

NO. 31980-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN KENNETH STEIN, a.k.a. JACK STEIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable James Stonier

APPELLANT'S OPENING BRIEF

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APPELLATE
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A. SUMMARY OF ARGUMENT.

Although the Supreme Court remanded Stein's case for hearings on the violation of his right to counsel and egregious appellate delay, the trial court misapplied principles of collateral estoppel and barred Stein from relitigating those issues. Moreover, the prosecutorial and judicial misconduct at issue require dismissal of the charges in the interest of justice.

Additionally, the trial court admitted evidence at trial of conduct for which Stein had been acquitted, contrary to principles of collateral estoppel and fundamental fairness. A number of other evidentiary errors also require reversal, including the admission of uncharged criminal conduct without appropriately balancing its unduly prejudicial effect or its relevance, evidence obtained in violation of the attorney-client privilege, and evidence for which Stein lacked adequate opportunity for cross-examination. The court also misled the jury in answering its question about the proof necessary to acquit Stein, thus undermining the verdict.

Finally, several sentencing errors occurred. Stein was denied his right to have a jury find beyond a reasonable doubt facts that increased his sentence regarding whether the three offenses of conviction involved "separate and distinct" criminal conduct. The

court imposed a vindictively long sentence after Stein's successful appeal. The Judgment and Sentence misstates the term of imprisonment imposed by the court.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred by refusing to hold a full hearing or dismiss the charges based on the denial of counsel or the violation of his rights to appeal and to receive justice without unnecessary delay as protected by the Sixth and Fourteenth Amendments and Washington Constitution, Article I, sections 10, 22.

2. The trial court misapplied the facts and the law in refusing to dismiss the charges against Stein based on CrR 8.3.

3. There is not substantial evidence in the record supporting the court's CrR 8.3 ruling, Finding of Fact 28. CP 1303.

4. To the extent the conclusions of law represent factual findings, there is not substantial evidence supporting Conclusions of Law 9, 10, and 12. CP 1304.

5. The introduction of expansive evidence of an offense of which Stein was acquitted violated the doctrine of collateral estoppel under the Fifth Amendment and the principles of fundamental fairness protected by the right to due process of law.

6. The court improperly admitted unduly prejudicial uncharged criminal conduct under ER 404(b).

7. The court erroneously admitted evidence that was a protected by the attorney-client privilege.

8. The court failed to enter necessary findings that a conspiracy existed at the time an alleged co-conspirator made several statements admitted at trial.

9. The court violated Stein's right to confront witnesses against him by admitting evidence of formal statements made during unrelated civil proceedings.

10. The cumulative harm from the evidentiary errors requires reversal.

11. The court failed to accurately explain the State's burden of proof in answering a jury question.

12. The court denied Stein his right to proof beyond a reasonable doubt of factual issues that increased his sentence beyond the presumptive standard range, contrary to the Sixth and Fourteenth Amendments.

13. The court vindictively increased Stein's sentence after his successful appeal.

14. The Judgment and Sentence incorrectly states the term of imprisonment the court imposed.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Collateral estoppel prohibits the relitigation of the same issues by the same parties when those issues were decided in a final judgment against one party. Did the trial court err by finding it was collateral estopped from deciding issues that had been ruled upon by the Court of Appeals when the Supreme Court had granted review and remanded the case for a new hearing on those issues?

2. The state and federal constitutions protect a defendant's right to appeal, receive justice without unnecessary delay, and be accorded due process of law. Did the State's role in causing extreme and extraordinary delay in Stein's appeal violate his constitutional rights and thereby require dismissal of the charges in the interest of justice?

3. CrR 8.3 permits a court to dismiss charges in the interest of justice when simple mismanagement of a case prejudices the accused's right to a fair trial. Here, the State mismanaged the case and violated ethical rules in using a judge to influence a witness, thereby prejudicing Stein's right to a fair trial. Did the court abuse

its discretion by denying Stein's motion for dismissal under CrR 8.3?

4. The doctrines of collateral estoppel and fundamental fairness bar a prosecution in which the accused is required to relitigate matters of which he has been convicted. Did the State's reliance on evidence of an uncharged crime to prove matters that were inherent in the jury's verdict acquitting him of those charges violate collateral estoppel and fundamental fairness?

5. Cumulative evidentiary errors may deprive an accused person of a fair trial. Did the court improperly admit unfairly prejudicial evidence of uncharged bad acts without making the required foundational findings, statements of co-conspirators when evidence did not support a finding the conspiracy existed, confidential statements made to an attorney, and unopposed out-of-court declarations when that evidence was unduly prejudicial?

6. The court must not give confusing or misleading instructions explaining the prosecution's burden of proof or the presumption of innocence. Here, the court responded to a jury question regarding the degree of evidence required to acquit without correctly informing them that no discrete amount of evidence was required for an acquittal. Did the court's failure to

clearly answer the jury's question deprive Stein of his right to a fair trial by jury?

7. The rights to a jury trial and due process of law bar the court from increasing a sentence based on factual findings not proven to a jury beyond a reasonable doubt. Did the court improperly increase Stein's sentence based upon its findings that the three counts of attempted murder against Hall were separate and distinct criminal conduct?

8. A court may not vindictively increase a sentence based on a successful appeal. Here, the court imposed a significantly longer sentence after retrial despite weaker evidence of Stein's guilt and even though it would be impossible for Stein to serve even part of this 660-month term given his age and health problems. Did the court's sentence violate the bar against vindictive sentences?

9. A Judgment and Sentence must accurately reflect the court's sentence. Is the Judgment and Sentence incorrect when it does not correctly state the length of the term of imprisonment the court imposed?

D. STATEMENT OF THE CASE.

Ned Hall was an attorney and court-appointed limited guardian for Nick Stein, Jack Stein's wealthy father. 20RP 3327, 3339. On three occasions in early June 1987, Hall found evidence of intruders on his property. First, Hall found plastic milk jugs and bottles in his yard that he later learned contained homemade napalm. 20RP 3431. Next, two men came to Hall's home in the pre-dawn hours. 20RP 3433-38. Both separately asked to use Hall's telephone after giving odd stories explaining their presence. Id. Hall did not let either man into his house and both left without incident. Id. About two weeks later, Hall heard a noise in his bathroom, and when he went to investigate, a gunshot hit him in the finger. 20RP 3440-41.

After pleading guilty to one count of conspiracy to commit first degree murder, Gordon Smith testified he was present during each of these incidents. 20RP 3498. He said he and others, including Richard Bailey and Michael Norberg, made the napalm with the intent to set fire to Hall's home and kill Hall. 20RP 3484-87. He and Bailey delivered the bottles to Hall's yard but abandoned them when Smith told Bailey they had been discovered and both fled. 20RP 3486-87.

Smith and Bailey also went to Hall's home in the middle of the night, intending to lure Hall out of his house while the other person would shoot Hall. 20RP 3490-93. The plan failed. Id.

Finally, Smith, Bailey, Bailey's brother, and Norberg went to Hall's house with two shotguns and two machetes. 20RP 3494 Smith entered Hall's bathroom and when Hall appeared, Smith got nervous and the gun discharged unintentionally. 20RP 3496. Smith and the others ran away. 20RP 3497.

Smith and Bailey both testified they were recruited by Norberg, who promised them money if they killed Hall. 20RP 3483; 23Rp 3845. Norberg was Jack Stein's stepson. Norberg had extensive involvements in drug using and dealing, in addition to routinely committing other thefts. 20RP 3477-78. Norberg repeatedly discussed, with most anyone he met, his desire to kill Hall, who he said was a lawyer interfering with his inheritance. 21RP 3675-76. Smith never met or spoke to Stein. 20RP 3498. Stein never expressly solicited Bailey but in October 1987, said vaguely not to worry about money and he would send an attorney if Bailey needed one. 23RP 3901.

Jack Stein had developed a contentious relationship with Hall. 20RP 3390-91. He perceived Hall was trying to disrupt his

inheritance. In the 1980s Stein was involved in a variety of legal proceedings in which Hall was an adversary. 20RP 3345, 3349, 3377, 3400. These cases were tried before Judge Thomas Lodge, and were decided against Stein. 17RP 2782, 2793, 2820, 2827.

On April 14, 1987, two months before the charged incidents against Hall, Nick Stein's longtime girlfriend Thelma Lund was killed. 17RP 2761; 20RP 3419. Bailey claimed he was present when Norberg killed Lund. 23RP 3839, 3864. In exchange for leniency and his testimony, Bailey pleaded guilty to one count each of first degree murder and attempted first degree murder, and served 13 years of a 20 year sentence. 23RP 3838-39.

After a jury trial in 1989, Stein was acquitted of conspiracy to commit first degree murder of Lund, first degree felony murder of Lund, and first degree aggravated murder of Lund, but was convicted of three counts of attempted first degree murder and one count of first degree burglary against Hall.¹ After a lengthy delay in which the State and Stein's appellate counsel improperly interfered with Stein's right to appeal, Stein's convictions were overturned

¹ State v. Stein, 94 Wn.App. 616, 619, 972 P.2d 505 (1999) (partially published), aff'd, 144 Wn.2d 236, 27 P.3d 184 (2001).

based on defective jury instructions defining unlawful complicity.
144 Wn.2d at 247-48.

Stein was convicted of the same offenses after a jury trial before Judge James Stonier and received a 660-month sentence. 25RP 4256. This appeal timely follows. CP 1429. The facts are further set forth in the relevant argument sections below.

E. ARGUMENT.

1. THE TRIAL COURT MADE INCORRECT LEGAL DETERMINATIONS AND REACHED UNSUPPORTED FACTUAL CONCLUSIONS IN REFUSING TO DISMISS THE CHARGES IN THE INTEREST OF JUSTICE BASED ON PROSECUTORIAL AND JUDICIAL MISCONDUCT.

a. The misconduct that occurred in the case at bar

requires dismissal of the charges against Stein. CrR 8.3(b)

provides in part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. . . .

Government misconduct necessitating dismissal of charges “need not be of an evil or dishonest nature; simple mismanagement is sufficient.” State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993); State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587

(1997). The defendant bears the burden of proving misconduct and prejudice by a preponderance of the evidence. State v. Rohrich, 149 Wn.2d 647, 653, 71 P.3d 638 (2003).

Sufficient prejudice is shown where the defendant was forced to either agree to a short delay, and thereby forfeit a speedy trial, or choose between a speedy trial and adequately prepared counsel. Michielli, 132 Wn.2d at 240 (citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). Similarly, a court has reasonable grounds for dismissing charges where the prosecution agreed to produce records but failed to do so as promised. State v. Sherman, 59 Wn.App. 763, 801 P.2d 274 (1990). As these cases illustrate, while dismissal of charges is an extraordinary remedy, neither the nature of the misconduct nor the degree of prejudice must be extreme. See e.g., State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (noting that had prosecutor acted improperly in delaying an interview with a witness, result would be prejudicial to right to fair trial based on defendant's right to an adequately prepared attorney and dismissal would not be unreasonable).

A trial court's decision regarding a motion to dismiss is reviewed for an abuse of discretion. Michielli, 132 Wn.2d at 240. A court abuses its discretion by using the wrong legal standard or

by resting its decision upon facts unsupported by the record.

Rohrich, 149 Wn.2d at 653.

b. The court misapplied the doctrines of collateral estoppel and the law of the case in refusing to dismiss the charges.

Stein argued that the judicial and governmental misconduct occurring in the course of his case required reversal due to violations of his right to counsel, his right to appeal, and his right to timely administration of justice. 10RP 1585. The trial court declined to rule on these claims, instead finding that collateral estoppel barred Stein from relitigating issues decided by the Court of Appeals. 10RP 1588-90, 1595-96.

Collateral estoppel bars the relitigation of an issue only when, among other factors, the prior adjudication was “a final judgment on the merits.” State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003) (quoting Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)). A final judgment is the court’s last action that disposes of the issues in controversy. State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003).

The Court of Appeals decision was not the final judgment in the case, as the Supreme Court decision superceded it for all

issues which it granted review. The Supreme Court granted review of the portion of the Court of Appeals decision pertaining to Stein's right to counsel and appellate delay claims. 144 Wn.2d at 240; Stein's Answer to Petition for Review and Cross-Petition, S.Ct. No. 68112-1. The Supreme Court ordered the claims raised in Stein's cross-petition be decided by the trial court upon remand. Id. at 248.² The trial court erred by finding the Court of Appeals ruling precluded it from deciding whether the governmental misconduct or attorney malfeasance was grounds for dismissing the charges against him. Harrison, 148 Wn.2d at 561-62.

For the same reasons, the law of the case doctrine does not preclude the trial court from deciding issues of misconduct Stein raised in his prior appeal. While one purpose of this doctrine is "to assure the obedience of lower courts to the decisions of appellate courts," that reasoning does not apply when a lower court's decision is not the final judgment in a case. Harrison, 148 Wn.2d at 562 (2003) (quoting 5 Am.Jur.2nd Appellate Review section 605 (2d ed. 1995) (internal footnote omitted)).

² The Supreme Court's ruling concluded, "We remand for a new trial, leaving to the sound discretion of the trial court the question of whether further relief is appropriate under CrR 8.3, or other theories raised in Stein's cross-petition." 144 Wn.2d at 248.

c. Stein's right to the timely administration of justice was plainly violated and the inherent prejudice merits reversal of his convictions and dismissal of the charges against him. Due to misconduct by prosecutors, a court reporter, and a Clark County clerk, Stein was denied his right to appeal for a number of years, as explained in the ruling by Judge Bryan, attached as Appendix A. Although the trial court stated that prior rulings barred it from considering issues related to appellate delay and the right to counsel and stopped Stein from presenting a full record of his claims on these issues, the court's written conclusions seem to rule substantively against Stein on all claims. CP 1304 (written findings attached as Appendix B);³ 10RP 1585-91, 1595-96. The trial court erred in concluding that egregious governmental misconduct did not make dismissal in the interest of justice the appropriate remedy.

³ The Conclusions of Law provide in relevant part:

9. Despite Judge Bryan's finding of governmental misconduct in the delay of Mr. Stein's appeal, Mr. Stein has not proven actual prejudice resulting from this misconduct.

10. Mr. Stein has failed to prove his ability to defend against the criminal charges has been impaired by the delay in his appeal.

.....

12. Mr. Stein has failed to prove that there has been prejudice to his rights which materially affect his right to a fair trial, and that a dismissal is justified in furtherance of justice as required by CrR 8.3.

In Washington, the right to a fair trial requires not only the due process requirements such as the right to counsel and “the right to appeal in all cases,” but also the right to justice that is “administered openly and without unnecessary delay.” Wash. Const. art. I, sections 10⁴ and 22.⁵ The federal constitution does not have any counterpart to Article I, section 10, nor does the federal constitution expressly guarantee the right to appeal. Rufer v. Abbott Labs., 154 Wn.2d 530, 549, 114 P.3d 1182 (2005); Ross v. Moffit, 417 U.S. 600, 606, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); Grove v. State, 127 Wn.2d 221, 238, 897 P.2d 1295 (1995).

Federal Judge Bryan did not rule on whether the Washington constitution required dismissal as a remedy for the misconduct.

The constitutional mandates contained in sections 10 and 22 of the Washington Constitution are “a means by which the public's trust and confidence in our entire judicial system may be strengthened and maintained.” Rufer, 154 Wn.2d at 549. While

⁴ Article I, section 10 provides, “Justice in all cases shall be administered openly, and without unnecessary delay.”

⁵ Article 22 provides in pertinent part,
In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

Rufer involved the public's access to documents, the same purpose may be ascribed to the unmistakably direct language contained in these constitutional provisions. Only by enforcing these constitutional mandates will there be an incentive to adhere to them. 144 Wn.2d at 248 (Sanders, J., dissenting).

The plain language of Article I, sections 10 and 22 dictate that delay in and of itself is a constitutional evil. Id. For example, when the prosecution fails to follow protocol such as filing written findings of fact, the State's actions result in appellate delay, thereby impermissible impacting the appellant's right to appeal and to receive justice "without unnecessary delay." State v. Smith, 68 Wn.App. 201, 209, 842 P.2d 494 (1992). In Smith, the Court reversed a conviction and dismissed the charges as the remedy for the State's failure to file written findings of fact which inhibited the appellant's ability to appeal from the trial court's CrR 3.6 order. Id.

A similar rationale applies here. Judge Bryan ruled the prosecution was responsible for the seven-year delay in Stein's appeal. App. A, p. 12-13. The State blocked the filing of the verbatim report of proceedings by instructing the county clerk not to file the transcripts until it received every volume, never following up that instruction with any direction that the volumes received should

be sent to the Court of Appeals, failing to advise the Court of Appeals that any missing transcripts could be easily provided to the court, and by erroneously advising the Superior Court that Stein's was to blame for not filing the transcripts. Id. at 10-15. Stein's appeal was dismissed due to the State's misrepresentations and had Stein not persevered by taking his case to federal court, he never would have received any justice whatsoever. Id. at 5, 9-10.

This delay in and of itself is a constitutional evil for which Stein may receive the relief of dismissal, just as a person denied a speedy trial may receive a dismissal even if the prosecution has a strong factual case. State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976) (without strict application of speedy trial rule, "the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved."). The constitution does not countenance governmental malfeasance or mismanagement that results in undue delay of justice. Accordingly, Stein is entitled to dismissal under the Washington Constitution.

Furthermore, extreme appellate delay violates the right to due process of law. United States v. Tucker, 8 F.3d 673, 676 (9th Cir. 1993). A due process violation occurs by (1) oppressive incarceration, (2) anxiety and concern awaiting the outcome of an

appeal; or (3) impairment of grounds for appeal or viability of a defense on retrial. Id.

Stein's extraordinarily delayed appeal was not a meritless appeal, but resulted in vacating his conviction and ordering a new trial while he remained incarcerated. See Tucker, 8 F.3d at 676 (insufficient prejudice from delay where appeal meritless). Stein was forced to undertake extreme measures to have his appeal reinstated, thus causing unusual anxiety and making his case different from the anxiety experienced by others who were successful on appeal. United States v. Antoine, 906 F.2d 1379, 1382 (9th Cir.), cert. denied, 498 U.S. 963 (1990). Furthermore, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." United States v. Mohawk, 20 F.3d 1480, 1487 (9th Cir. 1994) (citing United States v. Doggett, 505 U.S. 647, 655-56, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (noting that appellate delay has less affect on reliability than pre-trial delay). Here, evidence changed over the period of delay, including Bailey's change in testimony from claiming Stein was not guilty to proclaiming his involvement in soliciting people to kill Hall. 7RP 1130; 23RP 3946-47. While the trial court ruled the potential for Bailey to alter his testimony was

inconsequential, Bailey had changed his testimony several times based on his personal interest at the time he gave the testimony. See 7RP 1099-1100, 1144 (deposition testimony minimizing involvement and denying intent to kill); 23RP 3946 (civil trial testimony denying involvement in crimes). It is indisputable that the years between the 1989 trial and the 2004 retrial affected the memories and biases of witnesses, including providing a different incentive for Bailey in his testimony now that he had been released from prison.

In sum, actual prejudice does not require Stein to demonstrate he can no longer receive a fair trial. Societal concerns with the timely and prompt administration of justice themselves are grounds for reversal and dismissal. The extreme delay, caused in part by the State's efforts in seeking dismissal of Stein's appeal, is a constitutional evil for which Stein is entitled to meaningful relief.

d. Misconduct occurred in the case at bar. The Code of Judicial Conduct bars a judge from using his or her office to influence others. Code of Judicial Conduct, Canon 2(b); 9RP 1365-66. Canon 8(f) of the Code prohibits an attorney from assisting or facilitating a judge in violating the judge's ethical

obligations. Canon 8(f) does not require any intent to engage in wrongdoing; it is a strict liability standard. 9RP 1369.

Before Stein's retrial, the prosecution enlisted Clark County Judge Roger Bennett to speak with its key witness, Richard Bailey. The purpose of having Judge Bennett attend a meeting with Bailey and the prosecutor was "to get him back on board." 5RP 855.

Judge Bennett met with Bailey and discussed his testimony with him in person on two occasions. 7RP 1115, 1121. Judge Bennett told Bailey he could trust the prosecution in the case at bar. 7RP 1118. He also informed Bailey of the legal consequences of him refusing to testify in Stein's case. He "made it clear if I [Bailey] don't testify they can put me in jail." 7RP 1122.

Bailey had given crucial testimony linking Stein to the efforts to kill Hall but he testified in a later civil case that he lied during the criminal trial and Stein had nothing to do with it. Judge Bennett was the prosecutor in Stein's earlier trial and he became a judge shortly after that trial ended. 5RP 682, 686. Bailey had asked Judge Bennett for several favors in the past. 5RP 681-82. For example, Bailey asked if the judge could aid him in helping law enforcement, presumably as an informant. 5RP 748. Bailey asked Judge Bennett to help him with a clemency petition while he was in

prison, and for assistance with searching for his adopted daughter. 7RP 1110, 1113. Judge Bennett had not performed Bailey's requests although he may have named others from whom Bailey could get help. 9RP 1367.

Judge Bennett had a good relationship with Bailey because, among other things, he had permitted Bailey and his wife to have two "contact" visits in the prosecutor's office after Bailey pled guilty and while he was in jail waiting to testify in Stein's criminal trial. 5RP 694-95. Bailey had sex with his wife during these contact visits. Judge Bennett had not ever permitted such a visit for a witness before, although he allowed Bailey's brother to have one similar visit. 5RP 696.

Law Professor John Strait testified at the CrR 8.3 hearing as an expert in professional ethics. 9RP 1344-46. Strait explained that meeting with a witness for the purpose of "getting him on board" violated the judicial canon's prohibition on using one's status as a judge to benefit another person. 9RP 1365-66. Bailey knew Judge Bennett was a judge, had turned to Judge Bennett for favors before, and would be expected to be influenced by the judge based on his judicial status. 9RP 1366.

Strait also testified that the prosecution violated the ethical rules by enlisting Judge Bennett's help in convincing Bailey to cooperate. 9RP 1368-69. By allowing or encouraging Judge Bennett to participate in a meeting with Bailey for the purpose of persuading Bailey to testify, the prosecution violated Canon 8(f) and 2(b). 9RP 1369.

The trial court found Judge Bennett had not committed misconduct because he had not coerced or threatened Bailey to procure his testimony and had not encouraged him to lie. CP 1303. Finding of Fact 28 provides, "There is nothing in the record to suggest Judge Bennett encouraged Richard Bailey to testify untruthfully, nor did Judge Bennett use his office to unlawfully coerce or induce Bailey to testify." CP 1303. Conclusion of Law 8 states, "Judge Roger Bennett's activities in regards to Richard Bailey did not amount to governmental misconduct, nor did they prejudice the defense in this case." CP 1304.

"A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual

determinations of the actual trier of fact.” Id. Legal issues are reviewed de novo. Id.

The trial court’s findings and conclusions are incorrect. CrR 8.3 does not require deliberate or intentional misconduct. “Fairness to the defendant underlies the purpose of CrR 8.3(b).” State v. Koerber, 85 Wn.App. 1, 5, 931 P.2d 904 (1996); see State v. Boldt, 40 Wn.App. 798, 801, 700 P.2d 1186 (1985) (purpose CrR 8.3 is to ensure person charged with crime “is fairly treated.”). As a result, simple mismanagement may be grounds for dismissal if there is actual prejudice. Michielli, 132 Wn.2d at 239-40.

Here, Judge Bennett admitted he met with the key prosecution witness in order to use not only his familiarity with the case but also his status as a judge to convince the witness to testify against Stein. No coercion or actual threats were required to be a violation of basic ethical rules. The trial court failed to appropriately analyze the misconduct by assuming deliberate wrongdoing was necessary.

Moreover, Stein was plainly prejudiced by the judge’s intervention and the prosecution’s request for such intervention. Bailey was reluctant to testify and may well not have done so had Judge Bennett not convinced him that he could trust the

prosecution and he faced jail if he refused to testify. Without Bailey's testimony, and without aligning themselves with Judge Bennett in order to ensure Bailey's testimony, the State's case would have been decidedly weak. They would not have had any eyewitness to testify about Lund's death or about Stein's purported efforts to gain Bailey's cooperation, and had only Gordon Smith's testimony about the efforts to kill Hall. Since Smith denied any intent to kill Hall, the case would be seemingly insufficient absent Bailey's testimony, and Judge Bennett's improper intervention in the case was critical to obtaining this testimony.

e. Remand for a new CrR 8.3 hearing is required.

If this Court does not order the dismissal of Stein's charges, it must provide Stein with the full and fair hearing ordered by the Supreme Court. See Harrison, 148 Wn.2d at 563 (manifest injustice to deny defendant a new sentencing hearing when sentence reversed by the Court of Appeals). Thus, remand for a new hearing is required.

2. COLLATERAL ESTOPPEL AND PRINCIPLES OF FUNDAMENTAL FAIRNESS BAR THE STATE FROM FORCING STEIN TO RELITIGATE CHARGES OF WHICH HE WAS PREVIOUSLY FOUND NOT GUILTY.

a. Collateral estoppel forbids the State from forcing a party to relitigate an issue when that issue was already decided

against the State. The doctrine of collateral estoppel is a component of the Fifth Amendment's protection against double jeopardy, applicable to the states through the Fourteenth Amendment. Ashe v. Swenson, 397 U.S. 436, 443, 25 L.Ed.2 469, 90 S.Ct. 1189 (1970); State v. Dupard, 93 Wn.2d 268, 272-3, 609 P.2d 961 (1980). Because it is of constitutional magnitude, a claim of former jeopardy premised on collateral estoppel may be raised for the first time on appeal. State v. Kassahun, 78 Wn.App. 938, 948, 900 P.2d 1109 (1995); RAP 2.5(a)(3).

Collateral estoppel means simply that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties.” Ashe, 397 U.S. at 443. When a person has been acquitted of criminal charges, the State cannot force him or her to relitigate that prior case.

An examination of the facts in Ashe and United States v. Dowling, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), are useful in explaining the doctrine. Ashe allegedly participated in the robbery of six people during a poker game, and was charged with six separate counts of robbery. 397 U.S. at 439. The prosecution first tried Ashe for one count of robbery against one of the poker

players, and Ashe was acquitted due to insufficient evidence of his identity as one of the robbers. Id. In a second trial for robbery against another one of the poker players, the prosecution offered stronger identity testimony and Ashe was convicted. Id. at 440. Ashe never disputed that the robbery occurred, only that he was not one of the robbers. Id. at 445. Since the first jury's verdict could only have rationally been based on the lack of proof of Ashe's identity as one of the robbers, the first verdict estopped the State from prosecuting Ashe on any of the remaining five counts. Id. at 446.

In Dowling, the defendant was charged with committing a bank robbery in which the robber wore a ski mask and carried a small pistol. 493 U.S. at 344. The prosecution introduced evidence that two weeks after this robbery, Dowling had entered a woman's home wearing a mask and carrying a small handgun, in order to prove Dowling's identity as the bank robber under Fed. E. Rule 404(b).⁶ Id. at 345. Dowling had been acquitted of burglary

⁶ Fed. E. Rule 404(b) provides,

and attempted robbery offenses related to this other incident. Id. at 344-45. Dowling objected to testimony about the burglary incident on grounds of double jeopardy, collateral estoppel, and fundamental fairness. The trial court admitted the evidence but, immediately after the witness testified and during final jury instructions, the court told the jurors Dowling, “had been acquitted of robbing Henry [the complainant in the burglary incident], and emphasized the limited purpose for which Henry's testimony was being offered.” Id. at 346.

The Dowling Court looked at the record of the burglary trial and found Dowling was not acquitted based on the State's inability to prove his identity. Id. at 350-52. During the burglary trial Dowling had not disputed the fact that he entered the home, but instead argued that no robbery occurred. Id. at 351. Since identity was not necessarily the issue on which the not guilty verdict rested,

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

evidence relating to the burglary was not barred by collateral estoppel. Id. at 348, 350.

Additionally, evidence may be admitted even though it “relates to alleged criminal conduct for which a defendant has been acquitted,” so long as it does not involve an issue necessarily decided by the acquittal. Id. at 348. There is a lower standard of proof to admit ER 404(b) evidence, and a not guilty verdict does not necessarily mean the prosecution could not prove a fact by a preponderance of the evidence. Id. Finally, the Dowling Court rejected the fundamental fairness argument, because “[e]specially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of Henry’s testimony merits this kind of condemnation.” Id. at 352.

Consistent with other courts, Washington applies four requirements to trigger collateral estoppel:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Harrison, 148 Wn.2d at 561.

Courts decide issues of fundamental fairness under the due process clause by determining “whether the introduction of this type of evidence is so extremely unfair that its admission violates ‘fundamental conceptions of justice.’” Dowling, 396 U.S. at 352 (quoting United States v. Lovazco, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). Collateral estoppel and fundamental fairness principles operate in the case at bar to preclude the prosecution from relying upon substantial evidence of a murder in which Stein was acquitted of being complicit.

b. Here, the court should have barred the State from forcing Stein to defend himself against allegations of which he was already acquitted. The jury verdict in the prior case firmly decided the issue for which the prosecution sought to use the evidence in the case at bar. The prosecution had charged Stein with the following crimes against Lund: conspiracy to commit first degree murder; first degree felony murder; and aggravated first degree murder based on the aggravating factors of solicitation and committing murder in the course of a burglary. 94 Wn.App. at 619. The trial court’s instructions permitted the jury to convict Stein if it found he conspired with others and the actions of a co-conspirator were the reasonably foreseeable consequence of the agreement.

144 Wn.2d at 243.⁷ In the prior trial, several people testified Stein solicited them to kill Lund, but the jury found Stein did not aid Lund's murder or enter into an agreement with those who killed Lund. Id. at 242.

By finding Stein not guilty, the jury necessarily found Stein was not part of the conspiracy to kill Lund and he did not knowingly solicit, encourage or aid those who killed Lund. Yet in the case at bar, the State used Lund's murder to prove Stein was connected to the perpetrators of her death, knowingly work with them, and intended to achieve the same result for Hall. While the jury's not guilty verdict was a general verdict, it could only have rested upon Stein's lack of participation in efforts by others to kill Lund. Thus, the prosecution was estopped from using the same evidence against Stein in the case at bar for a purpose already decided in Stein's favor.

Furthermore, the admission of evidence relating to Lund's murder was fundamentally unfair. The jury never learned Stein was acquitted of involvement in her death, as the jury did in

⁷ The Supreme Court reversed Stein's convictions because the jury instructions did not require the jurors to find Stein knew of the crimes perpetrated by accomplices. 144 Wn.2d at 245. This error applies to the crimes against Lund as well as Hall.

Dowling. Instead, they heard that Stein threatened Lund as he did Hall. 19RP 3302-03; 20RP 3390. They heard Lund was a kind and decent farmer who worked hard and supported her family even when her husband died and she had to run the family farm by herself. 17RP 2735-37, 2741-41. They heard about the brutal and senseless way she died at the hands of Norberg and Bailey as described by an eyewitness, a forensic pathologist, police officer, and crime scene photographs. 20RP 3419-23; 21RP 3548; 23RP 3862-65; Exs. 151-58. Unlike the seemingly Keystone Cops-like behavior of Smith and Bailey at Hall's house, Lund's death was cold-blooded and calculated. 20RP 3419, 3487, 3492-93, 3496.

The trial court did not weigh the fact of Stein's acquittal in assessing the unfairly prejudicial impact of the testimony, as discussed below. It is unacceptable for a jury to rely upon evidence of crimes of which a person has been acquitted to draw inferences that Stein was culpable here. It was fundamentally unfair to prosecute Stein based upon evidence of his complicity in another crime and force him to defend himself against conduct of which he had been acquitted, as he attempted to do. See 24RP 4061-62, 4066-67, 4107.

c. Reversal is required. The admission of substantial evidence that Stein solicited and paid others to commit an uncharged murder of which he had been acquitted violated the doctrine of collateral estoppel and was fundamentally unfair. As an error of constitutional magnitude, reversal is required unless the prosecution proves beyond a reasonable doubt it was harmless. Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (a constitutional error which possibly influenced the jury adversely cannot be harmless); State v. Brown, 147 Wn.2d 330, 338, 58 P.2d 889 (2002) (same). Given the magnitude of this evidence, its inflammatory nature, and the lack of any limiting instruction, its introduction cannot be harmless.

3. THE COURT'S ERRONEOUS ADMISSION OF UNDULY PREJUDICIAL EVIDENCE REQUIRES REVERSAL.

a. The court must not admit unduly prejudicial evidence that lacks an adequate probative value. Uncharged criminal conduct may be admitted into evidence only when it is materially relevant to an essential ingredient of the charged crime and its probative value outweighs its prejudicial effect. State v.

Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404(b).⁸
Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

ER 404(b) forbids the admission of evidence of prior bad acts that tend to imply a defendant's propensity to commit a crime, unless the uncharged bad acts are admissible for certain limited purposes. State v. Wade, 98 Wn.App. 328, 334, 989 P.2d 576 (1999). Even if relevant under ER 404(b), ER 403 requires that the trial court exclude the evidence if the probative value of the uncharged actions is outweighed by the risk of unfair prejudice. The evidentiary rules require that the trial judge carefully balance the evidence's probative value against its harmful effect on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). A trial judge's decision to admit evidence is reviewed for abuse of discretion. See State v. Crenshaw, 98 Wn.2d 789, 659

⁸ Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

P.2d 488 (1983) (admission of photographs within judge's discretion).

b. The court failed to make the required foundational findings before admitting unlimited evidence of Thelma Lund's murder.

i. The court neglected a critical aspect of establishing the foundation before admitting uncharged criminal conduct. Before admitting uncharged acts under ER 404(b), the trial court “must” find by a preponderance of evidence that the defendant committed the uncharged acts the State seeks to use against him or her. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

In the case at bar, the trial court did not make any such finding. Stein had been found not guilty of being involved in a conspiracy to murder Thelma Lund. He was found not guilty even though the jury instructions did not require the jury to find that he knew about the murder in order to convict him of conspiratorial liability. 144 Wn.2d at 248.

The trial court summarily found Lund's murder relevant to establish Stein's motive, knowledge, and plan, constituted res gestae, and was more probative than prejudicial. 14RP 2280-82.

The court did not indicate it found Stein was involved in the prior murder, and did not claim to base its ruling on the civil verdict.

Stein's involvement is not apparent from the record. While there was evidence introduced at the prior trial alleging his involvement, he was found not guilty of that crime. Additionally, although Stein had been found liable in a civil trial for Lund's death, the details of this civil verdict were not presented to the trial court or made part of the record regarding what specific findings the jury made. There is no evidence the court relied on that finding when admitting evidence relating to the uncharged murder of Lund. The trial court's failure to make a necessary foundational finding renders its ruling admitting the evidence erroneous.

ii. The court ignored the fact of Stein's acquittal when weighing the probative value of the uncharged criminal conduct and its unfairly prejudicial effect. Proper balancing of probative value against risk of unfair prejudice requires the court to consider factors such as: (1) how clearly the prior act has been proved; (2) how probative the evidence is of the material fact it is admitted to prove; (3) how seriously disputed the material fact is; and (4) whether the government can avail itself of any less prejudicial evidence. United States v. Enjady, 134 F.3d 1427,

1433 (10th Cir.), cert. denied, 525 U.S. 887 (1998). When analyzing the danger of an unfairly prejudicial effect, a court weighs: (1) how likely is it such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct. Id.

The fact that a person has been acquitted of the conduct that the prosecution seeks to use against him is a necessary fact to weigh when considering the probative value and risk of unfair prejudice. United States v. Schwab, 886 F.2d 509, 513 (2nd Cir. 1989), cert. denied, 493 U.S. 1080 (1990). Although the trial court purported to conduct an on-the-record balancing of the probative value and prejudicial effect of the evidence, the court did not factor the acquittal into its balancing test. Even if an acquittal does not technically estop the prosecution from eliciting evidence of uncharged criminal conduct, “it will normally alter the balance between probative force and prejudice, which is already a close matter in many cases where prior misconduct of a defendant is offered.” Schwab, 886 F.2d at 513; see United States v. Phillips, 401 F.2d 301, 306 (7th Cir. 1968) (abuse of discretion for court to

admit uncharged crime without “giving effect to appellant's acquittal on the charges arising from” that alleged crime).

As the Supreme Court recognized in Dowling, admitting conduct for which a person has been found not guilty “has the potential to prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial.” 493 U.S. at 352. The Dowling Court further ruled that even if the prosecution is not collaterally estopped from introducing evidence of uncharged criminal conduct for which the defendant has been acquitted, the rules of evidence limit the admissibility of such evidence. Id. The Dowling Court assumed that the fairness of admitting such conduct will necessarily be factored into the balancing of the probative value versus prejudicial effect. Id.

Here, the fact of acquittal significantly reduced the probative value of the uncharged murder. If it were true that Stein was involved in planning or soliciting Lund’s murder, then it might demonstrate his motive to similarly kill Hall, his knowledge of the plan to kill Hall since similar parties were involved, and the plan to kill both people. But since Stein was found not guilty of any knowing involvement in that plan, it is distinctly less relevant. Instead, it drastically increases the prejudicial effect, since it

becomes propensity evidence. The jury was able to conclude that because Lund was killed by the same people involved in trying to kill Hall, and because Stein similarly distrusted Lund, Stein must have been a dangerous, murderous character and must have been involved in the efforts to kill both people. Additionally, the *res gestae* nature of the evidence is doubtful, since Lund was killed months before the attempts on Hall's life and was not inextricably intertwined in time and place.⁹

iii. Limitless evidence of the Lund homicide was improperly admitted. Buoyed by the court's order, the State introduced wide-ranging testimony about Lund, informing the jury about her upbringing as a hard-working farm owner and mother of four, displaying crime scene photographs and offering detailed testimony about the discovery of her strangled body in a bathtub. 17RP 2735-37, 2741-41; 20RP 3419-23; 21RP 3548; 23RP 3862-65; Exs. 151-58. The jury never learned that Stein was found not guilty of playing a role in her murder.

⁹ *Res gestae* evidence is admissible only where necessary to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693 (1980) aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981).

Even if the court acted within its discretion to admit evidence of Ms. Lund's murder, the court improperly placed no limits on the nature and amount of the evidence admitted. There certainly were limits to its probative value. The jury heard the exceptionally sad and gruesome details of how she died, but these facts did not demonstrate Stein's motive, knowledge, plan, or *res gestae*. The probative value lied not in how her death was discovered, what she looked like when found dead, what physiologically caused her death, or how hard she worked as a dairy farmer and mother. If her death was probative of Stein's involvement in the plan to murder Hall, it would be limited to the fact that similar people were involved in both incidents and Stein disliked and mistrusted Lund and Hall for similar reasons during the same time period. The details of Lund's upbringing, life, and sad death were elicited in great detail, as if that incident was also on trial, rather than as a collateral means of proving Stein's knowledge, motive, plan, and explaining the charged incident in a complete manner as to time and place without any limiting instruction. The improper admission of Lund's murder and other descriptions of Lund's life were unduly prejudicial, far more likely to inflame and confuse the jurors than to

aid them in assessing the charged offense, and should not have been admitted.

c. The court erroneously admitted uncharged allegations relating to threats of other people and at other times. Despite the defense objection, the court admitted evidence Stein threatened to kill Judge Lodge and wanted to blow up the Clark County courthouse. 15RP 2409-10; 23RP 3903 (solicited Bailey to kill unnamed judge).

The court admitted these allegations on the grounds they showed Stein's involvement in the "conspiracy." 15RP 2410. In Stein's appeal from his prior trial, this Court found allegations of a plot to blow up the courthouse and kill judges "was probative of Stein's involvement in the charged conspiracy to commit murder, and thus its admission does not violate ER 404(b)." Slip op. at 38.

Yet unlike Stein's earlier trial, he was not charged with conspiracy to commit murder or with any other conspiracy in the instant matter. The charges in the case at bar bear important distinctions from those Stein faced in his prior trial. He was charged with being an accomplice to three isolated events in which efforts were made purportedly to kill Hall. These offenses required proof Stein aided the participants in the offense with knowledge of

the crime they were attempting. Since Stein was not charged with being part of a conspiracy to commit murder, this rationale does not justify admitting uncharged, and highly inflammatory, allegations.

The threats to the county courthouse and judge were only probative to the extent they showed Stein wanted more uncharged crimes committed, that he was a dangerous person, and that because he wanted to do dangerous things he was more likely to have been involved in the attempts to kill Hall.

The alleged plans to blow up the courthouse, the same courthouse in which the trial occurred, and kill the judge, who the jury could infer was likely to be Judge Lodge, a witness who testified before the jurors, served no permissible purpose under ER 404(b). Instead, they demonstrated Stein was a dangerous person and was likely to have committed the charged offenses due to his involvement in other dangerous criminal schemes.

The prior Court of Appeals ruling affirming the admission of these other crimes does not govern the case at bar since the issues arise in factually distinct contexts. See Harrison, 148 Wn.2d at 561-62. The trial court failed to recognize this distinction and echoed this Court's ruling by stating the evidence was admissible to show a "conspiracy." 15RP 2409-10. Since no conspiracy

charge was presented, the court based its ruling on an unreasonable view of the evidence and abused its discretion.

d. The lack of a limiting instruction renders the error unacceptably harmful to the outcome of the case. The court never cautioned the jurors to use the ostensible ER 404(b) evidence for any limited purposes. Instead, it was admitted as substantive evidence. Thus, the potential for undue prejudice was unmitigated.

4. THE CUMULATION OF IMPROPERLY ADMITTED EVIDENCE REQUIRES REVERSAL.

In addition to the issues raised above, the trial court improperly admitted other evidence that was not probative or necessary to prove a material element of the charged offenses, or was not otherwise properly before the court, and which carried undue prejudice.

a. The trial court improperly admitted unnecessary testimony from Judge Lodge despite this Court's caution against admission. "Only in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity . . ." State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 20, 482 P.2d 775 (1975); see United States v. Frankenthal, 582 F.2d 1102, 1107 (7th Cir. 1978).

Testimony by a judge carries a distinct risk that the “prestige, dignity, and authority” of the judge may be imparted to the party presenting the judge’s testimony. Frankenthal, 582 F.2d at 1108; see e.g., Joachim v. Chambers, 815 S.W.2d 234, 238 (Tex. 1991) (testimony of judge “confers the prestige and credibility of judicial office to that litigant’s position, just as a judge who testifies to the litigant’s character.”) Canon 2 of the Code of Judicial Conduct prohibits a judge from lending the prestige of his office to advance the interests of others.¹⁰ Id. Calling a judge as a witness in a trial may force the judge to violate that canon. Id.

The circumstances in which a judge may testify are narrowly limited to when there is no other reasonably available way to prove the necessary facts. Carroll, 79 Wn.2d at 20. The judge should (1) offer strictly factual testimony, (2) that factual testimony must be “highly pertinent to the jury’s task,” and (3) the judge must be “the

Canon 2 provides:

(A) A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

only possible source of testimony on the relevant factual information.” United States v. Roth, 332 F.Supp. 2d 565, 568-69 (S.D.N.Y. 2004) (adopting Frankenthal as setting forth proper test to determine when party may use testimony from a judge at a jury trial); see also People v. Drake, 841 P.2d 364, 368 (Col. Ct. App. 1992) (judge’s testimony must be necessary to prove material element of offense).

In Stein’s earlier appeal, this Court cautioned the trial court to “carefully consider the need for” testimony by Judge Lodge in light of the dangers inherent in presenting a judge’s testimony. Slip op. at 33. The prior ruling did not substantively address whether Judge Lodge’s testimony was error, since Stein had not objected to Judge Lodge’s testimony during his prior trial and the ruling found he waived any objection to the judge’s testimony. Id. Yet, the ruling notes much of Judge Lodge’s testimony “was not strictly necessary and had the potential to unfairly influence the jury.” Id.

In the case at bar, Stein objected to Judge Lodge’s testimony, thus preserving the issue for review. 15RP 2437-38. Judge Lodge did not offer testimony directly pertinent to the

charged offenses. Instead, he testified about collateral issues which purportedly demonstrated Stein's motive. The judge's testimony involved recounting a number of prior cases in which Stein appeared as a litigant before him. Since his testimony related to ER 404(b) evidence as opposed to evidence about the charges themselves, it was certainly not highly pertinent to the charged offenses. Roth, 332 F.Supp. at 568 (judge's testimony not highly pertinent to issues before jury when involves ER 404(b) background information).

Moreover, the same information was available from other sources. The prosecution called Val Tollefson for the sole purpose of testifying about the same civil case history to which Judge Lodge testified. 17RP 2851-2884. Additionally, Ned Hall and Dale Haagen participated in the civil cases Judge Lodge testified about and offered the same litigation history, except for one case involving an automobile accident wholly unrelated to Nick Stein or Ned Hall and not particularly relevant to the charges. 18RP 3013-14, 3018-19; 20RP 3330-61, 3377-82, 3392-96, 3408.

Furthermore, the judge testified about personally witnessing Stein being uncooperative, unruly, dishonest, and threatening, so much so he held Stein in contempt. 17RP 2774-78, 2838. He

implicitly found Stein unbelievable in ruling against him and finding his actions frivolous. 17RP 2827, 2831.

In sum, Judge Lodge was not a necessary witness. His testimony was repetitive of other witnesses and it did not pertain to a highly pertinent issue to be decided by the jury but rather was background information. Since it was not strictly necessary, the prosecution should not have required Judge Lodge to testify.

The testimony had great potential to unfairly influence the jury. The jury heard directly from a judge, and presumably a respected member of the community, who disbelieved Stein and ruled against him on numerous occasions. The testimony also gave the jury a chance to put a face on the alleged victim of uncharged allegations that Stein threatened to kill Judge Lodge. His testimony about uncharged crimes and bad behavior was irrelevant to the charged crimes and carried a great potential to confuse the issues and inflame the jurors. See e.g., State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002) (prior behavior need not be criminal to violate rule against propensity evidence). The court abused its discretion by permitting Judge Lodge to testify about information for which others could, and did, testify and was not central to the case. Carroll, 79 Wn.2d at 20

b. The court improperly admitted statements a “co-conspirator” absent evidence a conspiracy existed at the time or that Stein was a part of it. Under ER 801(d)(2)(v), an out-of-court statement is not hearsay when offered against a party and made by a co-conspirator during the course and in furtherance of the conspiracy. Before admitting statements purportedly made during a conspiracy, the court must find the prosecution presented sufficient independent evidence establishing the existence of the conspiracy, that the defendant was a member of the conspiracy, and the statements were made in the course of and in furtherance of the conspiracy. State v. St. Pierre, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988); State v. Halley, 77 Wn.App. 149, 152, 890 P.2d 511 (1995).

A conspiracy is “an agreement . . . made by two or more persons confederating to do an unlawful act.” Halley, 77 Wn.App. at 154 (citing Webster’s Third New International Dictionary 485 (1969)). No formal agreement is required, but there must be a concert of action between two or more people, with the members of the conspiracy working together for the purpose of accomplishing a common goal. State v. Gallagher, 15 Wn.App. 267, 277, 549 P.2d 499 (1976).

In the case at bar, the prosecution introduced evidence from Ed Denny, Robert Lemire, and Kevin Arbour that Michael Norberg separately solicited them to kill Ned Hall in the early 1980s. 21RP 3672, 3675; 22RP 3718, 3724-25, 3450-51, 3757. There was no evidence Stein and Norberg were working together with the common purpose of trying to kill Hall in 1983, when Lemire specifically recalled speaking to Norberg, or in the early 1980s when Denny and Arbour recounted conversations. Id. There was no evidence Norberg was acting in conjunction with anyone else at that time or that Stein knew of Norberg's efforts. There was no evidence other than the statement itself that Norberg or Stein were engaged in a conspiracy to kill Hall in the early 1980s. St. Pierre, 111 Wn.2d at 118-19. Absent any evidence demonstrating there was an agreement between Norberg and anybody else at the time the statements were made, the court improperly admitted testimony by Denny, Lemire, and Arbour that Norberg solicited them to kill Hall in the early 1980s.

The trial court did not make any specific findings that the conspiracy existed in or around 1983. The remainder of the statements introduced under ER 801(d)(2)(v) occurred in late 1986 or 1987, close in time to when the incidents occurred.

The prosecution did not alert the court that it would introduce statements from the early 1980s or that there would not be any additional evidence that a conspiracy existed in the early 1980s. The court did not enter and findings as to when the conspiracy began. The court's ruling admitting statements of co-conspirators made no findings that the conspiracy existed at in the early 1980s and no trial evidence supported any such finding. 20RP 3473-74. The court erred by admitting statements by Denny, Lemire and Arbour from these earlier dates.

c. The court improperly admitted statements that were privileged attorney-client communications. An attorney's obligation to maintain the confidentiality of client communication is a "fundamental principle" in our justice system, benefiting not just the individual client but society at large. In re Schafer, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003).

Washington law bars an attorney from revealing client confidences in no uncertain terms. RCW 5.60.060(2)(a).¹¹

Similarly, RPC 1.6 provides:

a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(Emphasis added.). RPC 1.6 grants broader protection than the statutory privilege, as it also protects client's "secrets," defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Dietz v. Doe, 131 Wn.2d 835, 841, 935 P.2d 611 (1997). Since RPC 1.6 permits an attorney to reveal a secret if court-ordered to do so, the court resolves questions of privilege under both the statute and the professional code. Dietz, 131 Wn.2d at 841.

As the Supreme Court said in Schafer,

¹¹ RCW 5.60.060(2)(a) provides, "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." (Emphasis added.)

The attorney-client privilege is pivotal in the orderly administration of the legal system, which is the cornerstone of a just society. The reasoning is tripartite: to maintain the adversarial system, parties must utilize lawyers to resolve disputes; lawyers must know all the relevant facts to advocate effectively; and clients will not confide in lawyers and provide them with the necessary information unless the client knows what he says will remain confidential. The confidential relationship that exists between an attorney and client facilitates the full development of facts necessary for proper representation and encourages clients to seek legal assistance early.

Id. at 160-61 (internal citations omitted). The occasions when a lawyer is justified in revealing client confidences are “extremely limited.” Id. at 162-63.

i. By meeting with Carol Kyle to discuss legal representation, Stein was entitled to keep his conversation confidential. The client’s subjective belief dictates the existence of an attorney-client relationship, so long as that belief is reasonably formed based on the circumstances. Dietz, 131 Wn.2d at 843. The relationship does not need to be formalized and no fee needs to be paid for a communication to be confidential. In re Disciplinary Proceeding of McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). The essence of the relationship is whether advice is sought and received on legal matters. Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).

For example, in McGlothlen, the client received legal advice and assistance on which she relied, thereby demonstrating the attorney-client privilege applied. 99 Wn.2d at 522. In Bohn, the purported clients were the parents of an attorney's client, the attorney told them from the inception that he did not represent them and the legal work he performed was for the benefit of his own client. 119 Wn.2d at 359-60. No attorney-client relationship existed in Bohn despite the legal work the attorney performed based on the circumstances in which the request for legal assistance arose. Id. at 363.

In the case at bar, Stein met with Carol Kyle at some point during 1985 and 1987 for the purpose of obtaining legal representation. 14RP 2221, 19RP 3262. They spoke for over one and one-half hours during their first meeting. 19RP 3262. In the course of explaining the legal assistance he was seeking, Stein discussed how Judge Lodge was unduly interfering in the guardianship and probate matters in Clark County and Lodge and Hall were working against him and his father. 19RP 3264-66. At some point in their conversation, Kyle told Stein she was not licensed in Washington but provided names of other attorneys who would help him.

The attorney-client privilege exists for the purpose of encouraging honest consultation. Schafer, 149 Wn.2d at 160. Stein was seeking legal representation when he spoke with Kyle and reasonably believed his comments would be kept confidential. Kyle owed a duty to maintain the confidentiality of the confidences and secrets Stein imparted in the course of seeking Kyle's legal assistance. The court ignored the boundaries of the attorney-client privilege when it ruled Kyle's testimony admissible.

ii. Stein's statements to Ken Eisenland were privileged communications. Ken Eisenland represented Stein in a civil suit. During a deposition, Stein made a comment to Eisenland that Eisenland perceived as a threat to Ned Hall. Eisenland testified about the conversation he and Stein had.

An attorney may reveal client confidences and secrets when the attorney believes the client has firm intentions to inflict serious personal injury on an unknowing third party, or the client communicates the intent to carry out a "true threat." A true threat is a serious expression of intent to inflict bodily harm. State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001).

In the case at bar, during a break in a deposition Hall mentioned buying a new car. 18RP 2920-21. According to

Eisenland, Stein said to him that Hall would not have a need for a new car. 18RP 2921. Eisenland was concerned and asked Stein for an explanation. 18RP 2922. Stein allegedly said, “there are ways to solve problems without litigation.” 18RP 2922. When Eisenland asked him if he planned on shooting somebody, Stein said, “don’t worry about it.” Eisenland testified in 1989, when his memory may have been clearer, that Stein said “there are ways to take care of Ned Hall.” 18RP 2923.

Even if Eisenland correctly perceived what Stein said to him, which Stein disputed, these veiled and ambiguous comments were not “true threats.” Stein did not state he intended to physically harm Hall. While Eisenland may have been concerned, he did not believe a threat was going to be carried out, and Stein made no threat. Eisenland was not free to disclose comments Stein made to him in the course of his representation when he did not affirmatively believe Stein made a “true threat.”

The trial court admitted these statement on the grounds that Eisenland perceived them as a threat to Hall, and thus they were not protected by the privilege. However, since the statements were merely vague expressions that could have had multiple meanings and did not threaten bodily harm, Eisenland was merely

“concerned” as opposed to believing they would be carried out, and Stein told Eisenland “don’t worry” when Eisenland asked if Stein meant to do something, Eisenland was not free to divulge the information he learned in the course of representing Stein.

e. The admission of statements made in an unrelated civil trial or in a tape-recorded deposition violated Stein’s constitutional right to confront witnesses against him. The Sixth Amendment and Washington’s Constitution, Article I, section 22, grant an accused person the fundamental right to confront one’s accusers. Here, over Stein’s objection, the prosecution introduced a tape recording containing statements by various people including Nick Stein and trial testimony of Thelma Lund and Nick Stein given in a civil case in the early 1980s. Stein did not have an adequate motive and opportunity to cross-examine the declarants of these statements as required by the Sixth Amendment and Washington Constitution, art. 1, section 22.¹²

i. The admission of testimony violates the Confrontation Clause when there has not been a full and fair

opportunity for cross-examination. In no uncertain terms, an accused person's constitutional right to confront witnesses against him requires actual confrontation and meaningful cross-examination for the prosecution to introduce any out-of-court statements by unavailable witnesses that are "testimonial" in nature. Crawford v. Washington, 51 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004).

In Crawford, the Court abandoned its approach to assessing the right of confrontation and refashioned the critical inquiry that must occur based upon the fundamental importance of confrontation. Crawford serves as a serious reminder of the weighty importance of confrontation in protecting an accused's basic rights during a proceeding involving the deprivation of liberty. As Justice Scalia noted in his majority opinion,

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty.

Id. at 1371. The opportunity to cross-examine a witness, to test the witness's perception, memory and credibility, is the fundamental

¹² The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Likewise, the Washington Constitution guarantees an accused the right "to meet the witnesses against him face to face." Wash. Const.

purpose of the constitutional right of confrontation. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982). Cross-examination plays a central role in ascertaining the truth. California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Being “subject to cross-examination” means the opportunity for full and fair questioning, with a similar motive to that at trial. State v. Jenkins, 53 Wn.App. 228, 234, 766 P.2d 498 (1989); see United States v. Owens, 484 U.S. 554, 558-59, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988). The test of similar motive is not met simply because the questioner takes the “same side of the same issue” at the two proceedings. United States v. DiNapoli, 8 F.3d 909, 912 (2nd Cir. 1993). A general interest in testing the witness’s credibility at each proceeding is not sufficient to establish “similar motive.” United States v. Bartelho, 129 F.3d 663, 671 (1st Cir. 1997).

If a fact is only peripherally related to the first trial but of critical importance at the second, the questioner did not have a similar motive to prove or disprove the point. DiNapoli, 8 F.3d at

art. 1, section 22.

912. As suggested by the DiNapoli Court, “the questioner must not only be on the same side of the same issue at both proceedings but must also have a substantially similar degree of interest in prevailing on that issue.” Id.

In Stein’s prior appeal, this Court expressly declined to address the constitutionality of admitting Lund and Stein’s civil trial testimony, since Stein had only presented argument on its admissibility under ER 804(b)(1).¹³ However, Crawford makes plain that the touchstone for analyzing the scope of the confrontation clause bears no relationship to modern hearsay rules. 124 S.Ct. at 1374 (constitutional admissibility of statements no longer turns in any way on “the vagaries if the rules of evidence”). Id. at 1370. Instead, it is analyzed based on the intended scope of the confrontation clause itself. Absent evidence that ER 804(b)(1) was intended to define the requirements of confrontation, that

¹³ ER 804(b) provides in pertinent part:
Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceedings, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceedings, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

evidentiary rule and case law interpreting that rule do not govern the admissibility of testimonial statements by absent declarants.

ii. Without adequate confrontation, the testimony should have been excluded. Here, the prosecution introduced statements by Nick Stein and other unidentified people from a tape-recording made during a deposition. Ex. 241; 18RP 3085-3102. Jack Stein was not a party to the deposition and did not cross-examine anyone about their statements.

Statements contained in the tape recording were “testimonial.” The declarants knew they were being tape-recorded. 18RP 2911. The statements relate to the subject matter of litigation, which was whether Jack Stein either improperly influenced or tricked his father into signing an assignment contract giving him control over a large property his father owned. While the statements were not made in the course of a prosecution, they related to purportedly fraudulent acts and were given in a formal and official setting. Even if the statements themselves were not the product of official questioning, the recorded, official nature of the conversation gave the people present reason to know that their statements would be available for later use.

Additionally, testimony by Lund and Nick Stein during a civil trial regarding the validity of the same assignment of property were “testimonial.” Exs. 281-82; 19RP 3297-3318. The statements were made in the course of a trial and essentially accused Jack Stein of fraudulently obtaining property from his father while Nick Stein was in weak physical condition and otherwise trying to obtain property from his father against his will. 19RP 3299, 3305; 3312-13, 3317-18. Lund also alleged Stein once attacked and damaged her car when he was angry with her. 19RP 3303-04.

Stein did not have a constitutionally adequate opportunity to cross-examine Lund or Nick Stein about their allegations since he did not have a significantly similar motive to question them about their allegations of his hostility toward Lund or claims that he otherwise pressured his father regarding his inheritance, critical trial issues but not an important issue during the civil case.

Crawford demonstrates the paramount importance of adequate face-to-face confrontation, including the opportunity to cross-examine the declarant in a meaningful manner. Evidentiary rules are not similarly concerned with applying these constitutional principles and those rules are not substitutes for determining whether the right of confrontation has been violated. Given

Crawford's strict reading of the right to confrontation, the trial court erred by admitting statements when Stein never had the opportunity or substantially similar motive for cross-examination.

f. The cumulative harm caused by the several erroneous evidentiary rulings requires reversal. Even if the individual errors may be harmless, the combined harm may amount to deprivation of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Perrett, 86 Wn.App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997). There is a substantial likelihood that the court's series of errors, when taken together, effected the jurors' verdict.

The evidence in the case proving Stein knowingly participated in the plot to kill Hall was tenuous at best. There was very little testimony he plotted, planned, or offered money to the participants before they tried to harm or kill Hall. Norberg solicited each of the participants, not Stein. 20RP 3483; 23RP 3845. The evidence showing Stein knew about and endorsed Norberg's efforts came from not only distinctly disreputable people, but also people who were operating under a significant narcotic haze throughout the time period involved. 20RP 3529; 23RP 3842.

The only direct testimony of Stein's actual participation in a conversation about trying to kill Hall came from Ray Stradley, who claimed in 1989 that Stein said he would finance a "hit" on Hall. 21RP 3644. Stradley briefly lived in Norberg's house but left after Stein kicked Stradley off the property and threatened to call the police based on a financial dispute. 21RP 3656. Stradley had been involved in violently attacking a person in Norberg's house who pulled a gun on him after a drug dispute. 21RP 3558-59. The remaining evidence against Stein came from even less credible sources.

Upon learning the details of Lund's murder without hearing that Stein was acquitted of being involved in that offense, that he threatened to kill a local judge and talked about blowing up the county courthouse, Norberg had been soliciting people to kill Hall as early as 1983, Stein made veiled threats against Hall to his attorney, and Stein threatened Lund and his manipulated his father, the jury was clearly lead to conclude Stein was a dangerous person, with a propensity toward threatening people and associating himself with violent actors. The cumulative harm from the improperly admitted evidence affected the outcome of the case and require reversal.

5. THE COURT'S ANSWER TO THE INQUIRY BY THE DELIBERATING JURY CONFUSED THE BURDEN OF PROOF AND DENIED STEIN DUE PROCESS OF LAW.

During deliberations, the jury inquired of the court in a written note,

With regards to Instruction #9 [definition of accomplice liability], do we need to have a preponderance of evidence to prove an accomplice under subparagraphs (1) and (2) (solicits, commands, encourages . . . (2) aids or agrees to aid . . .)? Or, will a single piece of evidence in favor of conviction take precedence over evidence in favor of acquittal?

The court responded, without making a record as to whether counsel or Stein was consulted, "Preponderance of the evidence is not the applicable burden of proof in a criminal trial. Refer to Instructions 1, 2, 15, 16, 17, and 21." CP 1355.¹⁴ When a court undertakes supplemental jury instruction, it must do so in a manner that clearly states the law, does not mislead or confuse the jury, and answers the question presented. The court's answer in the case at bar failed to clarify the evidence necessary to acquit Stein of the charged offenses, thereby denying him due process of law.

¹⁴ Instructions 1 and 2 are attached as Appendix C. Instructions 15, 16, 17, and 21 were the "to convict" instructions for the three counts of attempted first degree murder and one count of first degree burglary. CP 1355. The jury note seems to be attached to the end of the packet containing the court's instructions.

a. The trial court must provide the jury with manifestly clear and accurate instructions defining the State's burden of proof and the jury's ability to acquit a defendant. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895); U.S. Const. amends. 6, 14; Wash. Const. art. 1, sections 21, 22. The Due Process Clause requires that the government prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid suggesting reasonable doubt may require a lesser showing than the constitution mandates. Victor v. Nebraska, 511 U.S. 1, 21, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An integral part of proof beyond a reasonable doubt is that the accused receives the benefit of the doubt. Victor, 511 U.S. at 8, quoting Commonwealth v. Webster, 59 Mass. 295, 230 (1850). Jurors are not required to explain their reason, or cite to a specific piece of evidence to prove that an acquittal is justified.

Jurors are free to weigh and determine facts based on their own common sense or personal beliefs. See Duncan v. Louisiana,

391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (recognizing “common-sense judgment of a jury” as inherent component of jury trial right). There is no mechanical rule the jury must apply when deciding whether a case merits a not guilty finding.

The court may not suggest that jurors must reach an agreement, must surrender their beliefs, or must compromise their personal sense of justice. See Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) (error to direct jurors to reach a verdict); State v. Boogaard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978) (error to order deadlocked jury to continue deliberating without telling both minority and majority to reconsider views).

When the trial court supplies supplemental instruction to a deliberating jury, it must not do so in a misleading, confusing, or prejudicial manner. United States v. Tines, 70 F.3d 891, 896 (6th Cir. 1995). A trial court’s instructions must make the relevant law “manifestly apparent.” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). As one court said,

The desire of a careful judge to avoid language which to him may seem unnecessarily repetitive should yield to the paramount requirement that the jury in a criminal case be

guided by instructions framed in language which is unmistakably clear.

Notaro v. United States, 363 F.2d 169, 175 (9th Cir. 1966).

In Humphrey v. Cain, the court's jury instruction defined proof beyond a reasonable doubt as "a serious doubt, for which you could give a good reason." Humphrey v. Cain, 120 F.3d 526, 528 (5th Cir. 1997), reasoning aff'd en banc, 138 F.3d 552, cert. denied, 525 U.S. 943 (1998). On habeas review, the appellate court reversed Humphrey's conviction because the instruction implied that a deliberating juror should be able to articulate a specific good reason to acquit the defendant. 120 F.3d at 531. This requirement decreased the State's burden of proof and "remove[d] a substantial protection assured defendants." *Id.* at 530. Requiring a certain quantum of evidence to acquit an accused person made it less likely that an undecided or inarticulate juror would give the defendant the benefit of the doubt. *Id.* at 531; see also Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir.), cert. denied, 437 U.S. 910 (1978) (improper to tell jurors must rely on "good and sufficient" reason to acquit).

In the case at bar, the jurors asked the court a question reminiscent of the improper jury instruction delivered in Humphrey.

The jury question showed the jurors believed that a certain amount of evidence was required in order to acquit Stein. CP 1355 (note attached to end of court's instructions).

The jurors had formed this erroneous impression of the quantum of evidence needed to find Stein not guilty based on the jury instructions. Rather than correcting the jurors' faulty understanding of the evidence required to acquit Stein, the court simply directed the jurors to re-read six of the instructions it gave. By failing to correct the jury's plain misimpression that proof beyond a reasonable doubt required it to find a certain amount of evidence favored acquittal, the court failed to adequately instruct the jury.

Since the court took the affirmative step of addressing the jury's inquiry, its failure to provide clear direction on the burden of proof question the jury asked was an inexcusable lapse. By failing to clarify the jury's misunderstanding, it implicitly informed the jury that it was correctly applying the law. None of the jury instructions to which the court referred the jury stated whether a particular quantum of evidence was required for an acquittal.

b. Failing to adequately explain the law to deliberating jurors requires reversal. While the court's written instructions may have been adequate in another case, once the

court provided supplemental instruction it undermined those instructions. An error regarding the burden of proof is structural and therefore is not subject to any form of harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993). Sullivan concluded

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

508 U.S. at 280 (citations omitted). The error in this case was the denial of a finding beyond a reasonable doubt. As Sullivan concluded, such error requires reversal whenever it arises.

6. THE COURT VIOLATED STEIN'S RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW BY IMPOSING AN INCREASED SENTENCE BASED ON THE FACTUAL DETERMINATION OF SEPARATE AND DISTINCT CRIMINAL OFFENSES.
 - a. A fact which increases the punishment to which a

criminal defendant is exposed must be proven to a jury beyond a reasonable doubt. The Sixth Amendment right to a jury trial and the Due Process Clause of the Fourteenth Amendment entitle a criminal defendant to a jury determination of every element of an offense with which he is charged on the basis of proof beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (citing United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). The Sixth Amendment protects criminal defendants from exposure to penalties “*exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” Apprendi, 530 U.S. at 483 (emphasis in original). Likewise, the Fourteenth Amendment’s due process clause protects criminal defendants from an increased sentence based upon facts not formally pleaded, submitted to a jury, and proven beyond a reasonable doubt. See Specht v. Patterson, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Jones v. United States, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (Stevens, J., concurring)).

As such, a court’s ability to impose a sentence is limited to the maximum permitted by the jury verdict alone. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403

(2005). The rule is mandated by the “basic principles undergirding the requirements” of the Sixth and Fourteenth Amendments.

Apprendi, 530 U.S. at 484; see also Ring v. Arizona, 536 U.S. 584, 607, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

b. Washington’s “separate and distinct criminal conduct” judicial finding of fact exposes criminal defendants to enhanced punishment, violating the defendant’s right to a jury trial.¹⁵

In Washington, it is presumed sentences for multiple offenses “shall be served concurrently.” RCW 9.94A.589(1)(a); former 9.94A.400(1)(a). The SRA permits the court to impose consecutive sentences only after a factual determination, based upon a preponderance of the evidence, that the offenses arose from “separate and distinct criminal conduct.”¹⁶ RCW 9.94A.589(1)(b); former 9.94A.400(1)(b).¹⁷ In cases where the sentencing court finds “separate and distinct” conduct, the defendant “shall” serve

¹⁵ This issue is presently pending before the Washington Supreme Court in State v. Cubias, 152 Wn.2d 1013, 101 P.3d 108 (2004) (granting review of unpublished decision in COA 49988-2-I), argued on February 10, 2005. Division I ruled the Sixth Amendment is not implicated when the trial court imposes consecutive sentences. State v. Kinney, 125 Wn.App. 778, 782, 106 P.3d 274 (2005).

¹⁶ The statute also allows for the trial court to impose consecutive sentences as an “exceptional” sentence. RCW 9.94A.589(1)(a); former RCW 9.94A.400(1).

consecutive, and therefore, exceptional sentences. RCW 9.94A.589 (1)(a), (b); former RCW 9.94A.400(1)(a), (b). Absent such a factual determination, an offender must receive a sentence based on the model of concurrent sentences with each prior and current offense counted in the offender score. State v. Tili, 139 Wn.2d 107, 120, 985 P.2d 365 (1999).

Here, Stein's presumptive sentence for each count of attempted first degree murder convictions would be 195.75-260.35 months, to be served concurrently. RCW 9.94A.589 (1)(a); former RCW 9.94A.310. Based on the court's finding of "separate and distinct" conduct, Stein received consecutive terms of 220 months, resulting in a 660 month sentence.

Because the judicial finding of fact of "separate and distinct" conduct increased the sentence to which Stein was exposed, the Sixth and Fourteenth Amendments required the State to prove the fact to a jury beyond a reasonable doubt. See Apprendi, 530 U.S. at 497; Blakely, 124 S.Ct. at 2543 (quoting 4 Blackstone, Commentaries on the Laws of England 343 (1769)). The consecutive sentencing provision of the SRA, which permits

¹⁷ The statute in effect at the time of the charge offense, RCW 9.94A.400, has been recodified as RCW 9.94A.589, but has not been

increased punishment based on a judicial factual finding by a preponderance of the evidence, violated Stein's constitutional right to a jury trial and to due process of law. Apprendi, 530 U.S. at 491-92; Blakely, 124 S.Ct. at 2538.

c. The structural error presented mandates reversal.

The error in this case is structural and not subject to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); State v. Hughes, 154 Wn.2d 118, 147-48, 110 P.2d 192 (2005).

In the instant matter, the jury was not asked to determine whether the conduct in the three counts of attempted murder was separate and distinct. As in Hughes, there can be little doubt that the three cumulative 220-month sentences is more severe than the sentence Stein faced without the imposition of consecutive sentences. The error is prejudicial per se, requiring reversal. Hughes, 154 Wn.2d at 148, 152.

d. Washington's broader protection of the right to a jury trial underscores the need for reversal. The most fundamental concepts of criminal procedure require the State prove to a jury

substantively changed on the issue pertinent to the case at bar.

every essential element of a crime beyond a reasonable doubt.

State v. Cronin, 143 Wn.2d, 568, 580, 14 P.3d 752, 758 (2000).

This allocation of the burden of proof to the State derives from the guarantees of due process of law contained in article I, § 3 of the Washington Constitution¹⁸ and the Fourteenth Amendment of the federal constitution. State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

The more specific and detailed guarantees of the right to jury trial and due process of law in the Washington Constitution traditionally require automatic reversal where the jury is instructed in a manner which relieves the prosecution of its burden of proving all essential elements of the crime. See e.g. State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953).

In Hughes, the Supreme Court ruled that using judicial fact-finding rather than jury fact-finding can never be harmless. After reviewing various federal court decisions that reached differing conclusions, the Hughes Court determined that when a trial court

¹⁸ Art. I, § 3 provides; "No person shall be deprived of life, liberty, or property, without due process of law."

utterly fails to submit an issue to the jury, Washington courts may not merely surmise what the jury would have found. 154 Wn.2d at 147-48. Accordingly, courts of this state may not use a harmless error analysis to determine how a jury would have decided a factual question never submitted to the jury. Id.

d. Because Stein's acts were not "separate and distinct," even a harmless error analysis cannot save the sentence imposed. Imposition of consecutive sentences for "separate and distinct criminal conduct" is "a narrow exception to the general policy of concurrent sentences for all current convictions." State v. Godwin, 57 Wn.App. 760, 763, 790 P.2d 641 (1990), rev. denied, 115 Wn.2d 1006 (1990) (discussing former RCW 9.94A.400(1)(b)). The Legislature has not defined "separate and distinct criminal conduct," but courts have interpreted it to mean anything that is not "same criminal conduct." See In re Restraint of Orange, 152 Wn.2d 795, 821, 100 P.3d 291 (2005).

This result is not warranted. Where the Legislature uses different terms within a statute, it is presumed the Legislature intended the terms to have different meanings. See United States v. Bean, 537 U.S. 71, 76 n.4, 123 S.Ct. 584, 154 L.Ed. 483 (2002) (quoting 2A N. Singer, Sutherland on Statutes and Statutory

Construction § 46.06, p. 194 (6th ed. 2000)). In RCW 9.94A.589, the Legislature used the term “same criminal conduct” in subsection (1)(a) and “separate and distinct criminal conduct” in subsection (1)(b). The Legislature defined “same criminal conduct,” as used in subsection (1)(a), but failed to define “separate and distinct criminal conduct,” as used in subsection (1)(b). Had the Legislature intended the meaning imposed by the courts, it would have provided for consecutive sentences for serious offenses that did not constitute same criminal conduct. Such convoluted reasoning is unnecessary.

Apart from the distinct terms used in the two subsections, the legislative intent suggests “separate and distinct” should not include multiple offenses stemming from singular intent. The principle that separate victims warrants separate punishments is based on the notion that where there are separate victims, “Each offense could stand alone.” State v. Turner, 31 Wn.App. 843, 847, 644 P.2d 1224 (1982). In the present case, no evidence showed Stein directed or knowingly involved himself in the attempts on Hall’s life, or the participants acted on more than a single impulse to harm a certain person. A jury could have found Stein’s actions not “separate and distinct,” but rather the result of a single criminal

intent. Absent a jury finding that the offenses were separate and distinct, Stein was entitled to concurrent sentences. Hughes, 154 Wn.2d at 150-52 (remedy for violating right to jury trial of facts enhancing sentence is remand for standard range sentence).

7. THE COURT IMPROPERLY AND VINDICTIVELY IMPOSED A GREATER SENTENCE ON STEIN AFTER HIS SUCCESSFUL APPEAL.

It is "patently unconstitutional" to chill the exercise of constitutional rights by penalizing those who choose to exercise them. United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). In Washington, all people convicted of crimes have the constitutional right to appeal. Wash. Const. art. I, section 22. A person cannot be penalized for exercising that right. City of Seattle v. Brenden, 8 Wn.App. 472, 474, 506 P.2d 1314 (1973).

A court may not impose an increased sentence when a person is convicted after a successful appeal if the increase is based upon vindictive feelings or upon other inappropriate sentiments. The presumption of vindictiveness arises when there is a "reasonable likelihood" that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." Alabama v. Smith, 490 U.S. 794, 799, 109 S.Ct. 2201,

104 L.Ed.2d 865 (1989). The concern prompting questions of vindictiveness arises when a judge imposes a sentence and then changes that sentence without explanation following a successful appeal. Id. at 802.

A harsher sentence is not presumed vindictive when the judge enters findings explaining the basis of its sentence. Texas v. McCullough, 475 U.S. 134, 138, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986); State v. Parmalee, 121 Wn.App. 707, 711 n.1, 90 P.3 1092 (2004). When a different judge imposes a harsher sentence after remand, there is less of a reason to presume vindictiveness as that judge was not the one who believed the original sentence was appropriate. Parmalee, 121 Wn.App. at 711-12.

The presumption of vindictiveness applies to the case at bar based on the factual circumstances. See Parmalee, 121 Wn.App. at 712-13 (analyzing case under presumptive of vindictiveness even though court found presumption did not apply based on circumstances of sentencing). After his first trial, in which he was convicted of the same offenses, Stein received a sentence of 540 months, or 45 years, in prison. 144 Wn.2d at 240. But following his retrial, the court imposed a 660-month sentence. CP 1432.

The court offered no explanation for imposing a harsher penal sanction than imposed after the first trial and did not acknowledge the 10 year difference although he was aware of the earlier court's sentence. 25RP 4428-30, 4256-57. The court merely stated that the 660 months were "appropriate" and Stein lacked introspection or remorse. 25RP 4256. This increased sentence is especially surprising since there was much less evidence of Stein's participation in the attempted murder plot than there was at the first trial; evident by comparing the facts as described in the Supreme Court decision to the facts elicited in the case at bar. 144 Wn.2d at 239. Unlike the earlier trial where several witnesses gave detailed accounts of Stein's personal involvement in soliciting others to kill Hall, only Ray Stradley, a witness of highly questionable credibility, attested to direct participation by Stein in soliciting or planning an effort to recruit someone to kill Hall. 144 Wn.2d at 239.

More importantly, Stein was 66 years old at sentencing. He had a long history of health problems which the court witnessed throughout the trial and pretrial proceedings. Stein had no criminal history and was receiving an exceptional sentence based on the "separate and distinct" sentencing enhancement. Since it would be

impossible for him even to serve the entirety of a 45 year sentence, it is unclear what rational purpose underlied a 55 year sentence.

The 55 year sentence the trial court imposed was plainly not merely to exact punishment, since the majority of it would never be served as it is unlikely likelihood Stein will survive half as long as the sentence imposed. Instead, the sentence must be presumed vindictive, based on the court's displeasure with presiding over Stein's case in light of his difficult personality or the court's desire to exact retribution for uncharged offenses. While the court claimed the sentence was based on a lack of remorse, the gross inflation of his sentence and the impossibility that Stein will be physically able to serve such a sentence demonstrate its improperly vindictive nature. Remand for resentencing before a new judge is required.

8. THE JUDGMENT AND SENTENCE INCORRECTLY STATES THE CONCURRENT TERMS IMPOSED BY THE SENTENCING COURT.

The Judgment and Sentence is the final order in a criminal case. See Tembruell v. Seattle, 64 Wn.2d 503, 509-10, 392 P.2d 453 (1964). It denotes the court's formal declaration as to the legal consequences of the conviction. Id. at 510; see also State v.

Johnson, 113 Wn.App. 482, 488, 53 P.3d 155 (2002) (Judgment and Sentence determines offenses of conviction).

At sentencing, the court unambiguously ruled Stein's burglary sentence would run concurrently to the sentence imposed for attempted murder in court 3, as the two offenses were the same criminal conduct. 25RP 4230. The Judgment and Sentence reflects the court's imposition of concurrent time for counts 3 and 4. CP 1432 (Judgment and Sentence, p. 6).

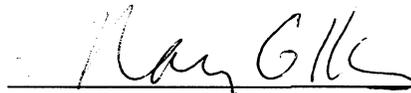
However, the Judgment and Sentence also provides that Stein must serve a total of 696 months confinement. Id. The 696 months derives from counting the three 220 month terms Stein received consecutively one counts 1, 2, and 3, and then adding the 36 month sentence for burglary consecutively. Id. This portion of the Judgment and Sentence is erroneous and must be corrected on remand. The court imposed a sentence of 660 months, not 696 months.

F. CONCLUSION.

For the foregoing reasons, Stein respectfully requests this Court vacate his convictions and sentence and dismiss the charges against him in the interest of justice, or alternatively, that the court order a new trial and sentencing proceeding.

DATED this 8th day of September 2005.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4	JACK K. STEIN,)	Docket No. C91-5523B
)	
5	Petitioner,)	Tacoma, Washington
)	May 15, 1996
6	v.)	9:35 a.m.
)	
7	TANA WOOD,)	
)	
8	Respondent,)	

9
10 TRANSCRIPT OF COURT'S ORAL DECISION
11 BEFORE THE HONORABLE ROBERT J. BRYAN
12 UNITED STATES DISTRICT.

12 APPEARANCES:—

13	For the Petitioner:	BARRY L. FLEGENHEIMER
14		Bell, O'Connor, Flegenheimer & Leong
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20	Court Reporter:	Julaine V. Ryen
21		Post Office Box 885
22		Tacoma, Washington 98401-0885
23		(206) 383-7919

24 Proceedings recorded by mechanical stenography, transcript
25 produced by Reporter on computer.

COPY

1 THE COURT: Preliminarily -- well, to start the
2 record, this is Stein versus Wood, No. 91-5233.

3 I would like to have the clerk file the original
4 depositions that I read that are part of the record in this
5 matter. I have those, and they have not yet been filed, but
6 they are the depositions of Bonnie Lainhart, James Frame, Gordon
7 Jones, and Dennis Hunter. In the absence of objection, unless
8 there is some objection, I will just file those with the clerk's
9 office and they will be part of the record of this case.

10 This comes before the court for a decision following
11 evidentiary hearing that was granted pursuant to 28 United
12 States Code Section 2254(d) and pursuant to the case of Sumner
13 v. Mata, found at 449 U.S. 539 at page 536. At issue in this
14 proceeding are requests for habeas relief based on, first,
15 denial of effective assistance of counsel during the appellate
16 process; and second, excessive delay in the appellate process
17 amounting to a due process violation. These issues are closely
18 intertwined. It is clear that the petitioner, Mr. Stein, has
19 exhausted his state remedies on these issues.

20 I will make oral findings of fact and conclusions of law
21 here this morning pursuant to Federal Rule of Civil Procedure
22 52(a), making written findings of fact and conclusions of law
23 unnecessary.

24 While there may be a question of whether the habeas corpus
25 amendments found in the Antiterrorism and Effective Death

1 Penalty Act of 1996 apply here, the same result follows, with or
2 without consideration of those amendments.

3 I am mindful of the presumption of correctness that the
4 findings in state court has in these matters. The findings I
5 Make here are based on a clear and convincing standard rather
6 than just a preponderance of the evidence standard. These
7 findings, however, are not intended to cover every detail that
8 supports them. To some extent, the findings will be conclusory
9 findings as opposed to a recitation of every detail that
10 supports those conclusions.

11 The file reflects that Mr. Stein is not incompetent, but
12 that he was not competent to represent himself on appeal in this
13 case, on direct appeal, nor is he competent to represent himself
14 on his habeas corpus petition. That finding is based on the
15 contents of the voluminous record here.

16 Mr. Stein was convicted of multiple counts of attempted
17 murder in a second trial in July of 1989, and he was sentenced
18 to 45 years imprisonment in the Superior Court of the State of
19 Washington for Clark County. He then filed a timely pro se
20 notice of appeal, and he also filed pro se a designation of
21 clerk's papers and a statement of arrangements. The latter two
22 filings were not adequate under the State Rules of Appellate
23 Procedure, but they were made.

24 In January of 1990, Mr. Stein timely employed counsel on
25 appeal, Mr. Lee, and through Mr. Lee arranged for the necessary

1 verbatim report of proceedings from three different court
2 reporters that had covered his trial. The object of Mr. Lee's
3 representation of Mr. Stein never varied. It was, at least, to
4 perfect Mr. Stein's appeal. The perfection of the appeal is the
5 issue in this case; that is, filing of the notice of appeal,
6 designation of clerk's papers, filing a statement of
7 arrangements, and filing what was necessary of a verbatim report
8 of proceedings. All of those are as required under the State
9 Rules on Appellate Procedure to perfect an appeal.

10 The question of responsibility for prosecuting the appeal
11 beyond perfecting it is somewhat cloudy here, but the appeal was
12 dismissed for want of perfection, and it's not necessary in
13 these proceedings to examine beyond that stage. I am not going
14 to get into the question of what should have been done if the
15 appeal had been perfected.

16 By the spring of 1990, the relationship between Mr. Stein
17 and Mr. Lee fell apart. Mr. Stein attempted to fire Mr. Lee,
18 and over time Stein filed appropriate pro se pleadings. He made
19 a bar complaint against Mr. Lee and attacked him and his legal
20 representation in writing.

21 It should be noted that Mr. Stein is the most difficult of
22 clients, and not just in regard to his relationship with Mr.
23 Lee, but certainly in regard to that relationship, he was a most
24 difficult client. He attacks his attorneys, he attacks judges
25 and prosecutors. He believes that there is a vast conspiracy

1 against him, and because of the nature of the offenses of
2 convictions, some fear on the part of those he distrusts is not
3 unreasonable.

4 Mr. Stein disagrees with and tries to fire virtually every
5 lawyer that he's had whenever they don't get the results that he
6 wants on an immediate basis, but nevertheless, in spite of that,
7 he has never waived his right to direct appeal, nor has he
8 waived any of his constitutional rights that are at issue in
9 this proceeding. In spite of the fact that he is a difficult
10 client, he is entitled to constitutional protections.

11 Over the next several months, after March and April of 1990
12 when Mr. Stein attempted to fire Mr. Lee, the stormy
13 relationship continued and Mr. Lee attempted to withdraw. His
14 withdrawal from representation of Mr. Stein was rejected by the
15 Court of Appeals and he remained counsel of record throughout
16 the relevant period, the period relevant to these habeas
17 proceedings.

18 Because of Mr. Stein's attempt to fire him and because of
19 Mr. Stein's abusive conduct towards him, Mr. Lee effectively
20 abandoned Mr. Stein and any attempt to perfect his appeal. Mr.
21 Lee now, erroneously, takes the position that he could not do
22 anything for Mr. Stein after being fired by Mr. Stein in the
23 spring of 1990. He was still in the case, however, as is
24 reflected by the Court of Appeals' rejection of his withdrawal
25 motion, and as is reflected by Mr. Lee's own correspondence in

1 the record and his own activities in regard to the appeal.
2 Clearly, he had a continuing duty to Mr. Stein to perfect the
3 appeal.

4 Mr. Lee believed, and apparently still believes, that Mr.
5 Stein's appeal was not frivolous and that he had meritorious
6 issues to raise on direct appeal.

7 I indicated that Mr. Lee abandoned Mr. Stein and any
8 attempt to perfect his appeal. There are a number of specific
9 facts that show Mr. Lee's abandonment of his client. This is
10 not necessarily an exhaustive list, but here are some of the
11 things that lead me to that conclusion:

12 Mr. Lee did not speak to trial counsel. He did not review
13 trial counsel's file even though it was offered to him.

14 He allowed his personal view of Mr. Stein's competency to
15 color his judgment regarding Mr. Stein's credibility and to
16 color his judgment regarding his own, that is Mr. Lee's,
17 actions. His view was that Mr. Stein was not competent, and he
18 let that personal view inappropriately affect his judgment in
19 regard to how he handled the case.

20 Mr. Lee inappropriately and in an untimely fashion disposed
21 of Mr. Stein's files.

22 Mr. Lee did not follow through in getting the verbatim
23 report of proceedings ordered and filed, although funds for that
24 purpose were available to him. He did not file a proper
25 designation of clerk's papers or a proper statement of

1 arrangements, and as near as I can tell and recall, he never
2 really examined into what his client had done in regard to
3 filing those documents.

4 When problems with producing court reporter Langer's part
5 of the verbatim report of proceedings surfaced, Mr. Lee made no
6 reasonable effort to perfect the record by either seeking or
7 requiring production of and filing the existing originals or
8 copies. He made no reasonable effort to order and file new
9 copies. He did not monitor Mr. Langer's efforts to produce an
10 original or a duplicate original or a copy. He made no effort
11 to reconstruct the record by other methods. And he
12 inappropriately relied on statements of his client's wife made
13 against the best interests of his own client.

14 Mr. Lee ignored the Court of Appeal's orders, including
15 sanction orders against him, and wrongly told his client to pay
16 the sanctions. It is my understanding that the sanctions have
17 not been paid to this date.

18 As reflected by his testimony here, Mr. Lee failed to
19 understand his obligations to both Mr. Stein, as his client, and
20 to the court and apparently based his erroneous understanding of
21 his duties on a negligently wrong misinterpretation of the case
22 of State v. Dodd in which he had been involved.

23 On the 4th of January of 1991 the Court of Appeals remanded
24 the case, the appeal of State v. Stein, to the Superior Court to
25 settle the record, because by then, of course, the appropriate

1 necessary verbatim report of proceedings had not been filed. In
2 spite of this opportunity to perfect the record, or to perfect
3 the appeal, Mr. Lee's abandonment of the case and his client
4 continued. He took no reasonable steps to settle the record.
5 He did not request a timely hearing. When the prosecution did
6 initiate a hearing, Mr. Lee did not plan for it or prepare for
7 it and did not meaningfully participate in it. Although he knew
8 that evidence was available laying blame for the missing part of
9 the record on others than Stein, he did not arrange for the
10 presentation of that evidence to the court. That evidence was
11 available from court reporter Langer, from Mr. Stein himself,
12 and also from Mr. Stein's wife, Bethany Norberg.

13 He made no effort to secure Mr. Stein's presence, although
14 it was a fact-finding hearing at which Stein had a right to be
15 present, and in spite of the fact that he knew that Mr. Stein
16 wanted to be there.

17 He did not request that a verbatim record be made of the
18 hearing, although substantial rights of his client were at
19 issue. He allowed the prosecutor to present the matter as
20 essentially not in dispute, and by his apparent acquiescence
21 and/or lack of a position at the remand hearing, Mr. Lee misled
22 the court into believing and concluding that Mr. Stein
23 personally was responsible for the missing transcripts when that
24 was not true.

25 The result of the remand to settle the record was that

1 Stein was held responsible for perfecting the record. Clear and
2 convincing evidence indicates to this court that the judge's
3 conclusion was erroneous. Stein used due diligence in
4 attempting to avoid the erroneous conclusion but was prevented
5 by his attorney's inaction from presenting his own evidence, and
6 it appears to me that no reasonable fact finder would have
7 reached the conclusion that the superior court did reach at the
8 remand hearing if Mr. Stein had minimally effective assistance
9 of counsel at that hearing.

10 Even after the remand hearing and ruling, which occurred in
11 August of 1991, Mr. Lee -- I believe that date is correct -- Mr.
12 Lee had further opportunity to correct the injustice of the
13 ruling and to perfect the appeal, but he not only did not do so,
14 but made no effort to do so. The result of these events and the
15 remand to settle the record was that Mr. Stein's direct appeal
16 was dismissed by the Washington State Court of Appeals.

17 Since the dismissal of the appeal, Mr. Stein has been
18 trying to reinstate his appeal, although his efforts and the
19 issues regarding what happened to his appeal have been somewhat
20 clouded by Mr. Stein's pro se efforts and by his attacks on
21 anyone who disagrees with him or his approach to this matter.
22 His attacks have included attacks on judges, including me; on
23 all of his attorneys, including Mr. Flegenheimer; and all
24 prosecutors who have been involved in the case; as well as
25 others. I am not aware, counsel, that he has attacked the

1 Attorney General's office or assistant attorneys general
2 individually, but I would expect if he has not, he may.

3 Indeed, if this court had not required Mr. Flegenheimer to
4 stay in the case over Mr. Stein's objection, as Mr. Lee was
5 required to stay in the case over Mr. Stein's objections at the
6 direct appeal process, this court probably would never have been
7 able to deal with the issue of whether Mr. Stein's right to
8 appeal was unconstitutionally taken from him by ineffective
9 assistance of counsel or for any other reason.

10 In any event, Mr. Lee's abandonment of Mr. Stein's appeal
11 and of Mr. Stein amounted to ineffective assistance of counsel
12 under the Strickland case test and certainly prejudiced Mr.
13 Stein because that was the cause of the loss of his right to
14 direct appeal.

15 Now let me turn my attention next to the actions of other
16 players in this matter who also by their actions deprived Mr.
17 Stein of due process rights by causing excessive delay in the
18 appellate process.

19 First, the official court reporter, Mr. Langer. I note
20 that Mr. Langer is an official court reporter. He at least was,
21 at the time in issue here, an officer of the court and had
22 obligations to the court and the public, as well as a
23 contractual obligation to Mr. Stein. He was the author or the
24 transcriber, taker and transcriber of the part of the verbatim
25 report of proceedings that was missing and that was the subject

1 of the remand to settle the record. He failed in many ways.

2 First, he should have filed the original transcript with
3 the court when it was completed instead of delivering it to a
4 third party. There was not a rule that required that, but it
5 was the custom and practice, certainly, at that time, and he
6 should have seen to the filing of the original.

7 When he was made aware that the original was not filed by
8 the third party, he should have immediately filed a duplicate
9 original or a copy or prepared an additional copy or original
10 and filed it. That should have been done immediately and
11 without delay as soon as he learned that the original had not
12 been filed, as he expected it was going to be filed, by the
13 third party, who was Mr. Stein's stepson, I gather.

14 The Clark County Clerk's Office also failed in their
15 duties, not only to Mr. Stein, but also to the court and the
16 public. They should have filed what they did have in the way of
17 a report of proceedings with the Court of Appeals. They did not
18 file it, as required, and as I understand the evidence, they are
19 still holding the report of proceedings, although it has now
20 been completed, and they should have filed it timely when it was
21 filed with them. They should have filed it, that is with the
22 Court of Appeals.

23 The prosecutor, Mr. Hunter, also was a part of this
24 unfortunate scenario. I want to note that the clerk is also an
25 officer of the court, acting on the court's behalf. The

1 prosecutor is an officer of the court, also acting on the
2 court's behalf, as any lawyer is. The prosecutor gave bad
3 advice to the clerk to hold the file until all the report of
4 proceedings was in, and then failed to give appropriate advice
5 to tell the clerk when everything was in so the clerk could file
6 the report of proceedings. The clerk, after getting the advice
7 from Mr. Hunter to hold the file until everything was in, has no
8 way of knowing when the report of proceedings was complete, and
9 Mr. Hunter failed to follow up by giving them that information.
10 It seems to me that Mr. Hunter took on the duty when he
11 undertook to advise the clerk; particularly in a matter in which
12 he represented a party to the dispute in the case, he took on
13 the duty to advise the clerk fully in regard to the requirements
14 of filing the report of proceedings.

15 All of the report of proceedings that was in issue was in
16 the Clark County Clerk's Office before the mandate came down
17 from the Court of Appeals dismissing the direct appeal. It's an
18 open question as to whether that mandate would have been
19 withheld if the Court of Appeals had been aware that the record
20 was finally settled to perfect the appeal.

21 The prosecution also failed in its duties in the way that
22 the hearing to settle the record was set up and conducted. The
23 prosecution, without knowing the truth regarding these
24 transcripts and without investigating the facts adequately,
25 presented an untruth to the court, which I think the prosecutor

1 believed in good faith, but he presented an untruth as a fact,
2 that this was all Mr. Stein's fault. In addition to that, he
3 failed to protect the criminal defendant's due process rights to
4 be present and to have a record made, and that was less than one
5 would hope of a prosecuting attorney who represents not only the
6 state, but also is an officer of the court and has a duty to the
7 public beyond getting and holding convictions.

8 The superior court judge, Judge Borst, also, unwittingly, I
9 expect, participated in this unfortunate matter. He should have
10 had the defendant present at this fact-finding hearing to settle
11 the record. He should have had a reporter present to make a
12 verbatim record of what occurred, and he should have had
13 evidence before him on which to base a finding as to the
14 responsibility for the incomplete verbatim report of
15 proceedings. Although, in his defense, I should say, it
16 probably appeared to him to be an agreed set of facts between
17 the plaintiff and the defendant made, through that agreement, by
18 defendant's counsel of record. I expect that it appeared to him
19 that it was essentially a stipulated factual matter.

20 While Mr. Stein's call direct to Judge Borst was not
21 appropriate since he was a litigant represented by a lawyer,
22 that call should have put the judge on inquiry at least
23 regarding Mr. Stein's presence and participation in this record
24 settlement proceeding. There is no record to tell us what, if
25 anything, was made of that call by the judge or by counsel.

1 And lastly, the judge should have had notice of the remand
2 to settle the record from the Court of Appeals and should have
3 set a more timely hearing rather than just waiting for someone
4 to set a hearing up, as the prosecutor did. I have no way of
5 knowing whether he personally had notice that the case was
6 remanded to him or not.

7 Those are the necessary findings of fact in this matter,
8 and from those findings conclusions of law follow.

9 The first conclusion of law is, in a way, a mixed finding
10 of fact and conclusion of law. This is an obvious shortcut, but
11 in regard to the question of ineffective assistance of counsel,
12 I simply agree with everything that Professor Strait said. He
13 was credible, and his opinions are consistent with the law and
14 the duty of counsel, as I know it, and his opinions were not
15 seriously here attacked. I accept those, his conclusions, in
16 regard to the ineffective assistance of counsel.

17 The second conclusion of law is that Mr. Stein was denied
18 effective assistance of counsel in regard to perfecting his
19 direct appeal, as a result of which he was prejudiced by the
20 dismissal of his direct appeal.

21 The third conclusion is that Mr. Stein was denied his due
22 process rights due to excessive delay in the appellate process
23 caused by officers of the court, separate and apart from his own
24 attorney, and this delay also prejudiced him in that it was also
25 a cause of the dismissal of his appeal.

1 The fourth conclusion is that the two aforementioned
2 constitutional violations independently justify habeas relief
3 but are factually closely entwined together and combine to show
4 a clear violation of Mr. Stein's right to effective assistance
5 of counsel on appeal and his right to due process of law on
6 appeal.

7 Fifth, any presumption of correctness in the state
8 fact-finding process regarding dismissal of the appeal is
9 overcome by clear and convincing evidence presented in this
10 habeas proceeding. The fact finding of Judge Borst that was
11 then relied on by the Court of Appeals, and the Supreme Court in
12 later proceedings, should be set aside in this court under the
13 authority of 28 United States Code Section 2254(d), and
14 specifically because the merits of the factual dispute regarding
15 either responsibility for the missing record and regarding
16 ineffective assistance of counsel were not resolved in the state
17 court proceeding because the fact-finding procedure employed by
18 the state court was not adequate to afford a full and fair
19 hearing; because the material facts were not adequately
20 developed at the state court hearing; because the applicant,
21 that is Mr. Stein, did not receive a full, fair, and adequate
22 hearing in the state court proceeding; because Mr. Stein was
23 otherwise denied due process of law in the state court
24 proceeding; and because this court has concluded, based on the
25 record as a whole, that the factual determination is not fairly

1 supported by the record. Those last findings are consistent
2 with subparts 1, 2, 3, 6, 7, and 8 of the statute, of 28 USC
3 2254(d).

4 The sixth conclusion of law is that the appropriate remedy
5 under Lozada v. Deeds, 964 F.2d 956, and Coe v. Thurman, 922
6 F.2d 529, is to set aside the state court's order dismissing Mr.
7 Stein's direct appeal and to reinstate the appeal subject to the
8 Washington State Rules of Appellate Procedure. An order and a
9 writ of habeas corpus will issue, and I have prepared that order
10 and writ, and it indicates that the writ is granted and that the
11 respondent shall release the petitioner from custody within 90
12 days of the date of this order if he is not afforded a right to
13 direct appeal pursuant to the Washington State Rules of
14 Appellate Procedure.

15 The order further recites that timelines set by said rules
16 should run from the date of this writ as though it were the date
17 of entry of a trial court decision pursuant to Rules of
18 Appellate Procedure 5.2(c). All proceedings, including but not
19 limited to request for counsel, notice of appeal, perfection of
20 appeal, briefing, and argument should be conducted pursuant to
21 the Rules of Appellate Procedure. In other words, the order and
22 writ puts this case back in the same position that it was in on
23 the day the judgment of conviction was signed.

24 That's the findings, conclusions, and the order of the
25 court in this matter.

1 Now, I want to do a couple more things.

2 Mr. Flegenheimer's participation in this matter with this
3 judgment is effectively concluded. The burden will be on Mr.
4 Stein from here on to follow the state court rules if he wants
5 the direct appeal that he indicates he's been seeking for all
6 these years.

7 I am concerned about his ability to process an appeal on
8 his own. As I indicated, I personally don't think he's
9 competent to do that. I have no idea of his current financial
10 status, as to whether he can afford a lawyer or not. He needs
11 at least to be steered into the appeal process and the Rules of
12 Appellate Procedure regarding filing notice of appeal. Although
13 he filed one, I think it's appropriate that he file another
14 since we're starting everything from scratch, and he needs to
15 know how to seek counsel if he is indigent. I suspect that
16 someone should advise the clerk as to what to do with the
17 transcript they have, and someone should tell Mr. Stein what he
18 must do to perfect his appeal at this stage.

19 I guess what I'm saying, Mr. Flegenheimer, is that I would
20 appreciate it if you would carry this two steps further by
21 assisting Mr. Stein with the filing of his notice of appeal, if
22 he chooses to do so pro se, and advise him, maybe by being sure
23 he has a copy of the State Rules on Appellate Procedure, as to
24 what he must do to seek counsel and to get the matter, the
25 appeal, perfected. I am not asking that you give him further

1 legal advice, only that mechanically it seems to me that he
2 needs to be steered in the right direction, and that should be
3 the end of your representation of him.

4 I expect, Mr. Flegenheimer, that you will want to order a
5 transcript of this, of these findings and conclusions and
6 decision, on his behalf, and I would expect that you would want
7 the court reporter to send a copy of that direct to Mr. Stein.

8 Am I second-guessing you too much?

9 MR. FLEGENHEIMER: No, that's correct, Your Honor.
10 Immediately after this proceeding I will go down and get the
11 order form and present it to the court.

12 THE COURT: I think that's appropriate. I guess I'm
13 concerned, in light of what's happened here, that Mr. Stein get
14 a copy of this proceeding this morning, a transcript of it, as
15 soon as possible so that he can understand what happened and
16 will not be further confounded by the problems of court
17 reporters and so forth.

18 I might add to this that I have no idea whatsoever about
19 what went on at the trial, whether he has grounds that should be
20 argued on appeal or whether there was error in the record,
21 whether he was guilty of what he did or didn't do. Those things
22 are not the subject of this proceeding. All I know is that he
23 does have a right to a direct appeal that was unconstitutionally
24 taken from him.

25 Counsel, I want to thank both of you for -- or all of you,

1 I should say -- for your efforts in this matter. It has not
2 been easy. It particularly has not been easy for Mr.
3 Flegenheimer, as we know from the record in his attempts to
4 withdraw and Mr. Stein's attempts to fire him, but certainly Mr.
5 Flegenheimer's continued efforts in Mr. Stein's behalf have been
6 in the highest traditions of our profession. I want to extend
7 my personal appreciation to Mr. Flegenheimer for staying in this
8 matter, in a difficult situation, and doing the best he could
9 with it. While he didn't win on a lot of the points that Mr.
10 Stein raised, he won on this important point, which certainly is
11 to his credit, and is an indication of considerable work and
12 legal ability in bringing this difficult matter to this
13 conclusion. One can only hope that ultimately in this matter,
14 if the appeal is prosecuted and ruled on, on its merits, that
15 justice will be done.

16 Thank you. I'm closing my file on the Stein matter at this
17 point.

18 (Recessed at 10:20 a.m.)
19

20 C E R T I F I C A T E

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.
23
24

25 _____
JULAIN V. RYEN

May 16, 1996
Date

APPENDIX B

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FILED
JUN 19 2003

JoAnne McBride, Clerk, Clark Co.

FILED

JUN 19 2003

JoAnne McBride, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,

Plaintiff.

v.

JOHN KENNETH STEIN,
a.k.a. JACK STEIN

Defendant.

NO. 88-1-00788-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CRIMINAL
RULE 8.3 HEARING

THIS MATTER having come on regularly for hearing beginning on September 3, 2002 and concluding on April 1, 2003, before the undersigned Judge of the above-entitled court pursuant to a CrR 8.3 hearing. The parties appeared by and through their attorneys of record below named. The Court having considered the motion, testimony of the witnesses, the arguments of counsel, and the records and files herein, and being fully advised in the premises, now, therefore, makes the following:

I. FINDINGS OF FACT

1. Mr. Stein has failed to prove that his memory of the events surrounding the charges has been impaired to the extent that his ability to assist in his defense has been adversely affected.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT
TO CRIMINAL
RULE 8.3 HEARING

ATTORNEY GENERAL'S OFFICE
Criminal Justice Division
900 Fourth Avenue, Suite 20
Seattle, WA 98164
(206) 464-6430

- 1 2. Mr. Stein's memory function was tested in 1989 and again in February 2003 by Dr. Stan
2 Abrams.
- 3 3. Based upon a comparison of the memory tests in 1989 and 2003, Mr. Stein's memory
4 functioning is stable.
- 5 4. Prior to 1989, Mr. Stein suffered from impairment of his short-term memory functioning,
6 but that impairment has stayed the same over time.
- 7 5. Mr. Stein's short-term and long-term memory and cognitive functioning were stable from
8 1989 to the present.
- 9 6. Mr. Stein's reported difficulty staying focused is not due to deterioration in his mental
10 condition, but rather his distraction by family activities.
- 11 7. The conclusions of Dr. Stan Abrams are consistent with the Court's observations of Mr.
12 Stein throughout these proceedings and in his testimony.
- 13 8. Mr. Stein is an intelligent man, and described his relationships and dealings with attorneys
14 and others, recalling both in-court and out-of-court proceedings with detail.
- 15 9. Neither Mr. Stein nor his counsel, except for one instance involving a deposition transcript,
16 has complained that Mr. Stein's memory of the events of 1989 was defective or faulty.
- 17 10. Mr. Stein has failed to prove that his mental abilities have deteriorated over the years since
18 his 1989 trial and during the period of his delayed appeal.
- 19 11. At no time since these criminal proceedings began in 1988, has Mr. Stein had the liquid
20 resources to retain his own counsel.
- 21 12. The lack of liquidity of Mr. Stein's assets required Judge Morgan to sign a provisional
22 order guaranteeing payment to attorneys Dane and Dunkerly at the time of Mr. Stein's first
23 trial in 1988.
- 24 13. At the time of his first trial in 1988, Mr. Stein stood to inherit approximately three million
25 dollars from his father's estate, but over the years, these funds have been exhausted.

- 1 14. Attorneys Dane and Dunkerly successfully sued Mr. Stein for their fees, decreasing Mr.
2 Stein's financial resources, and this representation was for the first trial and was not the
3 basis of the appellate court's action.
- 4 15. Mr. Stein's potential inheritance was lost to the estate of Thelma Lund as the result of a
5 wrongful death/RICO civil action that resulted in a judgment against Mr. Stein of four
6 million dollars. There has been no evidence that the estate would have exceeded the
7 judgment against Mr. Stein.
- 8 16. Mr. Stein has failed to establish how the reversal of his criminal convictions would have
9 had any impact on the wrongful death judgement, since the wrongful death action would
10 not have turned on the criminal enterprise predicate acts.
- 11 17. As of this time, Mr. Stein's father's estate has been distributed, and all appeals have been
12 exhausted and denied.
- 13 18. Mr. Stein has argued that the testimony of Richard Bailey would have been in favor of Mr.
14 Stein had this trial commenced around six years ago, however, this Court cannot speculate
15 on how Mr. Bailey would have testified at that time.
- 16 19. The current condition of witness Michael Norberg cannot be concluded to have prejudiced
17 the defense, as his most recent video deposition shows him to be coherent but combative.
- 18 20. It is not clear that Michael Norberg's abilities and effectiveness as a witness have
19 diminished with the passage of time.
- 20 21. Potential witness Dr. Peter Lusky has recently died, and will not be available to testify.
- 21 22. Should the inability to cross-examine Dr. Lusky prejudice the defense, the remedy is to
22 exclude the testimony, not to dismiss the charges.
- 23 23. The loss or destruction of Multnomah county jail records related to whether Richard Bailey
24 ^{had} ~~was allowed~~ visitors cannot be deemed to be prejudicial to Mr. Stein's right to a fair trial
25 since, (1) we do not know when they were destroyed; (2) we do not know if they would

1 have corroborated or impeached Mr. Bailey; and (3) the impeachment would have been on
2 a collateral matter.

3 24. There has been no direct evidence that any of the witnesses on the merits of the criminal
4 allegations have suffered dissipated memories or that Mr. Stein has been prejudiced by
5 dimmed memories of witnesses.

6 25. Not only is this case deluged with trial transcripts of prior testimony, but Mr. Bailey,
7 testified that he could recall the events.

8 26. Mr. Norberg was not asked about the events, and Mr. Stein's memory of the events remains
9 intact as previously discussed.

10 27. As a former prosecutor in the first two trials, Judge Roger Bennett was disqualified to act
11 as a judge in the instant case, and he has not so acted.

12 28. There is nothing in the record to suggest that Judge Bennett encouraged Richard Bailey to
13 testify untruthfully, nor did Judge Bennett use his office to unlawfully coerce or induce Mr.
14 Bailey to testify.

15 II. CONCLUSIONS OF LAW

16 1. Mr. Stein is collaterally estopped from raising a claim of ineffective assistance of appellate
17 counsel because that issue was decided in the federal district court under, *Stein v. Wood*, U.S.
18 District Court (W.D. Wash., Tacoma) Case No. C91-5523B.

19 2. This Court is also bound by the decision and oral findings made on May 15, 1996 by Judge
20 Robert J. Bryan of the federal district court in the above-referenced case, who found that Mr.
21 Stein's appeal was dismissed and delayed in part due to governmental misconduct.

22 3 The only issue before this Court in the CrR 8.3 hearing was whether Mr. Stein's right to a fair
23 trial has been prejudiced by governmental misconduct causing a delay in his appeal.
24
25

- 1 4. Mr. Stein has failed to meet his burden of proving that his memory of the events surrounding
2 the charges has been impaired to the extent that his ability to assist in his defense has been
3 adversely affected.
- 4 5. Mr. Stein has failed to prove that any misconduct of the government, resulting in the delay of
5 his appeal, has caused Mr. Stein's financial losses.
- 6 6. Unfair prejudice does not result from a witness' current leanings, and it is irrelevant to the
7 issue of actual prejudice that a witness chooses to switch from the prosecution or the defense.
- 8 7. There are numerous trial transcripts with which to refresh witnesses' memories, impeach their
9 testimony, or substitute in lieu of their testimony, therefore, the possibility that memories of
10 witnesses have faded does not establish actual prejudice to Mr. Stein's right to a fair trial.
- 11 8. Judge Roger Bennett's activities in regards to Richard Bailey did not amount to governmental
12 misconduct, nor did they prejudice the defense in this case.
- 13 9. Despite Judge Bryan's finding of governmental misconduct in the delay of Mr. Stein's appeal,
14 Mr. Stein has not proven actual prejudice resulting from this misconduct.
- 15 10. Mr. Stein has failed to prove that his ability to defend against the criminal charges has been
16 impaired by the delay in his appeal.
- 17 11. The case of *State v. Rorich*, 110 Wn. App 832 (Div III, 2002) is an anomaly in the case law
18 and is not controlling authority on this Court. Therefore, the mere passage of time is
19 insufficient to show Mr. Stein's right to a fair trial has been actually prejudiced. If *State v*
20 *Rorich* is a correct application of the current state of the law, then Mr. Stein would be entitled
21 to a dismissal.
- 22 12. Mr. Stein has failed to prove that there has been prejudice to his rights which materially affect
23 his right to a fair trial, and that a dismissal is justified in the furtherance of justice as required
24 by CrR 8.3.

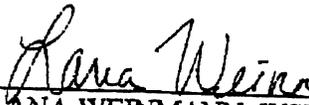
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1 DATED THIS 9th June
2 day of May, 2003

3 
4 THE HONORABLE JAMES J. STONIER
SUPERIOR COURT JUDGE

5 Presented By:

6 CHRISTINE O. GREGOIRE
7 Attorney General of Washington

8 
9 LANA WEINMANN, WSBA #21393
10 Assistant Attorney General
Attorney for Plaintiff State of Washington

11 Approved for Entry:

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14 WILLIAM D. MCCOOL, WSBA #09605
Attorney for Defendant

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT
TO CRIMINAL
RULE 8.3 HEARING

APPENDIX C

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to

the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

The defendant has entered pleas of not guilty. Those pleas puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of the crimes beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	COA NO. 31980-2-II
Respondent,)	
)	
v.)	
)	
JACK STEIN,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 8TH DAY OF SEPTEMBER, 2005, I CAUSED A TRUE AND CORRECT COPY OF THIS **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> LANA SUE WEINMANN OFFICE OF THE ATTORNEY GENERAL 900 4TH AVE, SUITE 2000 SEATTLE WA 98164-1008	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JACK STEIN DOC# 955827 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF SEPTEMBER, 2005.

X _____ 