

NO. 69390-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of
MICHAEL MOCKOVAK,
Petitioner.

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Division I
State of Washington

**STATE'S SUPPLEMENTAL RESPONSE
RELATED TO LEARNED HELPLESSNESS DEFENSE**

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A. INTRODUCTION

Mockovak purchased in 2009 what was perhaps the best criminal defense trial lawyers money could buy in Seattle. Now he claims based on second-hand information that this team of legal experts made a “massive blunder” in failing to tell a jury that prior sexual abuse rendered Mockovak helpless to resist entreaties to commit murder. His claim should be rejected because he can show neither deficient performance nor prejudice.

The declarations that Mockovak relies upon does not establish that counsel passed on a learned helplessness defense because they were confused about the law. Evidence that one member of the legal team did not believe – eight months before trial – that they could bring both an entrapment defense and a diminished capacity defense aimed at undermining proof of the *mens rea* for the charged crimes does not answer the separate question of why counsel did not present evidence of learned helplessness to bolster an entrapment defense. And, where entrapment in Washington includes both subjective and objective components, snippets of evidence suggesting that one lawyer believed there was an objective component to entrapment whereas the other lawyer believed the standard to be subjective, does not

show that the legal team rejected a learned helplessness defense because they thought it was legally unavailable. Because Mockovak has plainly chosen as a strategic matter in this collateral attack *not* to seek input from the trial lawyers on this question, this Court should infer that such evidence would be adverse to him, and conclude that he has failed to meet his burden of proving that trial counsel's chosen strategy was unreasonable.

The conclusion that naturally flows from this record – and the conclusion required since counsel is *presumed* competent – is that Mockovak's trial lawyers did not present evidence of learned helplessness because in their judgment it would have been detrimental to their defense. Mockovak was aggressive, nasty, and persistent in fighting anyone who crossed him. The notion that he was helpless to resist his subordinate, an information technology employee, when he routinely battled his business partner, his chief operating officer, and other high-level peers, is highly improbable. Presenting such evidence would have opened the door to a great deal of unflattering information about Mockovak and would have undercut his more reasonable defense. This is especially true in light of recorded conversations that show – through words and laughter – that Mockovak was the originator and eager participant

in the plan to kill Dr. King. A learned helplessness defense would have drained all credibility from the defense case. Counsel was wise to forego it.

B. ISSUES PRESENTED

1) Whether Mockovak's deficient performance arguments fail where he has presented a declaration saying that one trial lawyer, Ms. Tvedt, believed she could not present a diminished capacity defense as to the *mens rea* for the charged crime at the same time as an entrapment defense, where the real issue is whether she could have presented evidence of learned helplessness as part of an entrapment defense.

2) Whether Mockovak has failed to establish that Mr. Robinson rejected a learned helplessness defense based on a misunderstanding of entrapment law where Mr. Robinson's cryptic comment about entrapment law was correct.

3) Whether Mockovak has failed to prove deficient performance of trial counsel where he has failed to obtain declarations from any of his three trial lawyers as to their reasons for rejecting a particular defense, where he obtained declarations from two of those lawyers on other strategic decisions.

4) Whether Mockovak has failed to establish prejudice from ineffective assistance of counsel where learned helplessness evidence would not have changed the result of the trial because the other evidence showed that Mockovak was not helpless in dealing with *anyone*, and where more damaging evidence would have been admitted to rebut the helplessness claim.

C. FACTS RELEVANT TO LEARNED HELPLESSNESS CLAIM

This Court is familiar with the facts surrounding the crime and the procedural history of this case, and the State detailed those facts in its original response to this petition, and in its brief on direct appeal. This section will focus on facts that bear particularly on the claim that counsel should have brought a learned helplessness defense, and that such a defense would have changed the outcome of this case. As a general matter, because the State does not have independent access to materials in Mockovak's trial files, the State cannot challenge certain factual representations made in Mockovak's materials. For that reason, the State has, for the most part, taken the facts underlying those declarations at face value (as contrasted with the implicit or explicit conclusions drawn from those

facts), and argues that Mockovak has failed to meet his burden to show constitutional error. However, should this matter be remanded for discovery and a reference hearing, the State reserves the right to challenge any of those facts after obtaining discovery now held by Mockovak and / or his former lawyers.

Mockovak retained the law firm of Schroeder, Goldmark & Bender (SGB) to defend him against these charges. He was represented primarily by three lawyers: Jeffrey Robinson, Collette Tvedt, and Joseph Campagna. At the time of this trial, Mr. Robinson had practiced criminal law for over 30 years in the State of Washington and he was lead counsel on the case. PRP and Br. in Support, Decl. of Robinson, p. 1, ¶ 2. Ms. Tvedt and Mr. Campagna are also very experienced and respected criminal trial lawyers. At least one other lawyer from SGB, Ms. Amanda Lee, apparently assisted with preparation of the case. PRP and Br. in Support, Decl. of Lobsenz, Appendix P (billing records).

Mockovak has conducted a lengthy and painstaking investigation into trial counsel's files, their computers, and their email, and he has also made a detailed search of Mockovak's personal laptop for information relevant to this petition. PRP and Br. in Support., Decl. of Lobsenz, pp. 1-22. Counsel obtained

declarations from Mr. Robinson and Mr. Campagna.

Mr. Robinson's declaration recounts strategic thinking as to jury instructions on entrapment, motions to suppress electronic recordings, the risks and benefits of state versus federal prosecution, his strategy for obtaining the most favorable forum, and discussions he had with Mockovak concerning these matters. PRP and Br. in Support, Decl. of Robinson, pp. 1-6.

Mr. Campagna, too, describes in his declaration the details of his research and thinking regarding entrapment instructions, and concludes that "there was no strategic or tactical reason" for submitting the instructions he recommended. PRP and Br. in Support, Decl. of Campagna, pp. 1-5. No declaration was obtained from Ms. Tvedt.

Despite providing this Court with about 300 pages of briefing and nearly 700 pages of attachments, Mockovak has not produced a declaration from any one of his trial lawyers describing the team's reasons for not presenting evidence of learned helplessness at trial.

Mockovak does, however, submit a declaration from his friend of more than 40 years who posted bail for him pretrial and who loaned Mockovak more than a half-million dollars to defray his legal costs. PRP and Br. in Support, Decl. of Marmer, p. 2, ¶¶ 5, 6.

According to the declaration of that long-time friend, Mr. Marmer, trial counsel considered a traditional diminished capacity defense as to the *mens rea* of the charged crimes, and they had hired an expert to explore that possibility. The declaration says:

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.

Decl. of Marmer, at 3 (emphasis added).

Marmer filed a second declaration after the State filed its response to the personal restraint petition. Pet.'s Reply Br., Second Decl. of Marmer, pp. 1-3. In that second declaration, Marmer says that he and Ms. Tvedt discussed Mockovak's history of sexual abuse, they discussed the possibility of Marmer testifying to that history, and they discussed experts who might testify in support of the defense. Id. It appears that these conversations took place sometime before September, 2010. Id., pp. 2-3, ¶¶ 7-8. Ultimately, the evidence of prior abuse was not presented. Mr. Marmer does not say in his second declaration that Ms. Tvedt believed that testimony about prior sex abuse was incompatible with an entrapment defense.

Mockovak has not provided the results of trial counsel's diminished capacity expert's evaluation or any other documentation regarding the legal team's investigation into a diminished capacity defense. Mockovak has likewise provided no documentation that elucidates the legal team's research or thinking regarding learned helplessness evidence. Instead of providing evidence relevant to trial counsel's decision-making, Mockovak obtained an evaluation of Mockovak (conducted four years after trial) and submitted that evaluation in February of 2015 as an attachment to his reply brief.

Pet.'s Reply Br., Decl. of Natalie Novick Brown, PhD. This was done after receiving the State's response to his personal restraint petition in November of 2014, years after he filed the petition.

Defense counsel's presentation at sentencing touched on some of the factors that might have gone into a diminished capacity defense, had such a defense been brought at trial. RP 3/17/11 96-98. At sentencing, the judge who presided over the entire trial considered Mockovak's history of sexual abuse and evidence regarding his mental state leading up to the crime and concluded that the information did not provide a basis on which to impose an exceptional mitigated sentence. RP 3/17/11 119-20.

In order to prove prejudice from trial counsel's approach, Mockovak repeatedly asserts in his latest brief that Kultin initiated the plot to kill Klock and Dr. King, as though repetition in a brief makes the assertion evidence. Br. of Pet. at 1, 2, 15, 16, 32, 33, 40, 43, 46, 47, 49. The record refutes this oft-repeated assertion. In reality, Mockovak first broached the topic with Kultin in late 2008/early 2009 and alluded to the fact that a person like Mr. Klock "would not go far in Russia." 11 RP 118. Kultin remembers a conversation during this time in which Mockovak suggested Kultin may have "some... Russian that can just put an end to it or, you

know, do something with, you know, rather than the legal way.”

11 RP 119. Kultin interpreted these comments as a joke, but not as a “funny joke.” 11 RP 119. Mockovak had previously joked with Kultin about him being in the Russian mafia due to his accent and daily suits and ties. 11 RP 113-14. Mockovak had once even touched Kultin through his suit and asked if he was “packing.” 11 RP 114-15.

One to three months later, Mockovak told Kultin in the office lunchroom that Klock would be traveling to Europe, which would be a good opportunity for “something to happen” to him. 11 RP 120-21. This conversation distressed Kultin and made him believe Mockovak wanted to have Bradley Klock killed. 11 RP 124, 126. It was only after this “lunchroom conversation” that Kultin first contacted his father, who connected him to a Portland FBI agent, who in turn connected him to Lawrence Carr, a Seattle FBI agent who handled the rest of the case. 11 RP 126-28.

Mockovak also repeatedly claims Kultin “persuade[d],” “manipulated,” “wheedle[d],” and “frighten[ed]” him into soliciting King and Klock’s murders, and that he reluctantly “g[a]ve in” after six months of Kultin’s persistent urgings. Br. of Pet. at 1, 2, 15, 16, 43, 46, 47, 49. In reality, the record shows Mockovak both thought

of the idea to kill Kultin and King and excitedly participated in the planning of their murders. Kultin only contacted the authorities after Mockovak repeatedly joked about Kultin being in the mafia and alluded about "something...happen[ing]" to Brad Klock after the June "lunchroom meeting." 11 RP 120-11. Agent Carr subsequently instructed Kultin that he was "never ever [to] bring the subject up with [Mockovak] again." 10 RP 69-70. Rather, he could only tell the doctor he was visiting friends in Los Angeles, one of whom he believed to be a Russian Mafioso, to get a "better idea of what Dr. Mockovak was thinking." 10 RP 72-73. Agent Carr further instructed Kultin that if the discussion of his trip to Los Angeles "should spark conversation about murder...he was not to have any part of that discussion....he was only to listen and to not contribute whatsoever to it." Id., 11 RP 129. Over the next two months, they did not discuss the issue.

On August 3, Mockovak called Kultin and cryptically asked if they could meet to discuss "that thing that we talked about before." 10 RP 76; 11 RP 131. The two met in a parking lot on August 5, where Mockovak expressed his frustration with Klock's lawsuit and that he wanted something to be "done to him." 11 RP 134. He also mentioned his partner, King, had a \$5 million life insurance policy if

“something were to happen to him” as well. Id. In response, Kultin told him he would “make some calls” to get more information. 11 RP 133. After this meeting, Kultin met again with Agent Carr and the FBI, who were still evaluating whether Mockovak was “talking about killing Brad Klock,” instead of “breaking his legs or hurting him.” 11 RP 145.

Mockovak and Kultin met again on August 11 and the conversation was recorded. Mockovak alleges that at this meeting he was uncertain about hiring the hitmen, that he said “no” seventeen times indicating he did not want to have Klock murdered. Br. of Pet. at 44. This claim is patently false. Mockovak was not saying “no” to hiring the hitmen, he was answering “no” to hiring the hitmen *before the deposition* when Kultin asked when Klock should be killed. At the same meeting, Mockovak answered “yeah” when Kultin told him he “made some calls” saying Mockovak was interested. Tr. 8/11 at 34. When Kultin told Mockovak “they” could do it, Mockovak replied “Oh good. Good.” Id. Mockovak also excitedly answered “yeah” repeatedly when discussing killing methods, but finally laughed, saying “I don’t care” when asked how he wanted Klock to be murdered. Id. at 40-41. Mockovak then

initiated discussion about how he would have to launder the money to pay the killers and Kultin. Id. at 42-43.

The audio recordings of the meetings between Kultin and Mockovak reveal Mockovak's excited tone of voice, the pace of the conversations, the eagerness with which Mockovak participated, and the energy and enthusiasm with which he imagined Dr. King's death. Those audio recordings are available on Exhibit 53 and are in this Court's possession for review.

D. ARGUMENT

Mockovak's ineffective assistance of counsel argument depends on his assertions that trial counsel believed that they could not simultaneously claim both learned helplessness and entrapment, and that one lawyer, Robinson, erroneously thought that entrapment had an objective component, whereas it should be viewed subjectively. Neither assertion merits relief. Mockovak has not produced evidence to show that trial counsel was mistaken on either point, or to show how trial counsel actually reached a decision to forgo learned helplessness evidence. In fact, Mockovak has quite deliberately chosen not to ask any of his trial lawyers to prepare a declaration as to this claim, although he presented

declarations from trial counsel as to other tactical decisions. He has failed to carry his burden of showing that the presumption of competent counsel has been overcome.

1. MOCKOVACK HAS NOT ESTABLISHED DEFICIENT PERFORMANCE.

To establish ineffective assistance of counsel, Mockovak must show both that defense counsel's representation was deficient, i.e., that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002).

The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Appellate courts must refuse an invitation from counsel on collateral review to demand "perfect advocacy" rather than "reasonable competence." Maryland v. Kulbicki, ___ U.S. ___, 2015 WL

5774453, *2 (October 5, 2015) (citing Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003)). A reviewing court must begin with a strong presumption that the representation was effective. Strickland, at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, at 689-90. The Strickland standard must be applied with “scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity” of the adversary process. Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Counsel’s representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 131 U.S. at 105. Courts must combat the “natural tendency to speculate as to whether a different trial strategy might have been more successful.” Kulbicki, at *2 (citing Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 840, 122 L. Ed. 2d 180 (1993)).

A collateral attack on strategic decision-making must include facts that permit a full understanding of counsel’s reasoning; it cannot be presented in a vacuum.

The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based,

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

Strickland, at 691. Decisions whether to call expert witnesses is generally tactical and cannot serve as a basis for an ineffective assistance argument. In re Pers. Restraint of Cross, 180 Wn.2d 664, 700, 327 P.3d 660 (2014) (decision not to call mental health experts in a capital murder case was tactical); State v. Mannering, 150 Wn.2d 277, 287, 75 P.3d 961 (2003) (decision not to call defense expert witness was trial tactic).

- a. Mockovak's Newly Proposed Trial Strategy Is Not A Diminished Capacity Defense; Declarations About Diminished Capacity Do Not Support His Argument.

Mockovak first argues that trial counsel did not understand that they could simultaneously present a diminished capacity

defense and an entrapment defense. The argument is based on a misinterpretation of assertions attributed to trial counsel, Ms. Tvedt, in Mr. Marmer's first declaration. Mockovak's interpretation of those remarks confuses diminished capacity – which seeks to attack the State's evidence as to a mental element of the charged crime – and learned helplessness as applied to entrapment – which seeks to bolster a defense as to which he has the burden of proof to show that he was not predisposed to commit the crime. There is no evidence that Ms. Tvedt or Mr. Robinson or Mr. Campagna rejected learned helplessness evidence because they thought it was legally equivalent to diminished capacity.

- i. Learned helplessness as to entrapment is not diminished capacity and its application to entrapment would be novel.

Evidence of diminished capacity seeks to show that the State has failed to prove specific intent, an element of the charged crime. Learned helplessness has been held, in some contexts, to be a component of a diminished capacity defense, but evidence of learned helplessness can also be used outside of the traditional diminished capacity context.

For example, a defendant claiming entrapment has the burden of proving that the criminal design originated in the minds of law enforcement or someone associated with law enforcement, and that the defendant was lured or induced to commit the crime.¹ As to whether he was lured or induced to commit a crime a defendant might arguably present evidence that he was particularly susceptible to inducement because he was sexually abused in the past and suffers from learned helplessness, State v. Shuck, 953 S.W.2d 662 (Tenn. 1997), although no Washington case has discussed or approved of such evidence in the entrapment context. And, a defendant in Washington would still have to show that there was a factual basis for the defense that made the expert's testimony helpful to the jury. See State's Resp. to PRP, at 80. It is unclear whether that defense, which essentially says that evidence of past abuse may excuse criminal conduct against someone wholly unconnected to the abuse, is consistent with Washington law and with public policy. See State v. Riker, 123 Wn.2d 351,

¹ RCW 9A.16.070(1) provides; "In any prosecution for a crime, it is a defense that: (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit. (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime." WPIC 18.05.

364-65, 869 P.2d 43 (1994) and discussion, *infra*. Thus, use of this defense is not a foregone conclusion in Washington. It is not in the mainstream; it would be novel.

For purposes of the ineffective assistance of counsel claim, however, the salient point is that a defendant who offered learned helplessness evidence to support an entrapment defense would not be pursuing a diminished capacity defense in the traditional sense, since it would not be targeted at showing that the State had failed to prove the *mens rea* of the charged crimes. Ms. Tvedt's comments must be read in that light.

- ii. Ms. Tvedt never ruled out using learned helplessness evidence; she said only that the legal team could not present a diminished capacity defense attacking the State's proof on an element of the crime at the same time as they presented an entrapment defense.

In his briefing, Mockovak says that "an entrapment defense and expert testimony about psychological deficits that rendered the defendant exceptionally vulnerable to entrapment were not inconsistent, were both available, and could be simultaneously asserted." Br. of Pet. at 24. Even if this statement is true, it is

irrelevant; Ms. Tvedt's comments expressly address diminished capacity, not expert testimony to support an entrapment defense.

It is plain from the words in Marmer's declaration and from the words attributed to Ms. Tvedt that she was saying that the defense team could not raise a traditional diminished capacity defense at the same time as an entrapment defense. According to Mr. Marmer's declaration, he opened the topic by asking 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." Decl. of Marmer, at 3, ¶ 13. Ms. Tvedt replied that they could, indeed, raise a diminished capacity defense, and she informed Marmer that they had retained an expert to evaluate Mockovak for that purpose. Id.

Marmer's declaration says nothing, however, about whether he and Ms. Tvedt discussed evidence of learned helplessness in the context of an entrapment defense, a defense upon which Mockovak had the burden of proof, and a defense that does not attack the State's proof as to the *mens rea* defined in the crime. Marmer's declaration does not address learned helplessness at all. Thus, Marmer's declaration does not address the same claim as Mockovak is trying to raise in his petition, so his evidence does not support his claim.

Mr. Marmer's second declaration further shows that Ms. Tvedt was not rejecting learned helplessness evidence based on a misunderstanding of the law. In the second declaration, Mr. Marmer makes clear that he and Ms. Tvedt were discussing a learned helplessness defense, perhaps as late as September, 2010. It was in April, 2010 that Ms. Tvedt told Mr. Marmer that the team could not pursue both diminished capacity and entrapment. The team continued to consider learned helplessness evidence, even though it had indicated that a diminished capacity defense could not be brought along with an entrapment defense. Ms. Tvedt never told Marmer that she could not raise learned helplessness at the same time as entrapment.

For these reasons, State v. Frost 160 Wn.2d 765, 161 P.3d 361 (2007) and State v. Galicia, 63 Wn. App. 833, 822 P.2d 303 (1992) are immaterial. The question presented is not whether trial counsel properly rejected a general diminished capacity attack as to Mockovak's *mens rea* for the charged crimes; the question presented is why trial counsel rejected learned helplessness evidence as a component of the trial defense. Neither Mr. Marmer's first nor second declaration address this point, and the second declaration proves that Ms. Tvedt considered the

defenses to be distinct.² Thus, Marmer's declarations do not establish that Ms. Tvedt believed she could not present evidence of learned helplessness as it relates to the issue of entrapment. All she said (if the Marmer declaration is taken as true and accurate) was that she did not believe they could present a traditional diminished capacity at the same time as entrapment.

Moreover, this declaration purports to capture a single conversation with one lawyer, not three, that occurred nearly eight months before trial. Mr. Robinson was lead counsel and there is no evidence to suggest that he shared Ms. Tvedt's view as to diminished capacity, relevant or not.

The declaration from Dr. Gronsiorek does not shed any light on trial counsel's reasons for not presenting the learned helplessness defense. Dr. Gronsiorek simply says that he told trial counsel about Mockovak's history of abuse, described his familiarity with such cases, told her that he could not serve as an expert witness, and later learned, in November, 2010, that he would

² Although Mr. Marmer is an accomplished lawyer, he admits he has minimal criminal law experience, so it is not surprising that he might misunderstand comments by Ms. Tvedt and fail to appreciate the distinction between presenting expert testimony to establish diminished capacity and presenting expert testimony to support a claim that one is susceptible to entrapment.

not be called as a fact witness. Pet.'s Reply Br., Decl. of Gronsiorek, pp. 1-4.

- iii. It appears that trial counsel pursued but ultimately rejected the strategy of presenting learned helplessness evidence as part of an entrapment defense.

As explained above, Mr. Marmer's first declaration sheds no light whatsoever on trial counsel's reasons for not presenting learned helplessness evidence, it speaks only to diminished capacity. Still, the first and second declarations together suggest that Ms. Tvedt was proceeding in a logical analysis of the case. Although she correctly identified early on that that they should not claim entrapment and diminished capacity, they continued to entertain the notion that evidence of learned helplessness *could* be presented as distinct from diminished capacity.

The Washington Supreme Court recently made clear that even if it is possible to present two inconsistent defenses, it is not always good strategy, and absent proof to the contrary, it should not be assumed that counsel's decision was unreasonable.

The concurrence asserts that Carson's attorney should not have objected to the modified Petrich instruction because such an instruction would not have been *inconsistent* with his primary strategy of painting the charges as wholly false.

We must resist the temptation to substitute our own personal judgment for that of Carson's attorney because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Thus, the deficient performance inquiry does not permit us to decide what we believe would have been the ideal strategy and then declare an attorney's performance deficient for failing to follow that strategy. On the contrary, counsel's performance is adequate as long as his challenged decisions "can be characterized as legitimate trial strategy or tactics." Kylo, 166 Wash.2d at 863, 215 P.3d 177 (emphasis added). The decision to object to the State's proposed Petrich instruction plainly can be so characterized. Even assuming the objection would have been, as the concurrence suggests, "not inconsistent with" trial counsel's primary strategy (concurrence (Gordon McCloud, J.) at 8), many trial advocacy experts recommend that attorneys eschew alternative arguments before a jury, which may view the presentation of an alternative argument as a sign that the attorney believes his first argument is weak:

[A] difficult issue is whether an advocate should advance alternative theories that are not inconsistent—for example, defending a contract suit by claiming duress and also arguing that the defendant's performance did not constitute a breach of the contract. Because of the cost of overtrying, advancing the second defense may be viewed by the jury as revealing the attorney's lack of confidence in his first defense. Here again, most experienced attorneys advise, as a general rule, against advancing multiple theories to the jury, even if such theories are not inconsistent.

Robert H. Klonoff & Paul L. Colby, *Winning Jury Trials: Trial Tactics and Sponsorship Strategies* 39–40 (3d ed.2007). Indeed, we have previously held that an all-or-nothing approach, though risky, is a reasonable trial strategy. *Grier*, 171 Wash.2d at 42, 246 P.3d 1260. Here, defense counsel may reasonably have wished to avoid an argument that

could be summarized as: “[a]ll the allegations are false—and even if they are not all false, you have to agree on which allegations are true” or “Carson did not abuse C.C.—and even if he did, he did not do it three separate times.”

Because objecting to the proposed Petrich instruction in Carson’s case can be characterized as part of a legitimate trial strategy, defense counsel did not perform deficiently when he objected to the instruction and instead focused on portraying the allegations against his client as wholly false.

State v. Carson, No. 90308-5, 2015 WL 5455671, at *6-7 (Wash. Sept. 17, 2015).

In a solicitation to commit murder trial, a defense of entrapment would not deny that the defendant intended to promote or facilitate a murder; it would accept that element of the charged crime, but it would seek to prove that, because the idea originated with law enforcement and because the defendant was lured by unreasonable inducements, the defendant should be excused from culpability. Depending on the facts of a given case, this would be a reasonable strategy. By contrast, with such clear evidence that Mockovak plotted for months to kill Dr. King, it would have been well-nigh futile to claim diminished capacity, i.e., to attempt to argue that he did not intend to promote or facilitate a murder.

The presumption of competence demands that this Court presume Mr. Robinson, Ms. Tvedt, and Mr. Campagna made a

reasonable tactical choice, and that Mr. Marmer's declaration concerning a different defense does not establish deficient performance. And, since Mockovak has made a deliberate choice to avoid asking trial counsel directly, he has failed to overcome the presumption.

b. Mr. Robinson's Comments About The Objective Component Of Entrapment Law Do Not Establish That He Improperly Crafted A Defense.

Mockovak argues that Mr. Robinson was confused as to the law of entrapment in a way that caused him to reject learned helplessness as a defense. Br. of Pet. at 20-21, 25-26.³ As with the claim about Ms. Tvedt, this claim turns less on what was said, and more on what was meant. Because Mr. Robinson's comments were correct or, at worst, ambiguous, and because Mockovak has studiously avoided asking Mr. Robinson what was meant by his remarks and how the remarks affected the choice of defenses, his claim must be rejected.

³ It should be noted that this argument is a species of Mockovak's earlier-rejected attempts to argue that WPIC 18.05 is invalid because entrapment in Washington is wholly subjective, an argument that this Court rejected on direct appeal. State v. Mockovak, 2013 WL 2181435.

As the State fully argued earlier, in Washington the law of entrapment includes both subjective and objective components. State's Response to PRP, at 54-58. A defendant's predisposition to commit a crime is one element of entrapment, and this element is subjective. State v. Lively, 130 Wn.2d 1, 10, 921 P.2d 1035 (1996). Also relevant, however, is whether police used "normal" persuasion to overcome resistance. State v. Waggoner, 80 Wn.2d 7, 10-11, 490 P.2d 1308 (1971); State v. Swain, 10 Wn. App. 885, 889, 520 P.2d 950 (1974). A jury is asked to consider whether police used "a reasonable amount of persuasion to overcome resistance." WPIC 18.05. This is manifestly an objective determination. Thus, a jury deciding whether a defendant has proved entrapment must make both subjective and objective determinations.

Again, Mockovak's claim turns on the declaration of Mr. Marmer, in which he claims that Mr. Robinson said 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." PRP and Br. in Support, Decl. of Marmer, pp. 3-4, 16. From this paraphrased comment – the declaration does not use quotation marks –

Mockovak concludes that Mr. Robinson believed entrapment to be a wholly objective determination. He then makes the unspoken leap to the conclusion that Mr. Robinson rejected a learned helplessness defense based only on this misunderstanding. Neither conclusion is warranted.

First, Mr. Robinson would clearly have been aware of WPIC 18.05 and it is obvious that it contains subjective elements, so it is absurd to claim that he was unaware that entrapment was subjective. In fact, early in the case he addressed the court as follows: "I will indicate that given the nature of the charges and the nature of the defense, *Dr. Mockovak's state of mind is clearly relevant.*" RP 1/12/11 23 (italics added). He also argued Mockovak's state of mind in closing argument. *See e.g.* RP 1/31/11 116, 123. Second, Mr. Robinson was correct that the word "reasonable" in the jury instructions connotes an objective element to the decision, so he was correct to interject this point. More importantly, it is an unwarranted leap of logic to conclude that Mr. Robinson abandoned an entire defense simply because he recognized that there was an objective component to the entrapment inquiry. Finally, although Mockovak asked attorney Joseph Campagna to opine as to the entrapment instructions, he

apparently did not ask Mr. Robinson to do so. *Compare* PRP and Brief in Support, Decl. of Campagna, ¶¶ 15-16 *with* Decl. of Robinson, pp. 1-6. Without direct evidence of Mr. Robinson's thought processes, this post-verdict comment to Marmer is simply too fragile a basis upon which to conclude that a lawyer with thirty years of trial experience blundered.

c. Mockovak Cannot Meet The In re Rice Standard Where He Has Chosen Not To Obtain Declarations From Trial Counsel.

As has been mentioned several times above, Mockovak has gone to great pains to gather evidence in support of this petition, but he has studiously avoided gathering direct evidence of trial counsel's reasoning as to the learned helplessness defense. That strategic decision is fatal to his petition.

Washington courts have consistently held that factual assertions in a personal restraint petition are held to a demanding standard.

...[W]e take this opportunity to explain more fully the showing petitioners must make to support a request for a reference hearing. As a threshold matter, the petitioner must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). This does not mean that every set of allegations which is not meritless on its face entitles a

petitioner to a reference hearing. Bald assertions and conclusory allegations will not support the holding of a hearing. See In re Williams, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). Rather, with regard to the required factual statement, the petitioner must state with particularity facts which, if proven, would entitle him to relief.

As for the evidentiary prerequisite, we view it as enabling courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is not sufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. *If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence.* The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

In re Pers. Restraint of Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992) (italics added). The requirement for affidavits from people with personal knowledge is not just advisory, it is mandatory.

Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on conclusory allegations, a court should decline to determine the validity of a personal restraint petition. . . . We emphasize that the quoted principle from Williams, is mandatory; *compliance with that threshold burden is an*

absolute necessity to enable the appellate court to make an informed review. Lack of such compliance will necessarily result in a refusal to reach the merits.

Matter of Cook, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990)

(citations omitted, italics added).

Mockovak has failed to meet this standard. To prove that trial counsel believed that the legal team could not raise a learned helplessness defense of any sort, Mockovak relies primarily on inapposite information contained in declarations of Mr. Marmer. These declarations do not prove what Mockovak claims. The Marmer conversation about diminished capacity occurred at least eight months before trial with only one of several lawyers who worked on Mockovak's case.

Mockovak offers no information as to what might have occurred in the eight months between that conversation and trial. He does not prove when a decision was made to forgo either a diminished capacity defense or a learned helplessness defense. He does not show who made that decision. He does not show what documentation either supported or undermined the defense. He does not show what Mockovak's diminished capacity expert opined in 2010. (But this Court can certainly infer it would not have been favorable to Mockovak or he would not have sought a freshly-

minted affidavit and evaluation from Novick Brown in 2014.) We do not know these things because they are held by Mockovak, his collateral attack lawyers, and/or his trial lawyers, and Mockovak has chosen not to share that information with the court.

Mockovak may argue that the State can get declarations from trial counsel if it wants them. Such an argument inappropriately shifts the burden of proof in a personal restraint petition. The State does not have equal access to the lawyers or to the pertinent information. Although the State can *ask* trial counsel to submit a declaration regarding his or her trial strategy, there exist several obstacles. First, trial counsel need not comply with the request without an order from the court, and counsel might be considered in violation of professional ethics if he responds based solely on a prosecutor's request.⁴ Second, even if trial counsel is

⁴ AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion 10-456 July 14, 2010 Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim. ("Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.")

inclined to produce a declaration, there can be issues as to the scope of the client's waiver of the attorney client privilege. Third, a prosecutor does not have access to trial counsel's files, computers, records, timesheets, notes, and internal communications with the client and co-counsel. If a prosecutor requests a declaration without access to these materials, he is stuck with no way to impeach the answers, even if they appear not completely accurate. The passage of time since a complex trial, and perhaps regret that a client was convicted, can sometimes cloud trial counsel's memory of events. The prosecutor who obtains a declaration without discovery is essentially conducting a deposition before he has obtained discovery.

Mockovak does not suffer from any of these limits. In fact, it is plain that he and his lawyers have the financial resources to fully litigate this collateral attack and have conducted an exhaustive review of all material in this case, including trial counsel's files, billing records, and a detailed forensic examination of all documents on Mockovak's personal laptop, before they decided what declarations to obtain from trial counsel. Their decision to forego declarations on the point of learned helplessness when they *did* obtain declarations on other points strongly suggests that

counsel did not think that declarations from the most logical source would be helpful to Mockovak's petition. When counsel is presumed competent, the failure to obtain a declaration that would provide clear evidence on an issue of fact should be deemed a failure to meet one's burden.

The missing witness inference, widely accepted across an entire spectrum of the law, is instructive by analogy.

The missing witness rule had been defined in an earlier opinion as follows: "[I]t has become a well-established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so,—the jury may draw an inference that it would be unfavorable to him." ...

State v. Abdulle, 174 Wn.2d 411, 417, 275 P.3d 1113 (2012)

(internal citations omitted). Mockovak possesses a wealth of information about how his case was tried, and he has released some of that information to this Court, but on this allegedly important topic, he has failed to obtain evidence clearly within his control. This Court should draw the inference that the evidence would be unfavorable to him. At a minimum this Court should conclude that his failure to produce this evidence is a failure to meet his burden.

Finally, this Court should note that the Washington Supreme Court recognized in Rice and through the rules of appellate procedure that appellate courts have an institutional interest in demanding that convictions be disturbed only on a concrete showing that constitutional error has occurred. This Court, too, has an institutional interest in discouraging litigants from cherry-picking facts that might support their arguments, while depriving the court of information most pertinent to the question. Where a petitioner eschews the best evidence of trial counsel's strategic decisions in favor of misinterpretations of second-hand information, his petition should be dismissed. The supreme court was correct in Rice to recognize that a petitioner should not be rewarded with a reference hearing, and the appellate and trial courts should not be forced to litigate these claims, unless and until the petitioner presents competent evidence.⁵

Mockovak has chosen not to provide declarations from his trial lawyers. Mockovak's willful blindness – his deliberate ignorance – should not be countenanced. Nor should Mockovak be permitted to submit additional declarations in reply to this brief. He

⁵ "If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence." In re Rice, 118 Wn.2d at 886.

filed this petition in 2012 and has already filed hundreds of pages of briefing and many hundreds of pages of attachments. The time for supplementing proof has passed.

2. MOCKOVAK HAS NOT ESTABLISHED PREJUDICE.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. The petitioner must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, at 687. This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, at 694. “The likelihood of a different result must be substantial, not just conceivable.” Richter, 562 U.S. at 112. Speculation that a different result might have followed is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Mockovak’s

ineffectiveness claim fails, even if the representation was deficient.

See In re Pers. Restraint of Rice, 118 Wn.2d at 889.

To prevail on his claim of ineffective assistance of counsel, Mockovak must establish that a sex abuse defense would have changed the result of the trial. Strickland, at 693, 695. The State argued in its original response that Mockovak cannot make this showing. State's Response to PRP, at 80-89. That response will be summarized but not repeated in its entirety.

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

So, too, with Mockovak's proposed defense. "Learned helplessness" is a term used in the context of battered spouse syndrome, and it may also be a by-product of certain forms of child

abuse, but Mockovak has made no showing that this disorder or syndrome supports the inference that *anyone* who suffers child abuse would be more inclined to go along with a plan to murder someone wholly unconnected to the abuse, and especially as to someone who was not in a position of power or authority over Mockovak.

Mockovak belatedly submitted an evaluation by Natalie Novick Brown purporting to conclude that at the time of the crime, Mockovak was influenced by numerous factors that might have affected his cognitive functioning. Pet.'s Reply Br., Affidavit of Natalie Novick Brown, at 6 (“...due to his mental defects and illness, Dr. Mockovak’s psychiatric functioning changed dramatically over the course of 2009 as events and illness cumulatively increased his stress and led to clinical depression....”). Her report relies in part on learned helplessness to conclude that Mockovak might have been less able to resist Kultin, but it does not address at all how this diagnosis would function as to a person who *originated* the plot to kill.

Mockovak proposed the plan to kill his business associates. Defense counsel acknowledged this fact in closing argument but

claimed Mockovak had been kidding. Defense counsel repeated this statement at sentencing.

Your Honor, when have we ever alleged that Daniel Kultin came up with this plan? We have never said anything like that. So it's easy to create that straw man and then knock him down.

RP 3/17/11 104.

Mockovak took a number of steps independent of Kultin designed to bring about the murders: he searched for flight information to determine when and where Dr. King would be traveling in Australia, 9RP 153-60; he provided a portrait of Dr. King so that hit men could recognize him; he raised and turned over thousands of dollars to finance the hit; he sealed the deal after careful thought and deliberation, telling Kultin that he had slept on the idea and concluded that it was the right thing to do. Fellow employees described Mockovak as uncharacteristically jovial on the day scheduled for the murder. 14 RP 94 (Brenda Sifferman); 122 (Sheree Funkhouser). He said, "This is going to be a great day." 14 RP 122. These facts demonstrate that, rather than being foisted on him, the murder of Dr. King was Mockovak's personal and fervent desire.

And, had Mockovak opened up his character by claiming he was unable to resist others, extremely damaging evidence from numerous sources would have been admitted to rebut that claim. Mockovak fired the chief operating officer of the company, Bradley Klock, and then they launched an aggressive campaign to retrieve from Klock money that they believed had been misappropriated, including an effort to have Klock prosecuted criminally. Criminal charges were filed by the Office of the King County Prosecuting Attorney but then dismissed after more information was gathered that cast doubt on Mockovak's allegations. State's Response to PRP, Appendices C and D. Mockovak vigorously pursued the criminal case against Klock, sending long email messages to the prosecutor to explain his position, and to ensure full prosecution. Id., Appendix K. Don Cameron, chief financial officer for Clearly Lasik, reported to the prosecutor's office that, among other things, that Mockovak had said in a meeting: "Brad is asking for a million dollars. If he is going to be that way, we'll do all we can to make it expensive and drawn out for him..." Id., Appendix L (Bates # 01394MEM).

According to his own private investigator, Mockovak "displayed a rage toward Brad Klock that was personal, and that

escalated over time. Dr. Mockovak's behavior and attitude were not within the range of what I experience as normal for my clients."

Id., Appendix J.

The jury also would have heard from others with decidedly unflattering information about Mockovak, some of which was presented only at sentencing. Id., Appendix M. The jury in Mockovak's case did not hear this evidence, but they probably would have had Mockovak placed his character at issue.

Even the evidence that the jury heard would have undermined the credibility of a learned helplessness claim. Mockovak had ongoing disputes with his business partner, Dr. King. 8 RP 12-14, 44-52. He refused to agree to the sale of an Edmonton Lasik center. 8 RP 82-83. He fought with Dr. King over the sale of a jointly owned residence in Vancouver, B.C. and the dispute almost ruined the business. 8 RP 85-88. They fought over a shareholder agreement and profit sharing. 8 RP 88-90. By mid-2009, both doctors had retained independent lawyers, the partnership was in jeopardy based on their continued fighting, and the CEO was acting as a mediator. 8 RP 94-96. At one point, Mockovak responded to a proposal by Dr. King by saying, "You can't just bully an agreement." 9 RP 9-10.

Mockovak confronted other employees, including the Chief Executive Officer of the company, Christian Monea. 9 RP 14. He told an employee to do as he said (against Dr. King in the business dispute) or she would be terminated. 9 RP 45, 48, 103-08 (testimony of employee Dawn Schreck). Mockovak said that if Dr. King insisted on a certain policy, he would challenge Dr. King to a duel like Alexander Hamilton and Aaron Burr. 9 RP 49.

The recorded conversations are key to understanding Mockovak, his state of mind, and his moods. Only by listening to the actual audio recordings can one capture the flavor of the conversations.⁶ To hear Mockovak say, “You wanna know something funny, I’ve often thought of going down in to the fucking garage and killing Joe myself” (Tr. at 100 (11/06/09 conversation)), is more chilling than simply reading the words in a transcript. Similarly, when Mockovak says on the eve of the murders,

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

⁶ It does not appear that Dr. Natalie Novick Brown listened to any of the recordings or read any of the discovery in the case.

Tr. 11/07/09 3-4, he does not sound pressured, fearful, or helpless. He sounds like a person content with a well-considered decision. The audio recordings reveal a bitter, angry, and calculating man who schemed to kill his business rivals for profit and for peace of mind. Expert testimony on learned helplessness would have seemed silly alongside these tape recordings.

Finally, Mockovak presents summaries of conversations of jurors in an attempt to show that jurors felt the case was difficult and that some of them hoped he would receive a lenient sentence. Br. of Pet., Appendix G (Decl. of Synder). These materials are improperly submitted and should be stricken or disregarded.

Since the earliest years of statehood, Washington has followed the rule that jury deliberations are secret and may be inquired into only to evaluate a claim of serious misconduct.

Upon grounds of public policy courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstood the charge of the court; or that they otherwise mistook the law, or the result of their finding; or that they agreed on their verdict by average or by lot.

Ralton v. Sherwood Logging Co., 54 Wash. 254, 256, 103 P. 28, 29 (1909). Neither parties nor judges may inquire into the internal

processes through which the jury reaches its verdict. State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006). There is no claim of juror misconduct in this case. Pages three and four of the Synder declaration touch on the juror's internal thought processes and deliberations. This information is improper and should not be considered.

Even if considered, however, the information is an unreliable means to assess prejudice. The Synder declaration is a summary of answers given to a representative of the defendant; jurors might well have tempered or colored their remarks in light of the questioner. Synder's bias should be apparent, and he compiled juror answers, devoid of context, so that an impartial assessment of their views is impossible. Only those portions that favor Mockovak are shared, and only interviews from jurors who might have been sympathetic are reported. And, there is no way to assess whether jurors would have wished a lenient sentence for Mockovak had they been privy to a fuller scope of information about his conduct and his character as might have been presented to rebut learned helplessness evidence.

E. CONCLUSION

Mockovak's evidence in support of deficient performance allegations do not establish what he purports, and he has not provided the best evidence for assessing these claims. Likewise, he has failed to show that he would have been acquitted if the jury had been presented with evidence of learned helplessness. For these reasons, he has failed to meet his burden and his petition should be dismissed.

DATED this 16th day of October, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

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

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

Dated this 16 day of October, 2015.



Name:
Done in Seattle, Washington