a big smile as they work on this. "There, now you know these if you decide to become a doctor some day.", dad tells her. She nods 'yes' and smiles.

12:37: Marie Claire says she wants to build their tent. Dad and Marie Claire start to put the tent together. They listen to nursery rhymes as they work together. Marie Claire wants to put two puzzles together to make them into their carpet. Dad tells her they can do that. They talk and put the puzzle together.

12:55: Still putting the dinosaur puzzle together. Marie Claire chatters away as she finds pieces that fit. "Here, daddy. This goes here!", she says as she hands dad a piece. They talk about words that rhyme.

1:02: Dinosaur puzzle put together. Marie Claire cheers and says they need to put the other puzzle together (Princess puzzle). As dad gets the box, Marie Claire suddenly says, "Daddy!" He hesitates and looks at her and she throws herself at him giving him a big hug. Dad holds her and kisses her cheek. Marie Claire says, "Oh daddy, I love you". Dad chuckles and tells her he loves her, too. Dad holds her for a few more seconds and then they go to putting the puzzle away. Marie Claire tells dad "thank you!" for bringing the puzzles. Dad smiles and tells her she's welcome.

1:08: That puzzle is put together. Dad puts the blanket over it, per Marie Claire's request. "Oh, daddy! Where's the books?", Marie Claire perplexes. Dad points to the bag they are in. Marie Claire opens the door to the tent to go get them and says, "Daddy, I hope the flies don't come in!" Marie Claire hands dad a board from the Lego's and tells him to use it as a fan to keep the flies out while the door is open. Dad complies. She grabs some books, comes back inside the tent and they zip it up to keep the 'bugs' out.

1:13: Dad and Marie Claire lay in the tent and read a book (Spoon) dad brought.

1:23: CSS tells them they have about 3 minutes. Marie Claire goes and hugs dad. He wraps his arms around her and holds her, rubbing her back. Marie Claire tells him she's hungry. Dad tells her she'll have to eat in the car as there's not much time left. CSS lets dad know that if she gets her shoes on quickly they will have a few minutes to eat a bit together.

Signature DJ Armstrong 9/23/10  
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1:26: Marie Claire crawls under the tent floor and dad tickles her and says, "Oh my goodness, we are being attacked by the creature under the tent." Marie Claire giggles loudly. Dad crawls out after her. Much laughter.

1:28: CSS tells Marie Claire she needs to get her shoes on. Dad breaks the tent down and puts it away.

1:30: Visit ends as Marie Claire gives dad a last hug and kiss and CSS takes her down to mom. Mom signs Marie Claire back into her care and leaves.

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Dad arrives at 10:32 and sets up the room waiting for his daughter. Security Guard Steve is in observation room. Dad sets out a throw blanket on the couch and presents on the table. It is his daughter's birthday. He sets up.

10:40 I go downstairs and am told by Jane that Mom has not yet called to see if Dad is set up in room.

10:46 Mom calls me and says she's been parked across street waiting for me to call her. Visit will extend 15 minutes today due to communication problems. CSS did not understand that she was supposed to call mom when dad was ready. Visit will go to 1:45 to make up the 15 minutes. I inform Dad. CSS goes downstairs and gets Marie Claire.

Dad meets us with Security Steve in lobby. Dad has a Hello Kitty balloon for Marie Claire's birthday.

We go to room and they tie the balloon to a pink box dad has in room. Marie Claire says "Is it time to measure?" Dad agrees, he measures her height against his ribs. He indicates that she's grown a couple of inches since last time.

Dad and daughter open presents. The first gift is a hello kitty stuffed animal. She is very excited. "Wow!" she replies with excitement.

Marie Claire talks to dad about Hello Kitty stuff in the Build a Bear store. They discuss Hello Kitty items as Marie Claire opens another gift with HK clothes in it.

As Marie Claire puts on her new clothes she tells Dad with enthusiasm, "This is my favorite Hello Kitty Doll!" As Dad undoes tags for clothes they talk about how they are ballerina clothes. He tells her he knows that she loves

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10/21/10  
Mockovak

ballerinas, so he got blue ballerina clothes for the doll. Marie Claire says, "That's amazing!" when she learns that the bows Velcro on and off. Dad has gotten her Hello Kitty bags to take her things home in. Dad tells her, "Okay I put the shoes on, you put the dress on." they work cooperatively to put the dress on the doll.

Dad plays classical music quietly in the background. They do Hello Kitty puppet theatre. Marie Claire sings for Dad who watches the show.

Marie-Claire tells Dad she's four, he tells her she'll be five.

She speaks of going to Disneyland for Christmas. "Would you come with me?" She asks him. He says he can't come but he would like to very much.

is a box of Legos, a camping type Lego type set. She is very animated and keeps saying "amazing!" More gifts opened; scarf, cards, legos, other HK items. Marie Claire is very excited.

She is told they will make Christmas cards later. She tells him she loves Christmas cards.

He teaches her about the piggy bank he brought. There are three slots. One says spend, one says save, one says share. He explains each one of them to her.

11:56 They do another puppet show, Dad takes pictures. He says he'll send her pictures. They put on a different outfit. Marie Claire comments on how tiny the dolls feet are.

Dad says, She can sit and have cake with us.

Dad says he's hungry and asks if they should eat. Marie

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10/21/10

Mockovak

Claire says okay.

They set out mats to eat and Dad gets out food. Daughter gets out macaroni and cheese she brought from home. Dad gets out two sandwiches he brought. Store made and bought. He brings out drinks he brought and fruit. She brings out carrots and says they can share those too. She brings out a container of broccoli too. She puts her food on a plate and when food is on her plate proceeds to eat. She shares her broccoli and carrots. Dad tells her he likes both. She notices that they have the same forks. They discuss putting blueberries and strawberries on the cake. Dad pours her juice, she tastes it and likes it and offers to share. Daughter asks, "do you like my Hello Kitty napkin?" My mommy bought it for me we use them for tea parties and lunch and celebrations.

Marie-Claire tells Dad she's going to "have a pinata for my birthday." She tells him her cousin had a doughnut eating contest for his birthday, "you had to close your eyes and only use your mouth. Mommy helped me a little."

She speaks of going to a farm and getting to feed a big pig. 12:10 She says, "I think I'm done." Dad says okay.

She wants to play Legos. Then she decides to "learn dad" how to draw Hello Kitty. Dad says, "learn me or teach me?" She corrects herself and says teach.

Marie-Claire notices that there are stickers, "that's amazing," she says. They sit and put people Lego's together. Marie-Claire wants to go on to making a truck, Dad says, "wait I will hand you the pieces and you can put them together." When she has difficulty he takes the first two

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10/21/10

Mockovak

pieces and shows her how to do it. She whines a little while he does this. When he repeats above she is told, "that's how you learn, by watching." They go back and forth building the truck. Then he hands her pieces for her to attach herself. They continue to build the truck together. When she gets frustrated he encourages her. Then he fixes his mess up.  
12:20: Dad and Marie Claire sit on floor and play with the Lego's.

12:40: Still on floor playing with Lego's. They make up stories as they play.

12:50: Dad and Marie Claire still playing with Lego's. They talk and make up stories as they play.

1:00: Marie Claire says it's time to eat. Dad asks if it's time for cake. Marie Claire says yes. Dad gets out a Hello Kitty cake, lights candles on it and sings Happy Birthday to her and then she blows candles out. They eat some cake, a few strawberries and then clean up their hands.

1:10: Back on floor playing with Lego's. Marie Claire sits on dad's lap as they look at Lego's and then moves next to him. Lot's of smiles.

1:20: They finish putting motor home together. They look at it and Marie-Claire asks, "is this a door?" Dad says yes, then goes on to explain how it's a trailer that can travel. They play with it when its assembled and decide where the stickers should go. They put together a Lego TV for the motor home. Dad comments on how it has a TV.

Marie-Claire says Hello Kitty is getting cold and needs a jacket. She looks through the bag for a jacket, she brings

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Mockovak

Dad a Hello Kitty ribbon, " I brought this from home. Dad corrects hr and says that he brought it for her to tie up her packages with. He tells her she can use it for anything she wants. Dad is finishing up details on the motor home. Dad gets help from Marie-Claire as he finishes. He helps her put the finishing details on the motor home. He "woooo-whoos' s at completion of Lego motor home. As Dad pushes it around one of the wheels comes off he fixes it. "you be the boy Daddy, I'll be the girl." "I' ll do the cooking she says." Then tells him to say he' s hungry. When he does he says will you make me some spaghetti?" She adds , " and a peanut butter sandwich?" She agrees. They play.

1:33 I tell Dad about twelve more minutes. He says to daughter they have ten more minutes before clean up. They continue to play.

1:35 Dad pretends to surf board, Marie Claire keeps asking, "one more time?" Dad accommodates her. Dad tells her they can play with it the next time they are together.

1:39 Dad tells her its time to clean up. They decide how to put the Lego's away together.

1:41 Dad gathers all her other presents and puts them in a bag for her.

1:45 Visit over. I walk Marie Claire down to Mom.

1:48 Mom arrives and signs for child.

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10:30: Dad is not here yet.

10:37: Dad arrives. Security Steve helps him bring thing in. CSS texts mom to let her know she can bring Marie Claire.

10:41: Mom arrives and signs Marie Claire into visit. CSS takes Marie Claire up to room 211 where dad greets her with a hug.

10:45: Dad gets out some food and drinks he brought. Oddwalla Carrot drink and a Blueberry one. Marie Claire tries the carrot and doesn't seem to like it. She likes the Blueberry. They sit and eat carrots with ranch and some blue corn chips and salsa. Dad also brought strawberries. They sit and talk about the food, trees, favorite drinks and fruit.

11:00: Dad talks to Marie Claire about his choir singing with someone special and that he'll try to get it recorded so she can see it later. Dad sits with his arm around Marie Claire as they talk. She eats part of her yogurt (mom sent). Marie Claire tells dad to eat some of it. He takes a bite and tells her he just wanted a bite.

11:10: Done eating, they sit on the floor and play with Legos. Dad brought two new sets of them.

11:25: Still making things with the Legos and pretending various things. Marie Claire builds onto the 'monster' they have build. "Here, let me show you how to do it, you silly daddy.", she smiles big. She gets it done and dad praises her for getting it done right.

11:45: Both are on floor creating things and stories with the Legos. Marie Claire sings as she puts the finishing touches on her creation.

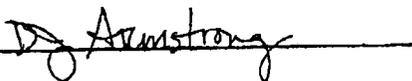
12:05: Marie Claire says she's a little hungry so they both go to the table and she eats some of her PBJ. Dad sits and drinks some juice and talks with her as she eats.

12:13: Marie Claire sits on dad's lap, eats her sandwich and looks at pictures they took of previous visits. Marie Claire nestles her head into dad's neck and smiles as she looks at them.

12:25: Still eating and talking. Marie Claire asks dad if they can go to the beach He asks, "Do you want to go to the beach, sweetheart?". She tells him she does. "That would be nice, wouldn't it?", dad asks. "Yes", she smiles. They talk about the fun they've had at the beach in the past. Dad goes and gets a few workbooks and they go over a few things as Marie Claire eats carrots.

12:35: Done eating. Marie Claire lays in dad's lap and "reads" a Curious George book to him. Dad has his arm resting on the side of Marie Claire's body and pats her leg as he

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11/05/10 (Fri)  
Mockovak (PP/Supervised)

snuggles her. Dad kisses the top of her head every so often and helps her with the story as she begins to slow down.

12:50: Dad and Marie Claire sit on floor and color on the theater set with chalk. "I'm making this a pixie color, daddy", Marie Claire says as she draws on the wood. "You put this green color on your part, daddy." She says as she hands dad a green chalk. He complies. "It's a pixie color", she tells him. Dad smiles and agrees.

1:05: Dad gets out a camera and takes a few pictures of Marie Claire and shows them to her.

1:20: CSS advises of time. Dad tells Marie Claire, "We only have ten minutes left." Marie Claire does a puppet show for dad; sings her story for him. He cheers and claps.

1:26: Dad does a real fast show at Marie Claire's request.

1:28: Shoes on and final farewells given.

1:30: Visit ends with CSS taking Marie Claire down to her mom.

Signature Dy Armstrong 11/5/10  
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11:40: Putting together a puzzle together.

11:55: Still putting puzzle together.

12:05: "I am so good at putting together puzzles", Marie Claire says as they start another jigsaw puzzle. They talk as they do so.

12:20: Done with the second puzzle, Marie Claire tells dad she wants to do another one (there are 4 in the box). Marie Claire yawns and tells dad that she's tired and going to take a nap when she gets home. Dad tells her he's going to have to drive home after the visit. "You can take a little nap if you want to. Daddy will eat some food while you do.", dad adds. Marie Claire tells him she wants to do the puzzle. They do.

12:40: Marie Claire gets frustrated with the last few pieces of the puzzle. Dad tells her they'll take a break and eat something and then go back to it. Dad picks her up and growls like a bear and tickles her as he carries her to the table. Dad gets out carrots, ranch, blueberry Naked Drink. Marie Claire opens the yogurt mom packed for her as well. Dad gets out some turkey and cheese slices and asks Marie Claire if she wants any. "No thanks", she says as she drinks more of her juice.

12:45: Dad goes and washes the spoon Marie Claire dropped on the floor. Marie Claire hides under the blanket while he is gone. Dad 'finds' her and carries her to the table. She giggles and goes and hides again. Dad puts the blue blanket on her and crawls towards her, growling. Marie Claire raises up under her blanket and growls as well. They mover the puzzle as they are crawling around. "Daddy! Look what we did. We crashed into the puzzle!", she exclaims. Dad says, "Uh-oh. Why don't we finish it since there are only a few pieces left." Marie Claire agrees and puts the final pieces together.

1:05: Both are eating and chatting and laughing.

1:10: Dad gets up and hides under the blanket. Marie Claire finds him. He grabs her and holds her. Marie Claire giggles. They play some more.

1:15: Dad cleans up the lunch mess. They are on the floor coloring now.

1:26: Dad helps Marie Claire get her boots on and gather her things. Dad embraces Marie Claire and tells her he loves her very much. Marie Claire hugs dad back.

1:30: Final hugs and kisses given, CSS takes Marie Claire downstairs where mom signs her back into her care. Visit ends.

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A handwritten signature in black ink that reads "D. Armstrong". The signature is written in a cursive style with a large, looped initial "D".

11/11/10  
Mockovak

10:30: Dad not here yet.

10:41: CSS texts mom and lets her know that dad is here and settling in.

10:46: Mom arrives and signs Marie Claire into visit. Marie Claire said she is tired of waiting. CSS takes Marie Claire upstairs to dad. Dad greets her in the lobby. Marie Claire smiles and gives dad a hug and shows him a fortune she has from a fortune cookie. We all go into room 211. As we walk into the room Marie Claire tells dad, "I have a small orange that I don't like" and lifts her lunch pail up for dad to see. Dad tells Marie Claire that he brought the tent this time since they haven't had it in awhile.

11:00: Dad puts the blanket on the floor and they look at a new thing he brought, a Bake and Decorate Cupcake Set. Dad opens the box and gets out the plastic cupcakes and all the fixin's and they 'make' cupcakes. They chat as they create.

11:10: They play with another game dad brought; looks like a clock puzzle type of thing. They set the puzzle timer and wait for the dinger to go off to signify that the cupcakes are cooled off enough to handle. Marie Claire goes, "Ding, ding, ding, ding!" and they take the cupcakes and put the candles on them and try to decide who to sing Happy Birthday to. Dad suggests Hello Kitty but Marie Claire has not brought it. So dad gets out the puppets and uses silly voices for each and sings HB to Marie Claire. She blows out the pretend candles and they 'eat' the cupcakes with gusto. Then they clean the frosting tops of the cupcakes with baby wipes and start over.

11:20: Marie Claire shows dad her ring. He admires it properly. "I got it at my store", she tells him. "What's your store?", dad asks. "Fred Meyers", she says. "Oh, Freddies. They have everything at Freddies", dad tells her. Marie Claire gets an excited look on her face, leans into dad and says, "Ya know what? *Target* has *everything!* More than you know probably." Dad grins. Dad watches as Marie Claire makes another cupcake. He takes pictures of her and asks if she wants to have a picture sent to the girls they are sponsoring. She tells him that's ok. He asks if she wants pictures of the girls for her and mom to see after Marie Claire tells him that mom wants to know the girls' names. She tells him, "No thank you".

11:40: Marie Claire and dad continue to talk and decorate cupcakes together. Good interaction. Once they are all made Marie Claire puts the girl puppet on her hand and sings HB to dad and he blows out the candles. "Happy Birthday, daddy", she says. Dad thanks her and they clean off the candles and frosting tops.

12:00: Marie Claire says she's done with the cupcake game. Dad asks if she wants to put together a puzzle. "No, it's time for our tea party", she tells him. They sit at the

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11/18/10 (Thurs)

Mockovak (PP/Supervised)

table and eat some baby carrots and ranch. Dad has water and Snapple tea as well. There is a yogurt, cashews, mini marshmallows and a PBJ on the table as well. All food is together. Not sure what dad brought and Marie Claire brought. They eat and talk. Marie Claire hides under the blanket she's sitting on in the chair at the table. Dad 'finds' her and she hides under it again. Dad goes and hides. Marie Claire gets quiet and looks at CSS. "I don't know where he is", CSS tells her. She finds him crouched beside the couch. Dad jumps at her and peals of laughter echo around the room. They go back to their tea party. Dad opens some pistachio nuts for Marie Claire and him to share.

12:15: Dad and Marie Claire play and eat. Dad gets under the blanket and pretends to be a couch that is hungry. Marie Claire feeds him cashews. Dad laughs and gets back up at the table.

12:19 Marie Claire wants to take pictures. She puts her cupcake set under the couch and goes underneath, too. She puts the camera in front of the couch and dad helps take a picture. Dad says he is going to have some more peanut butter and jelly sandwich (teasing). Marie Claire says, "No, Mom says I have to get all my sandwich." Dad says, "I will eat cashews then." Marie Claire says, "Mom says that I can not eat the food that you bring." Dad says, "Next time I will bring peanut butter and jelly sandwiches."

12:25 Marie Claire says she is going to have a cooking show. Dad helps her set up the puppet theater and she sits behind it and does a cooking show with the cupcakes. Dad watches and takes pictures.

12:40: Dad and Marie Claire sit with the blanket over their shoulders and play with the cupcake set again.

12:50: Marie Claire helps dad set up the tent so they can have a puppet show in it. After it's set up they put the blanket in for the soft floor and then the toys. They play and laugh.

1:10: Still playing in tent.

1:20: Outside of tent playing with a top and a gyroscope. Talking and smiling. CSS tells them they have ten minutes.

1:26: Dad begins to clean up the toys while Marie Claire continues to play with the gyroscope.

1:30: Marie Claire gets her shoes on and dad gathers her food items up and puts it away. Marie Claire gives dad a hug and kiss and leaves with CSS.

1:34: Visit ends with mom signing Marie Claire back into her care as dad waits upstairs.

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Dy Armstrong

11/18/10  
Mockovak

10:29: Dad is in lobby upstairs. CSS texts mom and lets her know to bring Marie Claire to ISNW.

10:34: Mom signs Marie Claire into the visit.

10:35: Dad is setting up the room in a Christmas theme. Marie Claire enters the room and dad stops what he's doing and squats down and gives her a big hug, saying, "Merry Christmas!" to her. They chat about all the things in the room: small Christmas tree, gifts, stockings, etc. Dad tells Marie Claire they have to leave some cookies and milk for Santa. He gets out some sugar cookies decorated. They decide to decorate the tree first. Dad says, "We need to go to sleep and then wake up so Santa can come with the presents."

10:45: Dad and Marie Claire decorate the tree with bulbs. Marie Claire drops one on the table and it breaks. Dad tells her not to touch it as he doesn't want her to cut herself. Dad cleans up the broken ornament. "I'm really sorry I broke the blue one", Marie Claire tells dad. "Oh that's ok. We have plenty more. These things break sometimes. It's ok", dad says. "We have a big tree at our house with lots of things on it. I'm in ballet now but I'm just new. I'll be in the Nut Cracker on someday.", she tells dad. "Oh, that's good!", he replies. Marie Claire asks dad about his holiday

10:55: Still talking and decorating the tree.

11:00: Done decorating, Marie Claire turns the lights on the tree, both cheer and clap. Marie Claire says it's time to go to sleep so Santa can come. She has picked out the cookies for him. Dad pours some milk in a cup and sets it and the cookies on the table. He covers Marie Claire up, head too, and tells her, "No peeking. You need to sleep." Dad comes in and says, in a deep voice, "Santa's here. Hope they left me some cookies. Oh they did. Yum. These are so good." He eats a few bites then says, "Has Marie Claire been good this year?" CSS says, "I think she's been excellent!" "Oh, well then excellent girls get lots of gifts and puts gifts under the tree. Big production of being Santa. Marie Claire giggles under the blanket.

11:05: All gifts under tree (and table), dad lays on couch with Marie Claire and says, "Oh, it's night time. I wonder if it's almost morning." Marie Claire says it is. They yawn, stretch and look at the tree area. Marie Claire's eyes are wide. "Look at what Santa brought!", she exclaims. Marie Claire eats a bite of cookie and then dad asks if she wants to open a present. She runs to the gifts and gets one to open. It's a Legos set. They discuss what Santa looks like as they munch on cookies. Dad notices that Marie Claire's tooth is gone and asks if she put it under her pillow. She says she did. "What did you get?"

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12/16/10 (Thurs)  
Mockovak (PP/Supervised)

Money?" "Real money and gold chocolate coins!", she chirps.

11:18: Looking in their stockings. Hello Kitty bubble bath, chocolate bar and "Diamonds!", she says in gleeful awe. "Yeah, big ones!" dad exclaims. She looks at them in the sunlight and smiles. There are pink diamonds as well. "Woooh", she says as she looks at them. Dad shows her that they are magnetic and they put them on the metal frame around the window.

1:25: Marie Claire gets another present and tries to read the tag. Dad tells her that it's for her. "Well, why don't you have any presents?", she asks soulfully. Dad pauses and says, "That's a good question." dad tells her that he has one present under the tree. Marie Claire digs through all of her gifts to get to dad's gift. He reads the tag, "To daddy", Marie Claire smiles sweetly. It's a tie. Dad is surprised and pleased. He tells Marie Claire it's perfect and will go with the suit he has. Marie Claire opens the next gift. It's a red velvet Christmas dress with white "fur" around the cuffs and hem. "Oooh, I looove it!", Marie Claire cries. Dad has set up a make shift dressing room in the corner of the room. Marie Claire dances over to it and changes into her dress and Hello Kitty tights; chatting to dad the entire time. Dad helps her with the sleeves.

11:35: Marie Claire opens another gift; books. She has dad get her Santa hat, which matches her dress. Marie Claire opens a big gift next. Dad helps her with it as it's big. "Wow!", she says. Dad sees it and tells her she has to open another one first because they go together. She complies. "Aaaaawww!!! It's a dooollly", Marie Claire smiles. "I looove it!" There are two dolls in the package; a boy and a girl. "You be the boy baby and I'll be the girl.", she tells dad. Dad tells her that they are twin babies. Marie Claire opens the other box and finds a little tote on wheels to hold the dolls and their accessories in.

11:45: Marie Claire tells dad to look in his stocking now. Then Marie Claire takes all the bows off the gifts and piles them on the chair before opening other gifts. "Oooohh, so sweet. I love it! Thank you so much!", Marie Claire croons as she sees a Hello Kitty outfit. Dad told her that he met Hello Kitty in Chicago and she sent that present for Marie Claire. "Why does Hello Kitty like me so much?", Marie Claire asks. "Because you are such a sweet girl", dad says.

11:55: Dad and Marie Claire sit on the floor and read the book that came with the dolls.

12:05: Marie Claire and dad sit on floor and dress the dolls and talk. Marie Claire chitchats away as they dress the dolls; making up stories about the dolls and the diamonds. Marie Claire asks dad why she got so many presents. "I guess you're lucky, huh? But before you leave we are going to give gifts to some other little girls, ok?", dad says.

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12/16/10

Mockovak

"Why?", she asks. "Because not all little girls are as lucky as you. So we're going to share with them", dad tells her. Dad rubs Marie Claire's back as she packs up the dolls bag to take them "to the park".

12:15: Dad takes pictures as Marie Claire continues to play. Dad gets out some apple slices and eats. Dad and Marie-Claire talk about the "prettiest Christmas tree ever." Marie Claire tell Dad that she has a big Christmas tree at home. He tells her that she has two trees now. She and Dad talk about names for the girl and boy doll. Marie Claire says she might name the girl Alice. She says its her most favorite baby doll ever. Dad sits on the floor and talk with her as she fiddles with the dolls.

12:30: Dad helps Marie Claire put her dolls away and pack up all their things, then they play the Bunny Hop game she unwrapped earlier.

12:42: Done with the game, they now sit at the table and watch a Hello Kitty cartoon and eat their snacks. Marie Claire can't see so dad sits her in his lap. She smiles as she munches and watches the show.

12:55: Dad opens the Odwalla drinks her brought and Marie Claire mixes the two then tells dad to do the same. Dad holds Marie Claire on his lap and braids her hair as she watches the movie. He kisses the side of her head. Marie Claire smiles.

1:10: Movie is over. Marie Claire asks dad if she can take the rest of the cookies home. Dad tells her yes. Dad asks her if it gets cold around here. Then he tells her, "Ok, I want you to open this present. It's from Prince and Sophie". He holds the box as she opens it. It's a pink coat with matching hat and gloves. She opens another gift; a purple and pink dress. She puts it on and dad takes a few pictures of her in it with the dolls.

1:20: Dad and Marie Claire sit at table and share the chocolate bar that was in her stocking. Christmas music plays in the background. Dad goes behind the curtain and changes into his dress shirt.

1:25: CSS takes a few pictures of them in their Christmas clothes. Dad cleans up while Marie Claire plays with the dolls.

1:28: CSS texts mom to let her know there are a lot of gifts and we will be down in a few minutes.

1:32: Dad gives Marie Claire final hugs and kisses and tells her he loves her very much. Dad tells Marie Claire, "I won't see you for 3 weeks. You know I'd like to see you more often but I can't right now. But you know that I love you so much, right?" Marie Claire has her head down. Dad raises her head and gives her a kiss on the cheek and a long hug. Marie Claire's eyes get a little misty. Visit ends with mom signing Marie Claire back into her care at 1:34.

Signature DA Armstrong 12/16/10  
Page 3/3 Mockovak

# EXHIBIT F

PACIFIC MEDICAL CENTERS

RE: MOCKOVAK, MICHAEL

CHIEF COMPLAINT

This 51-year-old ophthalmologist came in for a complete physical exam, but also for attention to several concerns. Because these issues took precedence, a physical exam was not performed today.

HISTORY OF PRESENT ILLNESS

He notes that he has had a chronic cough since 04/2009. Originally it was just a mild cough, but then became more persistent and has been associated with some nasal congestion. On 06/16/2009 he saw Dr. Joseph Lee at Overlake Medical Center. He was treated with azithromycin, Nasonex, Advair 100/50 and Guiatuss cough syrup. He has also been using over-the-counter cough syrup. He felt that his symptoms were improving, but then came back with a vengeance when he was recently exposed to a blast of cold air from an air conditioner. It has been followed by lots of continued congestion in the nose and throat, as well as a dry cough. He thinks he may have had a fever last week, but did not actually check his temperature. He also felt some chills. Sometimes his head feels warm.

Secondly, we talked about mood issues. He has just been through a very difficult divorce and he has had a problem with his practice and with his business colleague. All of this has led to tremendous emotional stress. He notes that he sleeps poorly and often feels anxious. At times he has been despondent, but never hopeless or helpless. He denies suicidal ideation. He does note that he has had a long history of "moodiness".

PAST MEDICAL HISTORY

Osteoarthritis involving the neck and lumbar spine.

PAST SURGICAL HISTORY

Corrective vision surgery.

MEDICATIONS

1. Nasonex 50 mcg, not currently being used.
2. Advair 100/50 b.i.d., not used.
3. Cough suppressants as noted above.

ALLERGIES

No known drug allergies.

HABITS

He has a few drinks of alcohol per week, no more than 7. He denies use of tobacco or any illicit drugs.

SOCIAL HISTORY

He was born in Chicago. He is divorced and has 1 daughter. He works as an ophthalmologist and rotates between 3 clinics throughout Washington State, devoting his time to doing corrective vision surgery.

FAMILY HISTORY

His brother has eczema. A nephew has asthma. One of his relatives also has hypertension and diabetes.

REVIEW OF SYSTEMS

Skin: He notes that he sometimes gets dry skin on his scalp. Neurologic: Occasional headaches.

---

PATIENT: MOCKOVAK, MICHAEL

DOB: [REDACTED]

MRN: [REDACTED]

DATE: 8/3/2009

PROGRESS NOTE

MADISON

Christopher Smith, MD

Page 1 of 2

**PHYSICAL EXAMINATION**

**GENERAL:** This is a well-nourished, tan, friendly, middle-aged man.

**VITAL SIGNS:** Blood pressure 122/80, pulse 88, weight 168, temperature 99.5, O2 sat 97%.

**SKIN:** Warm, not hot and no rashes present.

**NECK:** Without lymphadenopathy of the supraclavicular or cervical regions.

**CHEST:** Clear to percusslon. On auscultation, there is some slight coarsening of the breath sounds on inspiration and diminished intensity of the breath sounds on expiration. I did not appreciate significant prolongation of the expiratory phase of respiration.

**CARDIOVASCULAR:** Regular rate and rhythm without murmurs or gallops.

**PSYCHOLOGIC:** He is calm and cooperative. He does not appear sad, moody or anxious.

**ASSESSMENT**

1. Chronic cough with a history of eczema and also childhood history of "hayfever". I believe that this is due to reactive airway disease or a mild form of asthma.
2. Situational depression.

**PLAN**

Prednisone 20 mg daily for 7 days and then 10 mg daily for 7. In addition, he will resume Advair 100/50, 1 puff b.i.d., gargle, rinse and spit after use. I encouraged him to begin performing nasal irrigation as well.

For his mood, he will start citalopram 20 mg, 1/2 tablet daily increasing to a whole tablet after a week. We will check labs to include a PSA, CMP and lipids in anticipation of a followup visit with me in about 3 weeks for a complete physical exam and followup of these acute health concerns. He will call with any questions.

\*\*\*\*\* Document e-signed by Christopher Smith, MD on Sunday, August 23, 2009 at 3:09 PM \*\*\*\*\*

Christopher Smith, MD

CS/7234

D: 8/3/2009 11:32 PM

T: 8/5/2009 2:47 PM

Job# 1973296

PATIENT: MOCKOVAK, MICHAEL

DOB: [REDACTED]

MRN: [REDACTED]

DATE: 8/3/2009

PROGRESS NOTE

MADISON

Christopher Smith, MD

Page 2 of 2

# EXHIBIT G

March 7, 2011

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

Dear Ms. Tvedt:

I am writing to describe the clinical symptoms of major depression, a disorder for which prescription of an antidepressant medication such as Celexa (citalopram) is indicated. The patient must have (1) persistent depressed mood and/or (2) persistent diminished interest in or pleasure from usual activities. In addition, they must have, nearly every day, at least three (if both [1] and [2] are present) or four of the following symptoms: decrease or increase in appetite; sleep disturbance; objective psychomotor agitation or retardation; subjective fatigue or loss of energy; feelings of decreased self worth or guilt; diminished ability to think, concentrate or make decisions; and recurrent thoughts of death or suicidal ideation. The most accepted biological explanation of depression is decreased brain activity of the neurotransmitters serotonin and norepinephrine.

It has been known for decades (and is stated on page 366 of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, 2000) that "symptoms like those seen in a Hypomanic Episode may be due to the direct effects of antidepressant medication...or medication prescribed for other general medical conditions (e.g., corticosteroids)." The scientific basis for antidepressant (including Celexa) and glucocorticoid induction of hypomania are well described in the literature.<sup>1-4</sup> The core feature of hypomania is elevated, expansive and (sometimes) irritable mood. This mood disorder is accompanied by at least three of the following: inflated self esteem or grandiosity; decreased sleep; distractibility; increased goal-directed activity; excessive involvement in risky behavior; subjective experience of racing thoughts; and more talkative than usual. Patients with a history of high energy and drive and difficult interpersonal relationships are particularly susceptible. In contrast to mania, psychosis, inability to function, and need for hospitalization are absent. Antidepressants (such as Celexa) and glucocorticoids (such as prednisone and the fluticasone in Advair) cause hypomania in susceptible individuals likely by producing excessive brain activity of the neurotransmitters serotonin and norepinephrine.<sup>5</sup>

Sincerely yours,



Murray Raskind, MD  
Professor and Vice Chair  
Department of Psychiatry and Behavioral Sciences  
University of Washington  
206-764-2702

References:

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5. Salvadore G, Quiroz JA, Machado-Vieira R, Henter ID, Manji HK, Zarate Jr CA. The neurobiology of the switch process in bipolar disorder: a review. *J Clin Psychiatry* 71:1488-1501, 2010.

# EXHIBIT H

## KOMO News

[Print this article](#)

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# Eye surgeon found guilty in murder-for-hire plot

Originally printed at <http://www.komonews.com/news/115203034.html>

By [KOMO Staff](#) February 3, 2011

SEATTLE - A prominent Renton eye surgeon was convicted Thursday of hiring a hit man to kill his business partner.

A King County Superior Court jury found Dr. Michael Mockovak guilty of solicitation to commit the murder of Dr. Joseph King, his partner in the Clearly Lasik eye surgery center.

Mockovak also was convicted of attempted first-degree murder, conspiracy to commit first-degree theft and attempted first-degree theft. Jurors found him not guilty of a second count of criminal solicitation.

He faces up to 20 years in prison at his sentencing, scheduled for March 17 at the King County Courthouse.

During the trial, prosecutors argued that Mockovak chose murder out of greed, and that he made a \$10,000 down payment on the murder.

The hit man, however, was an FBI informant who videotaped Mockovak making the down payment.

"He chose murder out of greed and an overwhelming desire to run the business his way," said Senior Deputy Prosecutor Susan Storey.

In outlining the motive for murder, Storey said Mockovak would collect on a \$4 million life insurance policy on King. She also claimed Mockovak thought King was greedy and cheating him.

Mockovak's lawyers argued during the trial that he was the victim of entrapment, a government set-up. Jurors said that made deliberations tough.

"We were surprised by the amount of persuasion the government could do in an

entrapment, that they could really persuade the defendant," said juror Stephanie Delaney.

But Delaney says she felt the defense tried too hard to persuade them, and prosecutors agreed.

"We didn't believe that there was any entrapment and we think the jury did the right thing on those," Storey said.

Defense attorneys argued that Mockavak only joked about killing his partner, and FBI informant Daniel Kultin turned that joke into an actual plot.

King was not there as the verdicts were read. But, in a statement he said: "My colleagues, my family and I are relieved to put this sad episode behind us."