

*Response to PRP*

NO. 31980-2

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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

v.

STATE OF WASHINGTON,  
Respondent.

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**RESPONSE TO PERSONAL RESTRAINT PETITION,  
ANSWERING BRIEF AND MOTION TO DISMISS**

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
JUN 12 PM 12:42  
BY [Signature]

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2005 MAY 11 AM 11:02

*PRP has been censured w/ app and mot to dismiss should be considered by the panel that considers the appeal.  
EGS*

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Respondent State of Washington, by and through its attorneys, Rob McKenna, Attorney General, and Lana S. Weinmann, Assistant Attorney General, submits this response to Petitioner's personal restraint petition in accordance with RAP 16.9. This response is supported by the records and files in this proceeding and by the following appendices, which are court records from *State v. Stein*, Clark County Superior Court, Cause No. 88-1-00788-8, and Mr. Stein's prior Personal Restraint Petition under Court of Appeals No. 31993-4-II and Supreme Court Nos. 75331-8 (PRP) and 76387-9 (Motion for Discretionary Review). Most of the following appendices were previously submitted with the prior Response to Personal Restraint Petition.

Appendix A: Third Amended Information

Appendix B: Original Charging Documents

Appendix C: Mandate

Appendix D: Order Releasing Defendant on Bail and Conditions of Release

Appendix E: Findings of Fact and Conclusions of Law Pursuant to Criminal Rule 8.3 Hearing

Appendix F<sup>1</sup>: Court's Ruling on Bail Revocation, with Attachment A, Declaration of Mary O'Harra

Appendix G: Opinion February 26, 1999, Court of Appeals, Division II, No. 20813-0-II; *State v. Stein*, 94 Wn. App. 616, 972 P.2d 505 (1999).

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<sup>1</sup> An additional copy of Attachment A, Declaration of Mary O'Harra, is included in Appendix F because the copy of Attachment A provided by the court is partially unreadable.

Appendix H: Judgment and Sentence and Warrant of Commitment to State of Washington Department of Corrections (August 16, 2004) and Order Modifying Judgment and Sentence (December 3, 2004).

Appendix I: Order Dismissing Petition (November 17, 2004, Court of Appeals, Division II, No. 31993-4-II).

Appendix J: Ruling Denying Review (January 27, 2005, Supreme Ct. No. 76387-9).

Appendix K: Order Denying Petitioner's Motion to Modify Commissioner's Ruling (March 29, 2005, Supreme Court No. 76387-9).

Appendix L: Certificate of Finality (April 5, 2004, Court of Appeals, Division II, No. 31993-4-II).

Appendix M: Ruling Denying Review in Court of Appeals, Division II No. 30600-0-II

## **I. AUTHORITY FOR PETITIONER'S RESTRAINT**

Petitioner Jack Stein is currently in the custody of the Washington State Department of Corrections after being found guilty of Attempted Murder in the First Degree (three counts), and Burglary in the First Degree. Appendix H. He was originally arrested and placed in custody in 1988 when police determined there was probable cause to believe Mr. Stein had committed the crimes for which he was ultimately charged. (See Appendix B, Original Charging Documents). Mr. Stein was originally charged with Conspiracy to Commit Murder in the First Degree (Count I), Felony First Degree Murder (Count II), Aggravated

First Degree Murder (Count III), Attempted First Degree Murder (Counts IV-VI), and Burglary in the First Degree (Count VII). *See State v. Stein*, 94 Wn. App. 616, 619, 972 P.2d 505 (1999) (Consolidated appeal and personal restraint petition) (Entire decision is attached as Appendix G).

On July 7, 1989, after a month long trial, the jury returned verdicts on the Second Amended Information of Not Guilty on Counts I through III and verdicts of Guilty on Counts IV through VII. On appeal, this Court, although discerning an instructional error, found sufficient evidence to support the jury's finding of guilt. *Id.*, at 628; see also Appendix G, p. 12-14.

Thereafter, Mr. Stein was returned to the custody of the Clark County jail pending a retrial of the counts for which he was previously convicted and which were remanded for a new trial. (See section IV, Statement of the Case, for details of procedural history).

On June 16, 2004 a jury returned verdicts of guilty to the charges of Attempted Murder in the First Degree (three counts), and Burglary in the First Degree. Mr. Stein was sentenced to the Department of Corrections for a total term of 660 months on August 16, 2004. Appendix H.

**II. MOTION TO DISMISS PURSUANT TO RCW 10.73.140  
AND AS AN ABUSE OF THE WRIT**

**A. Procedural and Factual History Relevant to Motion**

In his March 2004 petition filed with the Supreme Court under No. 75331-8, Mr. Stein alleged he should be released from custody because:

1. His right to a speedy trial has been violated (referring to the proceedings in his 1989 trial).

2. He suffered an excessive appellate delay (between his 1989 trial and the federal district court decision in 1996 reinstating his direct appeal).

3. His Sixth Amendment right to retained counsel of choice was violated (referring to his counsel in the 1989 trial).

4. His Sixth and Fourteenth Amendment rights were violated because the trial court refused to hold hearings regarding counsel (referring to the trials in 1988 and 1989).

5. Egregious prosecutorial misconduct violated his Fifth and Fourteenth Amendment rights.

On December 9, 2004, Mr. Stein filed an Amended Memorandum In Support of Personal Restraint Petition (hereinafter Amended Memorandum) in this Court. (No. 31993-4-II) In this Amended Memorandum, Mr. Stein lists the following as grounds for relief:

- 1/2/3 Counsel of Choice/Speedy Trial/ Due Process
- 4/5 Judicial Misconduct and/or Mismanagement
- 6/7 Prosecutorial Misconduct/ Excessive Delay

8/9 Egregious Misconduct by Court Officials  
Vindictive Prosecution, Etc.

The grounds stated by Mr. Stein in the current petition are identical and his current Memorandum is nearly verbatim to his prior Amended Memorandum.

After Mr. Stein's March 2004 petition was dismissed on November 17, 2004 (Appendix I), his Amended Memorandum and a Motion for Reconsideration were forwarded to the Supreme Court and treated as a Motion for Discretionary Review. (No. 76387-9). Thereafter, Mr. Stein filed a Motion for Discretionary Review and attached and referenced his Amended Memorandum.

On January 27, 2005, the Supreme Court issued a Ruling Denying Review, specifically referring to having received Mr. Stein's Amended Memorandum. (Appendix J). Thereafter, Mr. Stein filed a Motion to Modify the Commissioner's Ruling, which was denied on March 29, 2005. (Appendix K). This Court issued its Certificate of Finality on April 15, 2005, indicating the decision dismissing Mr. Stein's petition became final on March 29, 2005. (Appendix L)

**B. Argument**

For an appellate court to grant relief by a personal restraint petition, relief must be appropriate under RAP 16.4(d), which states:

The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RCW 10.73.140 precludes subsequent petitions, which raise similar grounds for review.

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

Additionally, the abuse of the writ doctrine states that “if the petitioner was represented by counsel throughout post-conviction proceedings, it is an abuse of the writ for him or her to raise, in a successive petition, a new issue that was ‘available but not relied upon in a

prior petition.”” *In re Personal Restraint of Jeffries*, 114 Wn.2d 485, 495, 789 P.2d 731 (1990) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986)). “If [the petitioner] was fully aware of the facts supporting the ‘new’ claim when the prior petition was filed, and there are no pertinent intervening developments, raising the ‘new’ claim for the first time in a successive petition constitutes needless piecemeal litigation and, therefore, an abuse of the writ.” *Id.*

While Stein chose to file this and his prior petition pro se, he has clearly been represented by counsel throughout the relevant pretrial and post-conviction proceedings. See Appendix M, Ruling Denying Review in Court of Appeals, Division II No. 30600-0-II (Stein’s Motion for Discretionary Review of the denial of his ex parte motion for an order appointing James Lobsenz as his counsel for purposes of bringing a motion for discretionary review of the denial of his CrR 8.3 motion.)

Additionally, the only potential “new” claims in this petition compared to his prior petition are his unsubstantiated allegations of judicial and prosecutorial misconduct during the time his trial was pending following remand, all of which allegedly occurred prior to the time Mr. Stein filed his prior petition. Mr. Stein was clearly aware of the alleged facts supporting his claims prior to March 2004 when he filed his prior petition, as evidenced by his Amended Memorandum, which he filed in

this Court December 9, 2004 (No. 31993-4-II) and again with the Supreme Court as part of his Motion for Discretionary Review. (No. 76387-9)

Since Mr. Stein raised these same claims in a prior petition that was dismissed, this petition should be dismissed pursuant to RCW 10.73.140.

Similarly, since Mr. Stein was fully aware of the facts supporting his current claims when the prior petition was filed, and there are no pertinent intervening developments, raising any 'new' claims for the first time in this successive petition constitutes needless piecemeal litigation and, therefore, an abuse of the writ.

For the foregoing reasons, the State respectfully moves the Court to dismiss Mr. Stein's petition.

### **III. RESPONSE TO PETITIONER'S CLAIMS**

Mr. Stein alleges he should be released from custody because:

1. Counsel of Choice/Speedy Trial/ Due Process
2. Judicial Misconduct and/or Mismanagement
3. Prosecutorial Misconduct/ Excessive Delay
4. Egregious Misconduct by Court Officials, etc.

Respondent has determined that none of Mr. Stein's claims merit relief.

#### **IV. STATEMENT OF THE CASE**

##### **A. Facts of the Case and Procedural History Prior to Mandate.**

The underlying facts of the case and procedural history up to the point of the Mandate by the Supreme Court, issued August 3, 2001 (Appendix C) are contained in the opinions of the Court of Appeals, Division II and the Supreme Court. *See State v. Stein*, 94 Wn. App. 616, 619, 972 P.2d 505 (1999); *State v. Stein*, 144 Wn.2d 236, 249 P.3d 184 (2001).

##### **B. Procedural History Following Mandate.**

This was the third criminal trial under this cause number. The mandate from the Supreme Court requiring retrial of Mr. Stein's case was received by the Clark County Superior Court on August 7, 2001. Appendix C.

After the remand, the trial court set bail in the amount of \$250,000. On October 11, 2001, the court entered an Order Releasing Defendant on Bail and Conditions of Release, authorizing Mr. Stein's release on electronic home monitoring upon his posting of \$250,000 bond. Appendix D. Thereafter, Mr. Stein was released from confinement and placed on electronic home monitoring.

After various continuances requested by Mr. Stein, a CrR 8.3 hearing began on September 3, 2002, but was recessed repeatedly until finally concluding on April 1, 2004. Appendix E. The court denied Mr. Stein's motion to dismiss, and found that his right to a fair trial had not been prejudiced due to the delay in his appellate proceedings. Appendix E.

At a hearing on September 16, 2003, the court revoked Mr. Stein's release and ordered him back into custody for violations of his conditions of release. Appendix F. Bail was reset at \$500,000. Appendix F. Mr. Stein has remained in custody ever since.

On June 16, 2004 a jury returned verdicts of guilty to the charges of Attempted Murder in the First Degree (three counts), and Burglary in the First Degree. Mr. Stein was sentenced to the Department of Corrections for a total term of 660 months on August 16, 2004. Appendix H.

## **V. STANDARD OF REVIEW**

A petitioner has the burden of proving an alleged error caused him actual and substantial prejudice. *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); *In re Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Allegations unsupported by citation to authority, facts, or persuasive reasoning cannot sustain this burden of proof. *Cook*, 114

Wn.2d at 813-14; *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). A petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay. *Gronquist*, 138 Wn.2d at 396 (citing *Rice*, 118 Wn.2d at 886); *see also In re Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988).

After establishing the appropriateness of collateral review, a petitioner still has the ultimate burden of proof. The petitioner must show the existence of an error, and must show by a preponderance of the evidence that he or she was prejudiced by the asserted error. *Cook*, 114 Wn.2d at 814; *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); *State v. Kitchen*, 110 Wn.2d 403, 413, 756 P.2d 105 (1988); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). If the petitioner fails to meet this burden, he is not entitled to relief.

## VI. ARGUMENT

### A. **All of Petitioner's Claims Have Either Been Previously Considered and Rejected or May Be Addressed in His Pending Direct Appeal**

Even if the Court denies the State's motion to dismiss to petition pursuant to RCW 10.73.140 or as an abuse of the writ, there are jurisprudential reasons for declining to review Mr. Stein's current claims. A fundamental principle of habeas jurisprudence is that the writ will not serve as a substitute for appeal, and the court may grant relief only if there are no adequate alternative remedies available to the petitioner. *In re*

*Moore*, 116 Wn.2d 30, 33, 803 P.2d 300 (1991); *In re Hews*, 99 Wn.2d 80, 86, 660 P.2d 263 (1983); RAP 16.4(d) (“The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances. . . .”).

Mr. Stein’s petition is clearly subject to this now-familiar rule. He could have sought review of any of the trial court’s pretrial rulings, or any other errors he is alleging in the trial court proceedings, by discretionary review under the authority of RAP 2.2(a) and 2.3. In fact, Mr. Stein filed a Notice of Discretionary Review for the court’s denial of his motion to dismiss on July 18, 2003, but he failed to file his Motion for Discretionary Review and the matter was closed. (See Court of Appeals, Division II No. 30600-0-II). Additionally, Mr. Stein has filed a direct appeal, which is currently pending and consolidated under this same cause number.

In other words, there are clear and adequate remedies available to Mr. Stein other than a personal restraint petition. He has failed to show, or even to allege, that those other remedies are inadequate. In fact, this Court found exactly that in Mr. Stein’s March 2004 petition. Appendix I.

All of Mr. Stein’s claims have either been previously decided by this Court or can be addressed in his direct appeal. For example, Mr. Stein has alleged that he should be released from custody because the trial court in 1989 violated his right to have retained counsel of choice, denied him

his right to proceed pro se, and refused to hold a hearing regarding his choice of counsel. (See Mr. Stein's Memorandum in Support Writ of Habeas Corpus (Grounds 1 and 2)). These claims were previously decided against Mr. Stein by this Court in 1991 (Appendix G, pages 14-18), as found by this Court in November 2004 (Appendix I, page 2).

The doctrines of res judicata and collateral estoppel bar Mr. Stein from re-litigating the issue of whether the trial court in 1989 violated his right to retained counsel of choice and his right to proceed pro se. The need for judicial finality is recognized by the principles of res judicata and collateral estoppel, which apply in criminal cases and bar re-litigation of issues actually determined by a former verdict and judgment. *State v. Blakely*, 61 Wn. App. 595, 811 P.2d 965 (1991); *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). The principles underlying these doctrines are to prevent re-litigation of determined causes, curtail multiplicity of actions, and prevent harassment in the courts, inconvenience to the litigants and judicial economy. *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). Therefore, Mr. Stein is precluded from arguing issues that were raised and resolved in a prior action. *State v. Bryant*, 100 Wn. App. 232, 996 P.2d 646 (2000), *reversed on other grounds*, 146 Wn.2d 90, 42 P.3d 1278 (2002).

Additionally, “a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue.” *In re Lord*, 123 Wn.2d at 303 (citing *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986)). This burden can only be met by showing an intervening change in the law or “some other justification for having failed to raise a crucial point or argument in the prior application.” *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (quoting *Taylor*, 105 Wn.2d at 688). Mr. Stein has failed to even argue that he has met this burden.

As to grounds (1), (2) and (4)<sup>2</sup>, these issues were thoroughly considered by the trial court in 1989 and reviewed by this Court. A review of this Court’s decision in *State v. Stein*, 144 Wn.2d 236, 249, 27 P.3d 184 (2001) reveals that the issues were either not raised by Mr. Stein or the Court declined to review them, which makes the judgment of the Court of Appeals a final determination. *State v. Sherwood*, 71 Wn. App. 481, 860 P.2d 407 (1993).

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<sup>2</sup> Stein’s Issue statement related to ground (4) refers only to allegations of misconduct prior to his 1989 convictions, however, in the body of his Memorandum, Mr. Stein makes various unsubstantiated allegations related to the proceedings following the remand. All of those allegations could be address in his direct appeal.

Ground (3) and any other random allegations in Mr. Stein's Memorandum can be adequately addressed in Mr. Stein's pending direct appeal. For example, Mr. Stein claims that the "excessive appellate delay" between his trial in 1989 and the decision by the Court of Appeals in 1999 warrants his release from custody. In effect, Mr. Stein is raising the same issues that the Supreme Court remanded to the trial court for determination under CrR 8.3. The Supreme Court "[left] to the sound discretion of the trial court the question of whether further relief is appropriate under CrR 8.3..." *Stein*, 144 Wn.2d at 248. The trial court conducted a lengthy evidentiary hearing between September 3, 2002 and April 1, 2003, and concluded that Mr. Stein's claims were without merit. (See Appendix E).

Mr. Stein is apparently trying to subvert the traditional appellate review process by raising these claims in his petition rather than pursuing his motion for discretionary review that was closed for failure to pursue, and rather than waiting for appellate review. Since Mr. Stein has failed to produce a record of the CrR 8.3 hearing, his allegations are meaningless until a trial court record is available and provided to the Court.

**B. Mr. Stein Has Failed to Demonstrate Prejudice.**

In order to obtain relief in a personal restraint proceeding, the petitioner bears the burden of demonstrating that he is presently restrained due to a constitutional error and that more likely than not he was actually and substantially prejudiced by the claimed error. *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); *In re Hews*, 99 Wn.2d 80, 89, 660 P.2d

263 (1983). The petition must be supported by facts and evidence and not rest solely upon conclusory allegations; the petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay. *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). Mr. Stein has failed to discharge this burden. Mr. Stein's conclusory musings fail to demonstrate prejudice and should be rejected.

Mr. Stein raises complaints about the proceedings prior to and subsequent to the Mandate. But again, Mr. Stein has failed to provide a record for this Court to review. Most likely, Mr. Stein failed to provide a record because the appropriate record would show the majority of his claims are frivolous. This falls far short of the pleading and evidentiary standard of *In re Rice*, and falls short of the burden he must meet under *Barker v. Wingo, supra*, and *In re Benn, supra*.

Mr. Stein serves up a melange of claims in his petition that prior counsel, court officials, witnesses, current counsel and prosecutor's engaged in a conspiracy against Mr. Stein during the course of his prior trials, appeals, and now the current proceedings. However, this is nothing more than unsubstantiated ramblings with no discernible legal analysis or citation to the record of the facts underlying the alleged violations. Claims so vague and lacking in specifics can neither be addressed nor remedied.

Pro se litigants are subject to the same rules of procedure as attorneys. *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985). Mr. Stein has failed to provide a record supporting any of his claims. RAP 10.3(a)(4) provides that "reference to the record must be included for each

factual statement.” “The fact that many claims of . . . error are pressed does not alter fundamental math -- a string of zeros still adds up to zero.” *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (“Twenty times zero equals zero.”).

## VI. CONCLUSION

Since Mr. Stein raised these same claims in a prior petition that was dismissed, this petition should be dismissed pursuant to RCW 10.73.140 and as an abuse of the writ.

Alternatively, Respondent respectfully requests that the Court dismiss the petition pursuant to RAP 16.4(d) and/or for failure to demonstrate prejudice.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2005.

ROB McKENNA  
Attorney General



LANA S. WEINMANN  
Assistant Attorney General  
WSBA #21393

Attorneys for Respondent

Appendix A

Third Amended Information

1  
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3  
4  
5  
6  
7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF CLARK

9  
10 STATE OF WASHINGTON,

No. 88-1-00788-8

11 Plaintiff,

12 v.

THIRD AMENDED INFORMATION

13 JOHN KENNETH STEIN, aka JACK  
14 STEIN,

**FILED**

SEP 12 2001

15 Defendant.

Anne McBride Clerk, Clark Co

16  
17 COMES NOW the Attorney General for the State of Washington, and does by this  
18 inform the Court that the above-named defendant is guilty of the crime(s) committed as  
19 follows, to wit:

20 **Count I - Attempted Murder in the First Degree - RCW 9A.28.020(1),  
RCW 9A.32.030(1)(a)**

21 That he, John Kenneth Stein, aka Jack Stein, in the County of Clark, State of  
22 Washington, on or about the 1<sup>st</sup> day of June, 1987, with intent to commit the crime of  
23 Murder in the First Degree, did an act which was a substantial step toward the  
24 commission of that crime, to-wit: with premeditated intent to cause the death of Charles  
25 E. Hall, a human being, the defendant, or an accomplice of the defendant, did attempt  
26 to cause the death of Charles E. Hall by use of firebombs, in violation of  
RCW 9A 28.020 (1) and (3)(a) and RCW 9A.32.030 (1) (a) and (2), contrary to the  
statutes in such cases made and provided, and against the peace and dignity of the  
State of Washington

27 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability  
28 Act (RCW 9.94A.030(25) and (29), and RCW 9.94A.120(4)

29  
THIRD AMENDED INFORMATION - 1 of 3

ATTORNEY GENERAL OF WASHINGTON  
Criminal Justice Division  
900 Fourth Avenue, Suite 2000  
Seattle, WA 98164  
(206) 464-6430

682

1 **Count II - Attempted Murder in the First Degree - RCW 9A.28.020(1),**  
2 **RCW 9A.32.030(1)(a)**

3 That he, John Kenneth Stein, aka Jack Stein, in the County of Clark, State of  
4 Washington, between the 2<sup>nd</sup> day of June 1987. and the 13<sup>th</sup> day of June, 1987, with  
5 intent to commit the crime of Murder in the First Degree, did an act which was a  
6 substantial step toward the commission of that crime, to-wit: with premeditated intent to  
7 cause the death of Charles E. Hall, a human being, the defendant, or an accomplice of  
8 the defendant, did attempt to cause the death of Charles E. Hall by use of firearm(s) in  
9 violation of RCW 9A 28.020 (1) and (3)(a) and RCW 9A 32.030 (1) (a) and (2), contrary  
10 to the statutes in such cases made and provided, and against the peace and dignity of  
11 the State of Washington

12 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability  
13 Act (RCW 9 94A 030(25) and (29), and RCW 9.94A.120(4).

14 **Count III - Attempted Murder in the First Degree - RCW 9A.28.020(1),**  
15 **RCW 9A.32.030(1)(a)**

16 That he, John Kenneth Stein, aka Jack Stein, in the County of Clark, State of  
17 Washington, on or about the 14<sup>th</sup> day of June, 1987, with intent to commit the crime of  
18 Murder in the First Degree, did an act which was a substantial step toward the  
19 commission of that crime, to-wit: with premeditated intent to cause the death of Charles  
20 E Hall, a human being, the defendant, or an accomplice of the defendant, did attempt  
21 to cause the death of Charles E. Hall by use of firearm(s) in violation of RCW 9A 28.020  
22 (1) and (3)(a) and RCW 9A.32.030 (1) (a) and (2), contrary to the statutes in such cases  
23 made and provided, and against the peace and dignity of the State of Washington.

24 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability  
25 Act (RCW 9.94A 030(25) and (29), and RCW 9 94A.120(4).

26 **Count IV - Burglary In The First Degree - RCW 9A.52.020(1)(a) and/or (1)(b)**

27 That he, John Kenneth Stein, aka Jack Stein, in the County of Clark, State of  
28 Washington, on or about the 14<sup>th</sup> day of June, 1987. with intent to commit a crime  
29 against a person or property therein, did enter or remain unlawfully in a dwelling located  
at 6313 Riverside Drive, Vancouver, Washington, belonging to Charles E. Hall, and in  
entering or while in such dwelling or in immediate flight therefrom, the defendant or  
another participant in the crime was armed with a deadly weapon, to wit: a firearm, and  
did assault Charles E. Hall, a person therein, in violation of RCW 9A.52.020(1)(a) and/or  
(1)(b), and that the defendant or an accomplice did commit the foregoing offense while  
armed with and in possession of a deadly weapon as that term is employed in and  
defined in RCW 9.94A 125, contrary to the statutes in such cases made and provided,  
and against the peace and dignity of the State of Washington

1  
2  
3 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability  
4 Act (RCW 9.94A.030(25) and (29), and RCW 9.94A.120(4)).

5 CHRISTINE O GREGOIRE  
6 Attorney General

7 By: Lana Martuscelli  
8 Lana Martuscelli, WSBA #21393  
9 Assistant Attorney General

10 NAME: John Kenneth Stein, aka Jack Stein  
11 DOB: 07/06/39  
12 RACE: White  
13 SEX: Male  
14 HEIGHT:  
15 WEIGHT:  
16 HAIR:  
17 EYES:  
18 DOL.  
19 SSAN: 533-38-0640  
20 SID:  
21 ADDRESS:

Appendix B

Original Charging Documents

6

**In the Superior Court of the State of Washington  
In and For the County of Clark**

STATE OF WASHINGTON,

Plaintiff,

vs.

JOHN KENNETH STEIN,

aka JACK STEIN

Defendant.....

88 1 00788 8  
No. \_\_\_\_\_

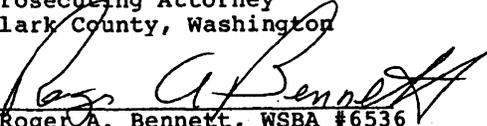
**INFORMATION**

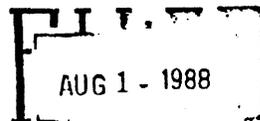
COMES NOW the Prosecuting Attorney in and for Clark County, State of Washington, and does by this inform the Court that the above named defendant..... is..... guilty of..... a..... crime..... committed as follows. to-wit:

That he, JOHN KENNETH STEIN, aka JACK STEIN, in the County of Clark, State of Washington, on or about the 13th day of April, 1987, with a premeditated intent to cause the death of Thelma Lund, a human being, did cause her death, and the defendant did solicit another person to commit the murder and had paid or agreed to pay money or another thing of value for committing the murder, and the murder was committed in the course of, or in futherance of the crimes of Burglary in the First or Second Degree, in violation of RCW 9A.32.030(1)(a) and RCW 10.95.020 and contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Washington.

August 1, 1988

ARTHUR D. CURTIS,  
Prosecuting Attorney  
Clark County, Washington

By:   
Roger A. Bennett, WSBA #6536  
Deputy Prosecuting Attorney



JoAnne McBride, Clerk, Clark Co.

AGGRAVATED MURDER IN THE FIRST DEGREE  
RCW 9A.32.030(1)(a) and RCW 10.95.020

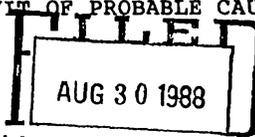
/

1 SUPERIOR COURT OF THE STATE OF WASHINGTON  
2 FOR CLARK COUNTY

3 STATE OF WASHINGTON, )  
4 Plaintiff, )  
5 vs. )  
6 JOHN KENNETH STEIN, aka )  
7 JACK STEIN, )  
8 Defendant. )

No. 88-1-00788-1

AFFIDAVIT OF PROBABLE CAUSE



JoAnne McBride, Clerk, Clark Co.

9 STATE OF WASHINGTON )  
10 COUNTY OF CLARK ) :ss

11 ROGER A. BENNETT, being first duly sworn on oath, deposes  
12 and states:

13 I am a Deputy Prosecuting Attorney employed by Clark County  
14 and make this affidavit in that capacity.

15 Probable cause exists to believe that defendant John Kenneth  
16 Stein, aka Jack Stein, in the months of April through June, 1987  
17 conspired with other persons to cause the death of Thelma Lund  
18 and Charles E. "Ned" Hall. Further, pursuant to this conspiracy,  
19 Michael Norberg, acting as the agent of defendant Stein did, in  
20 fact, murder Thelma Lund, and did solicit and aid in three at-  
21 tempts to kill Ned Hall.

22 I have received Report No. 87-4708 from the Clark County  
23 Sheriff's Office, authored by Deputy Harvey Watson. Said report  
24 states that on April 15, 1987, Ann Rydell, age 80, reported to  
25 the sheriff's office that she had discovered the deceased body  
26 of her neighbor, Thelma Lund, in Ms. Lund's mobile home located  
27 at 1709 N.E. 78th Street, Space 141, in Clark County, Washington.  
28 Deputy Watson responded to the scene and investigated, observing  
29 the body of Ms. Lund in a partially clad condition lying dead in  
30 a bath tub in the mobile home. A subsequent autopsy performed  
31 by Dr. Larry Lewman of the Multnomah County Medical Examiner's  
32

AFFIDAVIT OF PROBABLE CAUSE - 1

1 Office revealed that Ms. Lund, whose age was 77 years old, had  
2 died from strangulation and further had been subjected to a vio-  
3 lent beating, causing numerous injuries, bruises and contusions,  
4 and the breaking of ribs.

5 Investigation by Detective Dave Trimble of the Clark County  
6 Sheriff's Office, which included interviews with numerous per-  
7 sons familiar with Ms. Lund, including her adult daughters,  
8 ascertained that for approximately 26 years, Ms. Lund had been  
9 the companion to Nick Stein, a resident of Clark County who was  
10 born in 1912. Since approximately March, 1982, Nick Stein had  
11 been debilitated as the result of a stroke, and Ms. Lund had been  
12 taking care of him at the above address.

13 According to Detective Trimble's reports, the crime scene,  
14 being the residence of Ms. Lund, appeared to have been ransacked,  
15 in that items were removed from drawers and spread around the  
16 bedroom of the residence. Despite this, however, items of value  
17 such as jewelry were left in the residence and there was nothing  
18 of any significant value noticed missing, according to Marlene  
19 Winchester, the daughter of Ms. Lund. Ms. Winchester has indi-  
20 cated that there is one ring belonging to Thelma Lund which  
21 is unaccounted for, however it is unknown whether or not this  
22 ring was taken at the time of the homicide.

23 Mrs. Rydell further related to Deputy Watson that she and  
24 Thelma Lund were good friends and that they often talked about  
25 their experiences. She related that Thelma Lund had confided in  
26 her that until a short time prior to April, 1987, Nick Stein had  
27 lived Thelma Lund at the mobile home, however Mr. Stein had been  
28 injured and hospitalized and Nick Stein's son, who is defendant  
29 Jack Stein, had gotten Nick out of the hospital and taken him to  
30 Jack's house. Mrs. Lund had told Mrs. Rydell that Nick really  
31 wanted to come and stay with Mrs. Lund but that Jack Stein would  
32 not permit it. Mrs. Lund confided that she and Jack were "at

odds" over the situation, and that Mrs. Lund was extremely afraid of defendant Jack Stein.

Mrs. Rydell, in a subsequent interview with Detective Trimble related that she had observed the door to Mrs. Lund's mobile home open on the morning of Tuesday, April 14, 1987 and further that when she got up in the morning on Wednesday, April 15, 1987 she noticed that the door was still open. She then had gone to the Lund residence and found Ms. Lund's body.

Your affiant has discovered information which indicates that there is a long-standing animosity between attorney Ned Hall and defendant Jack Stein, and between Thelma Lund and defendant Jack Stein. According to Clark County Superior Court Cause Cause No. 82-4-00212-8, Vancouver attorney Ned Hall was appointed as Limited Guardian for the Estate of Nick Stein, due to Nick Stein's debilitation as a result of the stroke. Pursuant to this appointment, Mr. Hall sued defendant Jack Stein in Clark County Superior Court Cause No. 82-2-01908-2, alleging that defendant Stein had utilized duress, coercion and undue influence to induce Nick Stein to assign a seller's interest in a real estate contract having a value of approximately \$785,000 over to defendant Jack Stein. As a result of a trial held before the Honorable Thomas L. Lodge, Mr. Hall prevailed in his lawsuit and the assignment to defendant Jack Stein was set aside. Thelma Lund testified against defendant Jack Stein in that trial.

Following the trial, in connection with defendant Jack Stein's Motion for New Trial, Thelma Lund sided with Ned Hall and filed an affidavit favorable to the plaintiff's case.

At the trial, defendant Stein was represented by Ken Eiesland, who is now a Clark County District Court Judge. Mr. Eiesland has informed me that during the pre-trial proceedings in the above matter, defendant Jack Stein had told him that "Ned Hall can be gotten rid of." Mr. Eiesland construed this as a statement that

1 Mr. Stein was threatening the life of Ned Hall.

2 Mr. Hall has informed Detective Trimble that there exists  
3 substantial animosity between himself and defendant Jack Stein,  
4 resulting from Mr. Hall's appointment as Limited Guardian for the  
5 Estate of Nick Stein. Mr. Hall related that on one occasion Jack  
6 Stein told him that "someone is going to blow your head off."

7 Your affiant has reviewed Clark County Sheriff's Office  
8 Report No. 83-967 authored by John Howard of the Clark County  
9 Sheriff's Office. Deputy Howard states that on February 5,  
10 1983, he was contacted by Thelma Lund who stated that she and  
11 Nick Stein had been at Mr. Stein's farm at 16906 N.E. 18th  
12 Street, Vancouver, Washington at approximately 10:30 a.m. De-  
13 fendant Jack Stein had shown up and was extremely upset about  
14 court proceedings which had occurred on February 4, 1983 in-  
15 volving Nick Stein. Mrs. Lund related that she had lifted up  
16 a cable running across the driveway to the property so that  
17 Nick could walk under it and when she did so she hit defendant  
18 Jack Stein on the head with the cable. Mrs. Lund stated that  
19 defendant Jack Stein grabbed her by the left arm and threw her  
20 to the ground hard. She related that she was suffering sore  
21 arms and shoulders, as well as a sore neck and back.

22 Deputy Howard then contacted defendant Stein and notified  
23 him of the charges made by Thelma Lund. Defendant Jack Stein  
24 demanded charges be filed against Thelma Lund, claiming that she  
25 had hit him three times with the cable.

26 Detective Trimble interviewed Ned Hall further, and ascer-  
27 tained that in 1983 Mr. Hall had prepared a Will for his client,  
28 Nick Stein. The Will provides for 10%, or a minimum of \$150,000  
29 of Nick Stein's estate to go to Thelma Lund. The residue of the  
30 estate, after bequests of personal property to defendant Jack  
31 Stein was to be split three ways between defendant Jack Stein,  
32 and Nick Stein's two grandchildren, Tammy Stein and John Stein.

AFFIDAVIT OF PROBABLE CAUSE - 4

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN  
P. O. BOX 1900  
VANCOUVER, WASHINGTON 98668  
(206) 599-2261

1           On March 5, 1985, according to Clark County Sheriff's Of-  
2 fice Report No. 85-13-70, defendant Jack Stein contacted Linda  
3 Perry of the Clark County Sheriff's Office. Jack Stein stated  
4 that at approximately 1:00 p.m. on March 5, 1985 he had been  
5 assaulted by Thelma Lund. Defendant Jack Stein stated that the  
6 assault occurred at the residence of Nick Stein and Thelma Lund  
7 at 1709 N.E. 78th Street in Clark County, Washington. Jack  
8 Stein stated that he had gone to the residence to discuss legal  
9 matters with Nick Stein and was talking with him at that loca-  
10 tion. Thelma became upset about the conversation and starting  
11 interrupting when Jack told her it was none of her business and  
12 not to get involved. Defendant Jack Stein claimed that Thelma  
13 then hit him on the calf with her cane. Defendant Jack Stein  
14 claimed that Thelma told him, "If you don't quit meddling in  
15 your father's affairs, you are going to get a bullet through  
16 your head". The report indicates that there were no indications  
17 of any injuries to defendant Jack Stein.

18           A second Will of Nick Stein has been admitted to probate in  
19 Multnomah County Circuit Court, Cause No. 8708-91751. This Will  
20 is dated March 17, 1987 and purportedly signed by Nick Stein. At  
21 this time, Nick Stein was still living with defendant Jack Stein.  
22 The date of March 17th on the Will was handwritten in, after  
23 apparently the date of March 6, 1987 has been crossed out. The  
24 second Will, which is attested to by Keith Griffen, Attorney at  
25 Law, who, according to numerous documents in the probate file,  
26 was the attorney representing defendant Jack Stein, drastically  
27 alters the disposition of Nick Stein's estate, which according to  
28 documents filed in the probate case, has a value in excess of \$3  
29 million. The second Will provides for a specific bequest of  
30 \$10,000 to Thelma Lund, \$50,000 each to John and Tammy Stein, and  
31 the residue of the estate, approximately \$3 million, all to de-  
32 fendant Jack Stein. This Will is prepared on the stationery of

AFFIDAVIT OF PROBABLE CAUSE - 5

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN  
P. O. BOX 9900  
VANCOUVER, WASHINGTON 98668  
(206) 699-2261

1 Keith Griffen.

2 Although the second Will purports to have been signed by  
3 Nick Stein on March 17, 1987, the attestation page is dated  
4 April 13, 1987.

5 Clark County Superior Court Cause No. 88-4-00178-5, indicates  
6 that on April 10, 1987, attorney Ned Hall petitioned for a full  
7 guardianship over the person and estate of Nick Stein. At this  
8 time, Claude Blair of Vancouver, Washington was appointed to be  
9 the Guardian Ad Litem for Nick Stein. At that time, Nick Stein  
10 was still residing with defendant Jack Stein, at 12930 S.E. Ever-  
11 green Highway.

12 Detective Trimble has interviewed George Stein, who is the  
13 brother of Nick Stein. George Stein related that on April 12,  
14 1987, he and Thelma Lund went to visit Nick Stein at the resi-  
15 dence of defendant Jack Stein located at 12930 S.E. Evergreen  
16 Highway in Vancouver, Washington. During the visit, Thelma Lund  
17 asked Nick Stein if he wanted to come back home to her. Nick  
18 stated that he did wish to return to Thelma. Defendant Jack  
19 Stein was present when this question was asked and became ex-  
20 tremely angry. He physically grabbed George Stein and ushered  
21 him out of the residence, and a short time later, George Stein  
22 observed Thelma Lund being physically brought out of the house  
23 between defendant Jack Stein and his wife, Bethany Norberg.  
24 George and Thelma was ordered to leave the premises and were  
25 threatened with trespass. According to George Stein, Thelma  
26 received bruises at the hands of defendant Jack Stein as a result  
27 of this altercation. According to George's wife, Hazel Stein,  
28 Thelma Lund told her that Jack "rough-housed her and threw her  
29 out along with George Stein.

30 Detective Trimble interviewed Claude Blair, who related  
31 that on April 13, 1988 he had met with Thelma Lund at her mobile  
32 home and discussed with her the pending proposed full guardian-

1 ship proceedings instituted by Ned Hall. This meeting lasted  
2 until approximately 8:00 p.m., and he related that Ms. Lund was  
3 alive and well when he left the residence at that time.

4 On April 17, 1987, Detective Trimble had interviewed Nick  
5 Stein at 1709 N.E. 78th Street, #141. At that time, Nick Stein  
6 was in the custody of defendant Jack Stein and Bethany Norberg.  
7 Bethany Norberg and defendant Jack Stein were extremely reluctant  
8 to allow Detective Trimble to interview Nick Stein, and eventually  
9 he had to threaten them with charges of Obstructing a Public  
10 Servant in order be allowed to talk to Nick Stein unmolested by  
11 defendant and his wife. Nick Stein related to Detective Trimble  
12 that he did not wish to remain with defendant Jack Stein and  
13 "wanted out." Detective Trimble took Nick Stein into protective  
14 custody at that time. Subsequently, on April 24, 1987, Ned Hall  
15 petitioned the Superior Court of Clark County for a restraining  
16 order, Cause No. 87-2-00994-1, and obtained such an order restrain-  
17 ing defendant Jack Stein from contacting Nick Stein and further  
18 restraining defendant Jack Stein from visiting Nick Stein's new  
19 residence at the Rose Vista Nursing Home in Vancouver, Washington.  
20 A copy of this restraining order was served upon defendant Jack  
21 Stein on April 27, 1987 by Deputy Michel of the Multnomah County  
22 Sheriff's Office, according to a report filed by said officer.

23 Detective Trimble subsequently interviewed Irene Stein of  
24 Tumwater, Washington. Irene Stein is the former wife of defendant  
25 Jack Stein. Irene Stein related that her son, John, had picked up  
26 his grandfather, Nick Stein, at the Rose Vista Nursing Home in  
27 Vancouver, Washington on May 3, 1987 in order to transport him to  
28 attend the graduation ceremonies at the University of Portland,  
29 involving Nick's granddaughter, Tammy Stein. After the graduation  
30 ceremony, Nick Stein was taken away by Bethany Norberg and Jack  
31 Stein, who, according to Irene, was "running interference" for  
32 Bethany Norberg. Irene Stein expressed some concern about this,

AFFIDAVIT OF PROBABLE CAUSE - 7

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN  
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(206) 499-2261

1 however she was told by defendant Jack Stein, "keep out of this".

2 Two days later, on May 5, 1987, Nick Stein signed an affi-  
3 davit drawn upon the stationery of defendant Jack Stein's attorney,  
4 Keith W. Griffen, to the effect that he is opposed to the granting  
5 of a full guardianship to Ned Hall, and indicating that various  
6 funds located in Savings & Loan accounts were properly withdrawn  
7 from the accounts by defendant Jack Stein.

8 Daniel Ray, a Notary Public doing business in Portland,  
9 Oregon has been interviewed by Dennis M. Hunter, Deputy Prosecut-  
10 ing Attorney. Mr. Ray related to Mr. Hunter that he is the  
11 notary on several of the affidavits signed by Nick Stein. Mr.  
12 Ray advised Mr. Hunter that based upon the observations of Mr.  
13 Ray, between March and August of 1987, Nick Stein would sign  
14 anything that was put in front of him, and that he had observed  
15 both defendant Jack Stein and attorney Griffen exerting pressure  
16 on Nick Stein to sign documents.

17 On May 13, 1987, Ned Hall obtained an Order from the Superior  
18 Court of the State of Washington in Clark County Cause No. 87-2-  
19 00994-1 which orders that Nick Stein be released to the custody  
20 of his limited guardian Ned Hall for transportation back to  
21 Vancouver, Washington to be returned to the Rose Vista Nursing  
22 Center in accordance with the Order for Protection previously  
23 entered. Officers of the Clark County Sheriff's Office affected  
24 the retrieval of Nick Stein from the Park Royal Convalescent Cen-  
25 ter in Portland, Oregon and returned him to the Rose Vista Nurs-  
26 ing Home in Vancouver.

27 On April 15, 1987, defendant Jack Stein signed a Petition  
28 for the Appointment of Guardian and Conservator relating to Nick  
29 Stein. This document alleges that the residence of Nick Stein  
30 was at 5419 S.E. Nehalem, Portland, Oregon, which is also listed  
31 as the address of defendant Jack Stein. The Petition was actually  
32 filed in Multnomah Circuit Court under Cause No. 8705-90969 on

AFFIDAVIT OF PROBABLE CAUSE - 8

CLARK COUNTY PROSECUTING ATTORNEY  
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(206) 698-2261

1 May 11, 1987. On May 27, 1987, Keith Griffen, attorney for de-  
2 fendant Jack Stein, filed a Proof of Service of Notice of Peti-  
3 tion and gave notice that objections to the appointment of Jack  
4 Stein as Guardian and Conservator for Nick Stein must be filed  
5 in writing on or before June 8, 1987.

6 In response to these pleadings, Paul Fortino of the firm  
7 Perkins, Coie of Seattle, Washington, filed a Motion and Objec-  
8 tion to the Petition, alleging that it was undesirable to ap-  
9 point a guardian and/or conservator in the State of Oregon and  
10 in the alternative moving to deny the Petition because the pro-  
11 posed guardian/conservator was "unfit to serve as guardian or  
12 conservator." This pleading was signed June 5, 1987 and filed on  
13 June 8, 1987 in Multnomah County Circuit Court. Pleadings filed  
14 on June 8, 1987 by the firm of Perkins, Coie attack the allega-  
15 tions of defendant Jack Kenneth Stein to the effect that Nick  
16 Stein was a resident of Portland, Oregon, and said pleadings  
17 allege the prior incidents of undue influence exerted by defen-  
18 dant Stein upon Nick Stein. The pleadings also allege that  
19 defendant Stein withdrew money from Nick's savings accounts over  
20 Nick's objections and defendant Stein obtained, by undue influence,  
21 a Power of Attorney which was later set aside. The pleadings  
22 filed by Perkins, Coie, who represented Ned Hall in the Multnomah  
23 County proceeding, allege that "petitioner potentially poses a  
24 danger to Nicholas." The pleadings filed on behalf of Ned Hall in  
25 the Oregon conservatorship matter further allege that defendant  
26 Jack Stein does not have the character, sound judgment, prudence,  
27 or adaptedness to trust required of a guardian or conservator.  
28 Further, the pleadings allege that defendant Stein had a history  
29 of exerting undue influence over Nicholas to obtain money from  
30 Nicholas.

31 The pleadings also contain an affidavit of Nicholas Stein  
32 upon the stationery of Hall & Hollard, attorneys at law, dated

1 June 4, 1987. In this affidavit of Nick Stein, the following  
2 statements are made:

3 4. I do not want my son Jack to be my guardian. He is  
4 not a good manager. He is always running up bills and not paying  
5 them. My affairs are presently handled by 1st Independent Bank  
6 and Ned Hall as Limited Guardian and I want this to continue.

7 5. This guardianship was started here in Clark County in  
8 1982, when my son Jack was claiming to own a real estate contract  
9 which belonged to me. There was a court trial and the court said  
10 that the contract was mine.

11 6. Jack asked me to sign a Power of Attorney to him and then  
12 use the Power of Attorney to take money out of my savings & loan  
13 account. This was not my intention. He took Twelve Thousand  
14 (\$12,000) Dollars from the Tower Mall, Vancouver Branch of Benjamin  
15 Franklin Savings & Loan, and he also took money from Community  
16 First Federal Savings & Loan in Vancouver.

17 7. Jack's wife, Bethany, asked me for Two Hundred Thousand  
18 (\$200,000) Dollars. She said Jack is a suspect in the death of  
19 Thelma Lund, April 13, 1987, and that he needs the money so he  
20 can hire a lawyer. She also said that is why they moved to the  
21 State of Oregon."

22 It is logical to infer that the above-referred to pleadings  
23 would create great animosity in defendant Stein, against Ned Hall.

24 Your affiant has reviewed Report No. V70140012 from Corporal  
25 Bruce Patton of the Vancouver Police Department. Said report  
26 states that on June 1, 1987 at approximately 8:11 p.m., Ned Hall,  
27 who lives at 6313 S.E. Riverside Drive in Vancouver, Washington  
28 reported that he had found numerous bottles of fluid which ap-  
29 peared to be gasoline on his property. Corporal Patton recognized  
30 the fluid as being possibly a volatile liquid, and he asked  
31 Ned Hall and his wife if they had any knowledge as to who might  
32 be responsible for the items being left on their property. Maxine

AFFIDAVIT OF PROBABLE CAUSE - 10

CLARK COUNTY PROSECUTING ATTORNEY  
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(206) 599-2261

1 Hall related that they were "being sued for \$2 million by a ter-  
2 rible man, Jack Stein". Maxine Hall further stated that Ned Hall  
3 was the guardian of Jack Stein's father's estate.

4 Samples from the bottles of liquid were sent to the Washing-  
5 ton State Crime Lab, and a report issued by Dale C. Mann, Crimin-  
6 alist of the Seattle Lab which states that the bottles contain  
7 "a residue of flammable petroleum produce commonly marketed as  
8 automotive gasoline". "The crusty material contains soap. (The  
9 combination of soap and gasoline yields a flammable gelatinous  
10 material)."

11 On June 14, 1987 at 3:58 a.m. Ned Hall called the police  
12 department and related that he had been the victim of a shooting.  
13 Mr. Hall stated that he was in bed sleeping and heard a loud  
14 noise that woke him up. He walked towards the door into the  
15 bathroom of the residence and thought he heard a gun shot. As  
16 he reached for the door there was a second shot through the  
17 door that caused the mirror to break. Mr. Hall observed that  
18 he was bleeding from his thumb and thought that he had been shot.  
19 The investigation by Vancouver Police Officer Wessel concluded  
20 that in fact one shot had been fired and a portion of Mr. Hall's  
21 thumb had been cut off when the bathroom door was slammed on his  
22 hand.

23 Mr. Hall related that sometime earlier, subsequent to the  
24 incident with the flammable gasoline in the bottles, two unknown  
25 persons had come to his residence in the early morning hours and  
26 attempted to persuade him to open the door, however he had re-  
27 fused to do so.

28 On February 11, 1988, Detective Trimble interviewed Richard  
29 Douglas Bailey in the Multnomah County Corrections Center in  
30 Portland, Oregon. Mr. Bailey had been arrested for illegal posses-  
31 sion of a firearm. Mr. Bailey informed Detective Trimble that he,  
32 Bailey, had been involved in a series of criminal events in Clark

1 County, Washington in the spring and summer of 1987. He stated  
2 that he was an acquaintance of Michael Lynn Norberg, who is the  
3 stepson of defendant Jack Stein. Mr. Bailey had met Jack Stein  
4 through his association with Michael Lynn Norberg. During this  
5 period of time, in the spring of 1987, defendant Jack Stein had  
6 been living at a residence on Nehalem Street in Portland, Oregon,  
7 and Richard Bailey had seen Jack Stein at that residence and had  
8 been informed by Michael Norberg that it was defendant Jack  
9 Stein's residence. Michael Lynn Norberg was living at a house  
10 also on Nehalem Street a few blocks from the Stein residence.  
11 Mr. Bailey related that he had been recruited by Norberg to mur-  
12 der a person who, according to Michael Norberg was an impediment  
13 to Jack Stein's inheritance. Mr. Bailey related that he and  
14 Michael Norberg had committed numerous crimes together, including  
15 burglaries and drug transactions. He related that Michael Lynn  
16 Norberg promised him a sum of money to kill someone who was  
17 "ripping off" Jack Stein. The amount of money promised fluctu-  
18 ated in the several conversations between Norberg and Bailey,  
19 between \$5,000 to \$10,000.

20 Mr. Bailey related that he and Michael Norberg had gone to  
21 Jack Stein's residence on Nehalem Street and Michael Norberg had  
22 picked up a key which was hidden in a utility meter at the Stein  
23 residence. Michael Norberg related to Bailey that Jack Stein had  
24 left the key there for them. Bailey and Norberg then drove to  
25 Vancouver, Washington where Norberg directed Bailey to a trailer  
26 court where Bailey had parked his car and then the two of them  
27 had walked to a particular trailer. Bailey drew a map of the  
28 area which is quite consistent with the location of Thelma Lund's  
29 trailer. Bailey related that he took the key from Norberg and  
30 entered the trailer with the intent to kill the inhabitant,  
31 however he ascertained that the inhabitant was a woman and he  
32 "chickened out" and left the residence. Michael Norberg then

1 entered into the residence and Bailey heard the sounds of a  
2 violent struggle from within as well as the sounds of someone  
3 being beaten. After awhile Bailey entered into the trailer  
4 and observed the dead body of a woman in the bath tub. Bailey  
5 was then ordered by Norberg to rummage through the residence to  
6 make it appear as if the place had been burglarized. Bailey did  
7 this by pulling clothes out of drawers and leaving them around  
8 the bedroom.

9 After this was accomplished, Bailey and Norberg left the  
10 residence. Bailey provided to Detective Trimble a hand drawn  
11 diagram of the interior of the mobile home in which the incident  
12 had occurred, and according to Detective Trimble this diagram is  
13 very accurate in relationship to the mobile home of Thelma Lund.

14 Bailey related that he and Norberg then drove back to  
15 Portland where they went to Michael Norberg's residence and  
16 Norberg called up Jack Stein and said, "It's done", although in  
17 a subsequent interview, Bailey did not recall with specificity  
18 the circumstances surrounding this phone call.

19 Bailey further confessed to being involved in three inci-  
20 dents involving the residence of Ned Hall. Bailey related that  
21 he had been informed by Norberg that an attorney in Vancouver was  
22 also an impediment to Jack Stein's inheritance. Michael Norberg  
23 recruited Bailey to fire bomb the attorney's house in Vancouver.  
24 Bailey related that he, Michael Norberg, Gordon Smith, and  
25 a person named Steve who lived in a brown van parked at the  
26 Norberg residence concocted a "napalm" substance in the basement  
27 of Norberg's residence. Bailey related that the substance  
28 was formulated by mixing gasoline with grated pieces of soap,  
29 and that the person who knew how to make the mixture was "Steve".  
30 This has subsequently been verified by an interview with Steve  
31 Condley, who admitted to Detective Trimble that he is the person  
32 living in the brown van at the Norberg residence who had advised

1 Norberg and Bailey how to make napalm.

2 After the napalm mixture was completed, it was loaded into  
3 glass containers located in the Norberg residence. Bailey  
4 stated that he and Gordon Smith then transported these containers  
5 to the residence of Ned Hall in Vancouver, Washington with the  
6 intent of lighting them and throwing them onto the house of Hall  
7 causing it to burn. After arriving at the residence, Gordon  
8 Smith became afraid and related to Bailey that someone was watch-  
9 ing them. As a result, Smith and Bailey left the scene going  
10 through blackberry bushes and down some railroad tracks adjacent  
11 to the Hall residence. Two bags containing the glass containers  
12 of napalm had been taken to the Ned Hall residence, according to  
13 Bailey and, according to Bailey, one of the bags had been left be-  
14 hind.

15 As a result of information provided by Bailey, Gordon Smith  
16 was arrested and charged with Attempted Murder at the home of  
17 Ned Hall. Gordon Smith has subsequently corroborated the above-  
18 referred to statements of Richard Bailey and has pled guilty to  
19 Conspiracy and Attempted Murder involving Ned Hall.

20 According to Bailey and Smith, a few days after the aborted  
21 attempt to fire bomb Ned Hall's residence, Gordon Smith and  
22 Richard Bailey returned to the residence, this time each of them  
23 being armed with a firearm. The fire arms were a .22 caliber  
24 pistol and a .7 millimeter mag rifle. According to Bailey,  
25 Gordon Smith went to the door of the residence and attempted to  
26 induce Ned Hall to open the door. Mr. Bailey waited outside with  
27 the rifle. When Mr. Hall refused to open the door, Bailey  
28 approached the door and again attempted to induce Hall to open  
29 it, however he refused. Bailey and Smith then left the area.  
30 This information from Richard Bailey has been corroborated by an  
31 interview with Ned Hall. He stated that two young men had come  
32 to his residence in the early morning hours of June 4, 1987 and

1 had attempted to induce him to open the door, claiming that they  
2 had car trouble. Mr. Hall was suspicious and refused to open the  
3 door.

4 Mr. Bailey indicated that a third attempt was made at the  
5 Hall residence. On this occasion, Bailey, his brother Ricky  
6 Bailey, Gordon Smith, and Michael Norberg all went to the Hall  
7 residence. Some of the participants were armed with pistols and  
8 some were armed with machetes. Michael Norberg had a machete and  
9 was dropped off a distance away from the Hall residence. At that  
10 time, Norberg stated, "He has to be killed tonight, otherwise it  
11 will be done another way." According to Gordon Smith, Michael  
12 Norberg had previously made the statement, "Jack wants proof."  
13 This statement was made at a time when Smith was attempting to  
14 get paid for the second incident at Ned Hall's residence, because  
15 Smith had lied to Norberg, claiming Hall had been killed.

16 According to Richard Bailey, Gordon Smith, and Ricky Bailey,  
17 the three of them approached the residence and Gordon Smith  
18 entered through a bathroom window. As he did so, and was stand-  
19 ing in the bath tub, the male occupant of the residence started  
20 to come through the door from the bedroom into the bathroom and  
21 Smith discharged his firearm and slammed the door to the bath-  
22 room. The group then ran away, and returned to Portland, leav-  
23 ing Norberg behind.

24 As a result of this incident, which, according to Mr. Hall  
25 occurred on June 13, 1987, Gordon Smith has pled guilty to  
26 Attempted Murder of Ned Hall, Richard Bailey has pled guilty to  
27 Attempted Murder of Ned Hall, and Ricky Bailey has pled guilty to  
28 Burglary in the First Degree.

29 Bailey further related that in a conversation with Michael  
30 Norberg concerning the crimes planned against Ned Hall, Norberg  
31 had made a statement to the effect that no one would be paid  
32 anything if things weren't done the way that Jack wanted them

1 done.

2 According to Bailey, Michael Norberg had left a machete be-  
3 hind at the scene on the third incident at the residence of Ned  
4 Hall. This has been corroborated by the fact that Ned Hall re-  
5 covered a machete near his property sometime after the third  
6 incident.

7 Richard Bailey, in a deposition under oath taken on May 19,  
8 1988 related that following the attempts at the residence of Ned  
9 Hall, he had a conversation with defendant Jack Stein concerning  
10 payment. Richard Bailey had received only \$500.00 from Michael  
11 Norberg after the homicide of Thelma Lund. In a conversation  
12 with defendant Stein and Michael Norberg, Stein promised "more  
13 money for the first one", then more money when the murder of Ned  
14 Hall was completed, and then more money when the "jail went  
15 down". This last reference concerned a conversation between  
16 defendant Jack Stein and Richard Bailey in which Stein had  
17 indicated that he wanted Bailey to cause an explosion at the  
18 Clark County courthouse which he described as a "building with  
19 the sheriff's office on the bottom and the jail up on top," for  
20 the purpose of killing a judge. Your affiant is aware that prior  
21 to July, 1984, the Clark County courthouse had a jail on the top  
22 and sheriff's office on the bottom.

23 Defendant Stein and Michael Norberg had told Richard Bailey  
24 that the money to pay for the killings was coming from a "slush  
25 fund" accessible to defendant Stein.

26 In another conversation with defendant Stein, Bailey was  
27 told by Stein that he (Stein) was not close enough to the actual  
28 crimes to be arrested and that although he was prepared to go to  
29 jail, the police "couldn't prove anything."

30 In the same conversation concerning the proposed killing of  
31 a judge in the Clark County courthouse, defendant Stein solicited  
32 Richard Bailey to kidnap Ned Hall to bring him to Jack Stein so

1 that Jack Stein could torture him. According to Bailey, this  
2 conversation occurred subsequent to the last incident at the  
3 residence of Ned Hall.

4 Your affiant has interviewed Beth Fort, age 20, who is  
5 the girlfriend of Michael Norberg. Beth Fort informed me that  
6 she was a witness to the preparation of the napalm substance in  
7 the basement of the Norberg residence. Further, she stated  
8 that following that incident she had lived with defendant Jack  
9 Stein and Bethany Norberg in a residence near Gresham, Oregon  
10 which has been identified as being located at 2011 N.E. 164th  
11 Place. Ms. Fort related that in approximately February of 1988,  
12 after Richard Bailey had been arrested and had been interviewed  
13 by the police, she had a conversation with defendant Jack Stein.  
14 She stated that Stein solicited ideas from her concerning  
15 methods or persons which could be utilized to kill Richard  
16 Bailey while he was in jail. Defendant Stein told Ms. Fort  
17 that if Richard Bailey could be killed, he could not testify.  
18 Ms. Fort responded to defendant Stein that if that occurred,  
19 Stein would not have to pay Bailey. She related that at this  
20 suggestion, Stein laughed.

21 Ms. Fort informed your affiant that during the spring and  
22 summer of 1987, there were numerous people, mostly involved in  
23 the use of drugs, staying at the Norberg residence. She indicated  
24 that it was common knowledge among all the people in the resi-  
25 dence that Michael Norberg, acting on behalf of defendant Jack  
26 Stein, was involved in hiring Richard Bailey to commit murders.

27 One of the persons frequently at the Norberg residence during  
28 that period of time was Edward Denny. Mr. Denny has been inter-  
29 viewed by Detective Trimble and related that during this period  
30 of time, while he was visiting at the Norberg residence on Nehalem  
31 Street, he overheard Richard Bailey tell Michael Norberg that he,  
32 Bailey, wanted half his money now and half when the job was done.

AFFIDAVIT OF PROBABLE CAUSE - 17

CLARK COUNTY PROSECUTING ATTORNEY  
1200 FRANKLIN  
P.O. BOX 8000  
VANCOUVER, WASHINGTON 98668  
(206) 699-2261

1 Norberg responded that he would discuss it with Jack. Subse-  
2 quently, Denny heard Michael Norberg tell defendant Stein that  
3 Bailey wanted half his money now and half when the job was done  
4 and Stein replied by telling Norberg to tell Bailey that he,  
5 Stein, wouldn't pay that way, that he only would pay when the job  
6 is done. Denny further stated that Norberg had, prior to April,  
7 1987, offered \$10,000 to Denny to kill "a lady and an attorney,"  
8 and that the source of the money was "Jack."

9 On February 26, 1988, in Seattle, Washington, Detective  
10 Trimble interviewed Kevin Arbour, age 26. Mr. Arbour related  
11 that he had met Michael Norberg in 1979 through a mutual friend.  
12 He and Norberg had become friends, and in fact had been in-  
13 volved in manufacturing methamphetamine together. Arbour stated  
14 that he lived on Nick Stein's old farm house on N.E. 18th Street  
15 for a period of time, being allowed to do so by defendant Jack  
16 Stein and his wife, Bethany Norberg. Mr. Arbour stated that  
17 through his relationship with Jack Stein, he viewed Stein as a  
18 "scammer", that is who would do anything for money regardless  
19 of the legalities. He also stated that defendant Stein's wife,  
20 Bethany Norberg, had financed the methamphetamine lab set up by  
21 Arbour and Michael Norberg. Mr. Arbour's statements are corrob-  
22 orated by the fact that according to Clark County Sheriff's Of-  
23 fice Report No. 86-47-132 on October 17, 1986, Clark County Sheriff's  
24 Deputies executed a search warrant at Nick Stein's farm house at  
25 16908 N.E. 18th Street, Vancouver, Washington, and uncovered a  
26 clandestine methamphetamine lab. Documents found in the residence  
27 included mail, addressed to Michael Norberg.

28 Mr. Arbour stated that in late November of 1986, after  
29 Thanksgiving, he had been involved in conversations with Michael  
30 Norberg about killing Ned Hall and Thelma Lund. Arbour stated  
31 that Norberg had talked about killing Ned Hall by shooting him  
32 or having him shot with a high powered rifle from a hill top

1 overlooking Hall's residence. Arbour was familiar with the area  
2 and stated that there were "totem poles" located in the vicinity  
3 of the clearing overlooking Hall's residence. Detective Trimble  
4 has located the hilltop clearing with "totem poles" in the area  
5 of Ned Hall's residence. He further stated that Norberg had been  
6 following Ned Hall to "learn his routine." Arbour stated that the  
7 job of killing Ned Hall had also been offered to Eddy Denny, who  
8 turned it down. After discussing the plan to kill Ned Hall,  
9 Norberg talked to Arbour about "another problem," which was,  
10 according to Arbour, Thelma Lund. Norberg stated that if Thelma  
11 Lund was killed the police would link Norberg and Jack Stein to  
12 the crime. Norberg told Arbour that Nick Stein had written  
13 Thelma into his Will for 10% of his estate and that "Jack" did  
14 not want to pay it. Norberg told Arbour that "his family" will  
15 pay \$10,000 to "off" Thelma Lund. Norberg related to Arbour that  
16 a key would be made available to Thelma Lund's residence and that  
17 the murderer could go in at 2:00 or 3:00 in the morning and  
18 smother the victim with a pillow.

19 On July 26, 1988, Detective Trimble interviewed Roy Stradley,  
20 age 39. Mr. Stradley related that he had been living at the  
21 Nehalem Street residence of Michael Lynn Norberg in the spring  
22 of 1987. He stated that on one occasion during this period of  
23 time at the residence, he had engaged in a conversation with  
24 Michael Norberg. Norberg had talked about a guardianship for  
25 Nick Stein's property and that Norberg was mad at an attorney.  
26 Norberg had talked about kidnapping the attorney and further,  
27 there had been discussions with Norberg about the killing of an  
28 old lady. Stradley stated that Norberg told him about beating  
29 up an old lady and that things did not go right and that he,  
30 Norberg, was "stressed out."

31 Stradley admitted that while living at Norberg's residence,  
32 he had been offered a large amount of money to commit murders

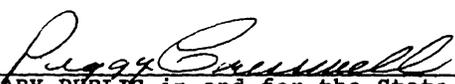
1 for Norberg and Jack Stein. He stated that he did have a conver-  
2 sation with Jack Stein but that Stein was "real careful" and was  
3 "sneaky and smart." Stradley related that Jack Stein had ap-  
4 proached him about committing murders because of his reputation  
5 and that Stein figured that Stradley would have connections to  
6 people who could commit such crimes. Stradley described Norberg  
7 and Stein as "scatter-brained" in their thoughts and that they  
8 were relying upon Stradley to arrange the crimes to be done for  
9 them. Stradley was told that "Norberg's grandfather" had a great  
10 deal of property and that there was a desire to obtain control  
11 over this property so that it could be developed for a shopping  
12 mall. Stradley was told that there was a woman who had gotten  
13 the guardianship or control of the property owned by "Norberg's  
14 grandfather" and that the woman was a nurse or caretaker for  
15 "Norberg's grandfather." Stradley stated that the initial ap-  
16 proach by defendant Jack Stein was very subtle, but that a later  
17 conversation with Jack Stein occurred. Stradley stated that  
18 Jack Stein was furnishing money for remodeling the Norberg house  
19 on Nehalem Street and that one day Stradley sent Michael Norberg  
20 to get Jack Stein so that they could "talk business" either  
21 about the house or about the offer previously made to him.  
22 Stradley stated that he did make Michael Norberg think that  
23 Stradley was serious about taking the job offered to him. During  
24 the ensuing conversation with Jack Stein, and referring to an  
25 offer to pay to have someone killed, Stein asked Stradley if  
26 Stradley could arrange it and Stein told Stradley that he would  
27 cover the finances and that as far as money was concerned, there  
28 was nothing to worry about. Stradley stated that he never ser-  
29 iously considered doing anything for Jack Stein and that murder  
30 was one thing he would not even consider. Stradley described  
31 Jack Stein as "satanic". According to Detective Trimble's re-  
32 port, when he contacted Stradley on July 26, 1988, Stradley

1 appeared visibly shaken when informed that Michael Norberg had  
2 been arrested for murder. He expressed surprise that Norberg  
3 had actually gone through with the plan.

4 Further your affiant saith not.

5   
6 Roger A. Bennett, WSBA #6536  
7 Chief Deputy Prosecuting Attorney

8 SUBSCRIBED AND SWORN to before me this 25th day of August,  
9 1988.

10   
11 NOTARY PUBLIC in and for the State of  
12 Washington, residing at Vancouver  
13 Commission Expires: 10-19-88

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## Appendix C

### Mandate

FILED  
Superior Court  
STATE OF WASHINGTON  
01 AUG 3 10 51  
BY C. J. HARRIS  
CLERK

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOHN KENNETH STEIN, a/k/a JACK STEIN,

Respondent.

MANDATE

NO. 68112-1

Clark County No.  
88-1-00788-8

C/A No. 20813-0-II & 21767-8-II

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington  
in and for Clark County.

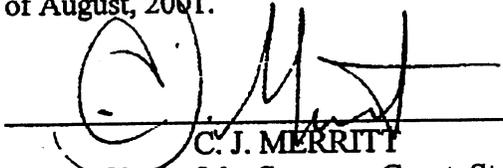
This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 12, 2001, became the decision terminating review of this Court in the above entitled cause on August 1, 2001. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

110/20

Page 2  
MANDATE  
68112-1

I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 31<sup>st</sup> day of August, 2001.

  
C. J. MERRITT  
Clerk of the Supreme Court, State of  
Washington

cc: Dennis Hunter  
James Lobsenz  
Jack Stein  
Lauri Boyd  
Hon. Philip Borst, Judge  
Clark County Superior Court  
Clerk, Division II  
Reporter of Decisions

Appendix D

Order Releasing Defendant on Bail and Conditions of Release

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**FILED**

OCT 11 2001

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, aka JACK  
STEIN,

Defendant.

No. 88-1-00788-8

ORDER RELEASING DEFENDANT ON  
BAIL AND CONDITIONS OF RELEASE

THIS MATTER having come on before the Honorable James Stonier on the defendant's Motion for Release of Defendant on the posting of cash bail or approved bond and the court having reviewed the files and records in this case and the documents in support of this motion,

IT IS ORDERED that the bail of the defendant be fixed in the amount of \$250,000.00, cash or approved bond; and that the defendant is hereby released from the Clark County Jail upon the posting of bail and on the following conditions:

1. That the defendant be under the supervision of the Supervised Release Unit of the Clark County Community Corrections Office, or their designee, and report in person to a supervised release officer or his designee at least once daily or additionally as the officer shall require;

1 2. That the defendant shall be placed on electronic home monitoring to be  
2 monitored by the Supervised Release Unit of the Clark County Community Corrections  
3 Office or their designee, and to commence immediately upon his release from jail; and  
4 the defendant shall comply with all conditions and restrictions imposed by his  
5 supervised release officer or his designee; *defendant to report at 8 a.m on 10/12/01*  
*to the Supervised Release Unit.*

6 3. That the defendant shall reside at an address in Clark County approved by  
7 the Court and provided to the prosecuting attorney, and shall not leave Clark County  
8 without prior approval of the court or the Supervised Release Unit of the Clark County  
9 Community Corrections Office;

10 4. That the defendant waive extradition;

11 5. That the defendant surrender any and all passports to the clerk of the  
12 court;

13 6. That the defendant have no contact in any way, *either directly or indirectly*  
14 or coconspirators;

15 7. That the defendant not have any contact, *either directly or indirectly*  
16 felony criminal offenses;

17 8. That the defendant possess no firearms or have any firearms in his place  
18 of residence;

19 9. The defendant shall not tamper with, intimidate or in any other way  
20 attempt to influence prosecution witnesses;

21 10. The defendant shall not violate any Federal, State or Local criminal laws;

22 11. The defendant shall appear at any and all court proceedings in this matter.

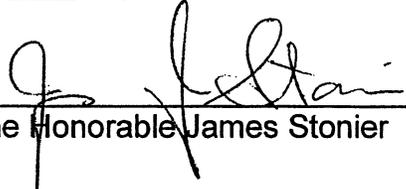
23 12. Other Conditions:

24  
25 A. That the defendant have No contact at all,  
26 either directly or indirectly, with Michael Norberg.  
27  
28  
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B. That the defendant may have contact with John Stein, Tamie Stein, Mark Norberg, Tamie Norberg, Greg Norberg, and Brian Norberg, however, he is not to discuss the case with them and they are not to assist in the preparation of his case nor are they to speak with any other witnesses about the case.

C. The court will allow 1 1/2 hours per day for defendant to be outside his home however he must notify ~~the~~ Clark County Community Corrections during business hours and he must be accompanied by his wife, Bethany Norberg. Additional time may be granted for time in the law library with court approval.

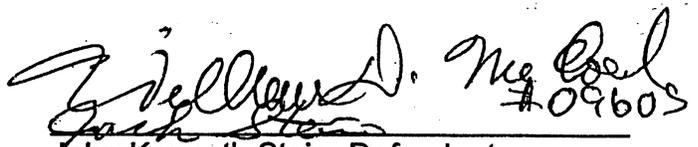
DONE IN OPEN COURT this 11<sup>th</sup> day of October, 2001.

  
The Honorable James Stonier

Approved by:

CHRISTINE O. GREGOIRE  
Attorney General of Washington

  
Barbara N. Bailey, WSBA #25611  
Assistant Attorney General

  
John Kenneth Stein, Defendant

Appendix E

Findings of Fact and Conclusions of Law Pursuant to Criminal Rule 8.3 Hearing

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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.

- 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 <sup>had</sup> ~~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.

1 DATED THIS <sup>19<sup>th</sup> June</sup> day of ~~May~~, 2003

2  
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:

12  
13  
14 WILLIAM D. MCCOOL, WSBA #09605  
Attorney for Defendant

Appendix F

Court's Ruling on Bail Revocation, with Attachment A, Declaration of Mary O'Harra

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**SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY**

**STATE OF WASHINGTON,**

**Plaintiff,**

**vs.**

**JOHN KENNETH STEIN,**

**Defendant.**

**No. 88-1-00788-8**

**COURT'S RULING ON BAIL  
REVOCAATION**

On September 16, 2003, this Court revoked Mr. Stein's release pending trial and ordered him back into custody, setting bail at \$500,000.00. His release was subject to the condition of electronic home monitoring, in order to provide the Court with the assurance that his whereabouts would be monitored.

The charges in this case involve three allegations of attempted murder, and the Court is aware that the allegations involve actions directed at a person Mr. Stein believed to be interfering with his legal/financial interests. Accordingly the concern of the Court in setting bail and conditions has been and remains public safety.

Accordingly Mr. Stein was required to report when he was leaving his residence and to check in periodically. When he was representing himself his release, subject to a property bond and the condition of electronic home monitoring,

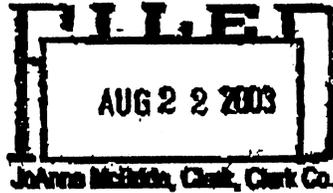
1 allowed Mr. Stein the opportunity to conduct legal research and prepare his defense  
2 while at the same time monitoring his activities. Prior to September 16, 2003, Clark  
3 County Corrections Department had reported to this Court on the record that Mr.  
4 Stein was not reporting as required. In response to the Court's warnings to Mr. Stein  
5 that he must comply with the requirements of the Court, Mr. Stein responded by  
6 arguing that the conditions were not appropriate. Despite the Court's  
7 admonishments, Mr. Stein has not been in compliance. (See Attachment A.)  
8

9 On September 16, 2003, in open court, the Court heard no responses from  
10 the Defense that explained his failure to comply. For public safety Mr. Stein was  
11 ordered back into custody.  
12

13 DATED September 30, 2003  
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18 James J. Stonier  
19 Superior Court Judge  
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ATTACHMENT A



**RECEIVED**  
AUG 22 2003  
Prosecutor's Office

STATE OF WASHINGTON  
CLARK COUNTY SUPERIOR COURT

STATE OF WASHINGTON,  
  
Plaintiff,  
  
JACK K. STEIN, aka Jack Stein,  
  
Defendant.

NO. 88-1-00788-8  
  
DECLARATION OF  
MARY O'HARRA

1. I am a Corrections Counselor II with the Clark County Corrections Department. I have been employed as a Corrections Counselor II since 1995.
2. Since 03/11/2002, I have been assigned to monitor Defendant in his compliance.
3. Mr. Stein was placed on Electronic Home Confinement on or about 10/12/2001 pending resolution of his appeal.

4. Attached is a copy of the standard Electronic Home Confinement (EHC) program policies. At the time Mr. Stein was placed on the program, he was allowed 1 1/2 hours per day out of his residence to take care of personal business, shop, yard work, have dinner, etc. The condition was that he was required to call in on the job location line prior to departure, giving time and where he will be (including address) when off site.

5. On or about 10/18/2001, the Court ordered that Mr. Stein was not to be required to use trip permits when off site to verify his movement.

6. On or about 07/11/2002, a review of Mr. Stein's court proceedings and EHC violations was held via telephone conference. At that time, Mr. Stein was granted to be outside of the confines of his home, while still staying on his property at any time as long as he returned into the house on an hourly basis to allow the equipment to monitor that he was present. At this time, the alcohol restriction was also removed.

7. Shortly after the hearing, between 07/11/2002 and through much of the month of August, 2002, Mr. Stein had phone problems - both technical and financial (phone disconnected). During this time, this writer made field contact and phone contact with Mr. Stein to address the issues of telephone service and of still exceeding

was allotted away from the residence. His attorney was contacted to assist in bringing Mr. Stein into compliance.

8. To assist staff on duty, a new phone line was installed for EHC, dedicated to clients who are on pager, such as Mr. Stein. Mr. Stein was advised of this number (360-2222) and told to use it in the future, which he did, to call in off premise locations.

9. During the winter months, Mr. Stein had very few violations in being away from home. However, with spring and warmer weather, Mr. Stein began venturing out more. At first he would call in and state that he was going to, for example, WalMart, Home Depot and to make copies – but would not provide addresses. As there is only one Home Depot in this area and one WalMart close to his residence, this was no real problem, however, he did not indicate where he was going to have copies made. During the next couple of months, Mr. Stein was sporadic in whether he called in his locations or not. For example, he failed to call in that he had to go to Court on 03/26/2003; On 04/18/2003, however, he called in and stated he had an all-day doctor appointment. Neither Mr. Pressey nor his attorney had any knowledge of this appointment and Mr. Stein was gone all day.

10. Mr. Stein was to have gone to trial in June and so no violations were filed. We continued to monitor and keep Mr. Pressey advised of Mr. Stein's

movements. Prior and during that time, Mr. Stein was contacted, by phone, when he had been out of range for extended periods of time and reminded that he still had a one hour half hour time limit for being off premises.

11. Since about the time the trial has been set over, Mr. Stein has stopped calling in when he is going to be off the property and has been off the property for extended periods of time, sometimes two and three times during the day (see attached sheet). When staff has attempted to contact Mr. Stein, he fails to answer his primary line and either hangs up the second line and/or transfers it to a fax-sounding type device. Mr. Pressey has been notified and the counsel and co-counsel have also been advised of the situation. Counsel and co-Counsel have spoken with me that they have contacted Mr. Stein to comply with rules. The violations continue. At this point, Mr. Stein is not complying with any of the remaining program rules. Monitoring of his movements are being recorded but there is no supervision or control. Electronic Home Confinement is not working for him as he has chosen not to follow the rules set for by the Court.

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

DATED this 22 day of August, 2003.

  
 MARY O'HARRA  
 Corrections Counselor II

**IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY**

State of Washington

Plaintiff,

vs.

*Defendant*

No.

**ORDER ESTABLISHING CONDITONS OF  
PARTIAL CONFINEMENT/  
ELECTRONIC HOME CONFINEMENT**

IT IS HEREBY ORDERED that the above named defendant shall be placed under partial confinement supervision through the County Corrections Department, Electronic Home Confinement Program, under the conditions which follow. The period of Electronic Home Confinement Jurisdiction is **30 Days**

**PARTIAL HOME CONFINEMENT RULES AND CONDITIONS**

1) I understand that participation in this program will be monitored by corrections staff and a tamper proof, non removable ankle bracelet which I agree to wear 24 hours a day during the entire period of involvement in the EHC program.

2) I agree to remain at my residence at all times, except for those hours agreed upon to fulfill my employment and community program responsibilities. Verification of compliance will only be by answering the phone and making the proper computer and voice transaction. I further understand use of the phone by all users must be limited to 10 minutes and not grouped. Extended periods between phone use shall be excused.

3) I must comply fully with my approved movement schedule. The only exception will be due to an emergency or overtime work. In the event of an emergency or overtime work I must immediately contact the EHC officer 397-6045, or after hours 397-6039. EHC staff will determine the validity of the non-scheduled movement. Justification and/or written documentation for the movement will be required.

1) In the event my approved schedule changes for any reason, I will notify EHC staff or program immediately. Early completion of work, an appointment, or other activity will require immediate return to my residence and the required notification.

2) I understand that my curfew restrictions will also be monitored by telephone calls and personal visits to my residence by Clark County corrections personnel and/or law enforcement personnel any time day or night.

3) I further understand and consent to my person, residence, vehicle and effects to be subject to warrantless search by EHC staff, having cause to believe a violation has occurred. I also agree to provide urine sample and/or breath test upon request during home or office visits in order to determine alcohol and/or controlled substance abuse.

4) I may receive unscheduled visits or contacts at my place of employment.

5) I understand that I am to have no call-forwarding, call-waiting or any service other than direct call-in on my home phone.

6) I agree to participate in any community program deemed appropriate by EHC staff or ordered by the Court.

7) While a participant in the EHC program, all medical expenses incurred will be my responsibility.

8) I will not associate with anyone on probation, parole or pending judicial action or anyone involved with illegal activity.

9) I understand that the consumption of alcohol or possession, in any fashion, is prohibited. Also, the possession or consumption of any illegal drug or controlled substance is prohibited.

10) In order to defray the costs of the program and monitoring equipment, I understand that I will be assessed a supervision fee to participate in this program and I agree to pay this fee. It is understood that the payment of this fee is a condition of my participation on this program. I understand that should I not be able to afford the daily fee and am still interested in the EHC program, I will have the opportunity to work this fee off on the Work Crew program, still confined to my home when not working on crew.

11) I understand and agree to be financially responsible for daily costs of equipment not returned immediately upon termination. I further understand I am financially responsible for stolen, lost, damaged, or alteration of said equipment and will be subjected to prosecution.

I acknowledge my EHC Program start date is \_\_\_\_\_ and scheduled termination is \_\_\_\_\_. I have received equipment number \_\_\_\_\_ and agree to return the equipment immediately upon program termination.

I understand and accept the conditions of Partial Confinement (Electronic Home Confinement) under which I have been released by the sentencing court. I understand failure to abide by all Partial Confinement rules and conditions imposed by the Court and supervised by the County Corrections Department and its representatives may result in removal from the program, return to secure detention, prosecution, and possible revocation of suspended jail time.

\_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

DATE: \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF PERSON UNDER  
PARTIAL CONFINEMENT

DATE	TIME LEFT/RETURN	APPRX TIME GONE	CALL IN?/NOTES
07/01/03	9:58 AM - 12:01 PM	2 HRS	N
	12:40 PM - 2:41 PM	2 HRS	N
	4:29 PM - 6:44 PM	2 ¼ HRS	N (Note: Extended time twice in one day)
07/02/03	NO PROBLEMS		
07/03/03	10:20 AM - 1:24 PM	3 HRS	N
	7:39 PM - 9:24 PM	2 HRS	N (Note: Extended time twice in one day)
07/04/03	NO PROBLEMS		
07/05/03	NO PROBLEMS		
07/06/03	NO PROBLEMS		
07/07/03	11:45 AM - 3:58 PM	4 HRS	N
07/08/03	4:49 PM - 6:21 PM	1 ½ HRS	N
	6:31 PM - 7:53 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/09/03	11:37 AM - 5:22 PM	6 HRS	N
07/10/03	9:59 AM - 12:28 PM	2 ½ HRS	N
07/11/03	12:30 PM - 5:56 PM	5 ½ HRS	N: ATTEMPTED CALLING - NO ANSWERS
07/12/03	9:36 AM - 11:00 AM	1 ½ HRS	N: ATTEMPTED CALLING - NO ANS
	1:49 PM - 3:47 PM	2 HRS	N: ATTEMPTED CALLING - NO ANS (Note: Extended time twice in one day)
07/14	11:02 AM - 12:29 PM	1 ½ HRS	N: ATTEMPTED CALLING - NO ANS
	4:35 PM - 5:59 PM	1 ½ HRS	N: ATTEMPTED CALLING - NO ANS (Note: Extended time twice in one day)
07/15/03	10:24 AM - 1:57 PM	3 ½ HRS	N: ATTEMPTED CALLING - NO ANS
07/16/03	2:38 PM - 7:15 PM	4 ¾ HRS	N: ATTEMPTED CALLING - NO ANS
07/17/03	10:02 AM - 11:56 PM	2 HRS	N
	6:10 PM - 7:22 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/18/03	1:54 PM - 3:41 PM	1 ½ HRS	N

	3:47 PM – 5:23 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/19/03	5:07 PM – 9:11 PM	4 HRS	N: ATTEMPTED CALLING – NO ANS
07/20/03	11:45 AM – 1:55 PM	2 HRS	N: ATTEMPTED CALLING – NO ANS
07/22/03	10:59 AM – 2:54 PM	4 HRS	N: ATTEMPTED CALLING – NO ANS
	3:16 PM – 5:23 PM	2 HRS	N (Note: Extended time twice in one day)
07/23/03	10:52 AM – 4:22 PM	5 ½ HRS	N: ATTEMPTED CALLING – NO ANS
	6:53 – 8:19 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/24/03	3:07 PM – 5:39 PM	2 ½ HRS	N
07/25/03	NO PROBLEMS		
07/26/03	12:18 PM – 4:41 PM	4 ½ HRS	N ATTEMPTED CALLING – NO ANS
	7:04 PM – 9:40 PM	2 ½ HOURS	N (Note: Extended time twice in one day)
07/27/03	NO PROBLEMS		
07/28/03	10:42 AM – 12:24 PM	1 ½ HRS	N
07/29	9:50 AM – 12:21 PM	2 ½ HRS	N
	2:38 PPM – 4:56 PM	2 ½ HRS	N: ATTEMPTED CALLING – NO ANS //(Note: Extended time twice in one day)
07/30/03	9:11 AM – 11:18 AM	2 HRS	N
	7:21 PM – 8:45 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/31/03	4:39 PM – 6:36 PM	2 HRS	N

NOTES: This writer is only recording the times that were outside the hour and a half. Times like 1 hr 15 minutes were not recorded. Mr. Stein goes in and out quite a bit. Even on the days where it is indicated "NO PROBLEM" there were still a lot of ins and outs.

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STATE OF WASHINGTON  
CLARK COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

NO. 88-1-00788-8

Plaintiff,

DECLARATION OF  
MARY O'HARRA

v.

JOHN K. STEIN, aka Jack Stein,

Defendant.

1. I am a Corrections Counselor II with the Clark County Corrections Department. I have been employed as a Corrections Counselor II since 1995.

2. Since 03/11/2002, I have been assigned to monitor Defendant in his compliance.

3. Mr. Stein was placed on Electronic Home Confinement on or about 10/12/2001 pending resolution of his appeal.

1           4.     Attached is a copy of the standard Electronic Home Confinement (EHC)  
2 program policies. At the time Mr. Stein was placed on the program, he was allowed 1½  
3 hours per day out of his residence to take care of personal business, shop, yard work,  
4 have dinner, etc. The condition was that he was required to call in on the job location  
5 line prior to departure, giving time and where he will be (including address) when off  
6 premises.  
7

8  
9           5.     On or about 10/18/2001, the Court ordered that Mr. Stein was not to be  
10 required to use trip permits when off site to verify his movement.  
11

12           6.     On or about 07/11/2002, a review of Mr. Stein's court proceedings and  
13 EHC violations was held via telephone conference. At that time, Mr. Stein was granted  
14 to be outside of the confines of his home, while still staying on his property at any time  
15 as long as he returned into the house on an hourly basis to allow the equipment to  
16 monitor that he was present. At this time, the alcohol restriction was also removed.  
17  
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19           7.     Shortly after the hearing, between 07/11/2002 and through much of the  
20 month of August, 2002, Mr. Stein had phone problems – both technical and financial  
21 (phone disconnected). During this time, this writer made field contact and phone  
22 contact with Mr. Stein to address the issues of telephone service and of still exceeding  
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1 time allotted away from the residence. His attorney was contacted to assist in bringing  
2 Mr. Stein into compliance.

3  
4 8. To assist staff on duty, a new phone line was installed for EHC, dedicated  
5 to clients who are on pager, such as Mr. Stein. Mr. Stein was advised of this number  
6 (397-2222) and told to use it in the future, which he did, to call in off premise locations.  
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8  
9 9. During the winter months, Mr. Stein had very few violations in being  
10 away from home. However, with spring and warmer weather, Mr. Stein began  
11 venturing out more. At first he would call in and state that he was going to, for  
12 example, WalMart, Home Depot and to make copies – but would not provide addresses.  
13 As there is only one Home Depot in this area and one WalMart close to his residence,  
14 this was no real problem, however, he did not indicate where he was going to have  
15 copies made. During the next couple of months, Mr. Stein was sporadic in whether he  
16 called in his locations or not. For example, he failed to call in that he had to go to Court  
17 on 03/26/2003; On 04/18/2003, however, he called in and stated he had an all-day  
18 doctor appointment. Neither Mr. Pressey nor his attorney had any knowledge of this  
19 appointment and Mr. Stein was gone all day.  
20  
21

22  
23 10. Mr. Stein was to have gone to trial in June and so no violations were  
24 filed. We continued to monitor and keep Mr. Pressey advised of Mr. Stein's

1 movements. Prior and during that time, Mr. Stein was contacted, by phone, when he  
2 had been out of range for extended periods of time and reminded that he still had a one  
3 and a half hour time limit for being off premises.  
4

5  
6 11. Since about the time the trial has been set over, Mr. Stein has stopped  
7 calling in when he is going to be off the property and has been off the property for  
8 extended periods of time, sometimes two and three times during the day (see attached  
9 sheet). When staff has attempted to contact Mr. Stein, he fails to answer his primary  
10 line and either hangs up the second line and/or transfers it to a fax-sounding type  
11 device. Mr. Pressey has been notified and the counsel and co-counsel have also been  
12 advised of the situation. Counsel and co-Counsel have spoken with me that they have  
13 instructed Mr. Stein to comply with rules. The violations continue. At this point, Mr.  
14 Stein is not complying with any of the remaining program rules. Monitoring of his  
15 movements are being recorded but there is no supervision or control. Electronic Home  
16 Confinement is not working for him as he has chosen not to follow the rules set for by  
17 the Court.  
18

19  
20 I declare under penalty of perjury under the laws of the State of Washington that  
21 the foregoing is true and correct.

22 DATED this 22 day of August, 2003.

23   
24 \_\_\_\_\_  
MARY O'HARRA  
Corrections Counselor II

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

State of Washington

Plaintiff,

vs.

*Defendant*

No.

ORDER ESTABLISHING CONDITONS OF  
PARTIAL CONFINEMENT/  
ELECTRONIC HOME CONFINEMENT

IT IS HEREBY ORDERED that the above named defendant shall be placed under partial confinement supervision through the County Corrections Department, Electronic Home Confinement Program, under the conditions which follow. The period of Electronic Home Confinement Jurisdiction is for: **7 Days**

PARTIAL HOME CONFINEMENT RULES AND CONDITIONS

- 1) I understand that participation in this program will be monitored By Corrections staff and a tamper proof, non removable ankle bracelet which I agree to wear 24 hours a day during the entire period of involvement in the EHC program.
- 2) I agree to remain at my residence at all times, except for those hours agreed upon to fulfill my employment and community program responsibilities. Verification of compliance will only be by answering the phone and making the proper computer and voice transaction. I further understand use of the phone by all users must be limited to 10 minutes and not grouped. Extended periods between phone use shall be exercised.
- 3) I must comply fully with my approved movement schedule. The only exception will be due to an emergency or overtime work. In the event of an emergency or overtime work I must immediately contact the EHC officer 397-6045, or after hours 397-6039. EHC staff will determine the validity of the non-scheduled movement. Justification and/or written documentation for the movement will be required.

4) In the event my approved schedule changes for any reason, I will notify EHC staff or program immediately. Early completion of work, an appointment, or other activity will require immediate return to my residence and the required notification.

5) I understand that my curfew restrictions will also be monitored by telephone calls and personal visits to my residence by Clark County Corrections personnel and/or law enforcement personnel any time day or night.

I further understand and consent to my person, residence, vehicle and effects to be subject to warrantless search by EHC staff, having cause to believe a violation has occurred. I also agree to provide urine sample and/or breath test upon request during home or office visits in order to determine alcohol and/or controlled substance abuse.

6) I may receive unscheduled visits or contacts at my place of employment.

7) I understand that I am to have no call-forwarding, call-waiting or any service other than direct call-in on my home phone.

8) I agree to participate in any community program deemed appropriate by EHC staff or ordered by the Court.

9) While a participant in the EHC program, all medical expenses incurred will be my responsibility.

10) I will not associate with anyone on probation, parole or pending judicial action or anyone involved with illegal activity.

11) I understand that the consumption of alcohol or possession, in any fashion, is prohibited. Also, the possession or consumption of any unlawful drug or controlled substance is prohibited.

12) In order to defray the costs of the program and monitoring equipment, I understand that I will be assessed a supervision fee to participate in this program and I agree to pay this fee. It is understood that the payment of this fee is a condition of my participation on this program. I understand that should I not be able to afford the daily fee and am still interested in the EHC program, I will have the opportunity to work this fee off on the Work Crew program, still confined to my home when not working on crew.

13) I understand and agree to be financially responsible for daily costs of equipment not returned immediately upon termination. I further understand I am financially responsible for stolen, lost, damaged, or alteration of said equipment and will be subjected to prosecution.

14) I acknowledge my EHC Program start date is \_\_\_\_\_ and scheduled termination is \_\_\_\_\_. I have received equipment number \_\_\_\_\_ and agree to return the equipment immediately upon program termination.

I understand and accept the conditions of Partial Confinement (Electronic Home Confinement) under which I have been released by the sentencing court. I understand failure to abide by all Partial Confinement rules and conditions imposed by the Court and supervised by the County Corrections Department and its representatives may result in removal from the program, return to secure detention, prosecution, and possible revocation of suspended jail time.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

DATE: \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE OF PERSON UNDER  
PARTIAL CONFINEMENT

DATE	TIME LEFT/RETURN	APPRX TIME GONE	CALL IN?/NOTES
07/01/03	9:58 AM – 12:01 PM	2 HRS	N
	12:40 PM – 2:41 PM	2 HRS	N
	4:29 PM – 6:44 PM	2 ¾ HRS	N (Note: Extended time twice in one day)
07/02/03	NO PROBLEMS		
07/03/03	10:20 AM – 1:24 PM	3 HRS	N
	7:39 PM – 9:24 PM	2 HRS	N (Note: Extended time twice in one day)
07/04/03	NO PROBLEMS		
07/05/03	NO PROBLEMS		
07/06/03	NO PROBLEMS		
07/07/03	11:45 AM – 3:58 PM	4 HRS	N
07/08/03	4:49 PM – 6:21 PM	1 ½ HRS	N
	6:31 PM – 7:53 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/09/03	11:37 AM – 5:22 PM	6 HRS	N
07/10/03	9:59 AM – 12:28 PM	2 ½ HRS	N
07/11/03	12:30 PM – 5:56 PM	5 ½ HRS	N: ATTEMPTED CALLING – NO ANSWERS
07/12/03	9:36 AM – 11:00 AM	1 ½ HRS	N: ATTEMPTED CALLING – NO ANS
	1:49 PM – 3:47 PM	2 HRS	N: ATTEMPTED CALLING – NO ANS (Note: Extended time twice in one day)
07/14	11:02 AM – 12:29 PM	1 ½ HRS	N: ATTEMPTED CALLING – NO ANS
	4:35 PM – 5:59 PM	1 ½ HRS	N: ATTEMPTED CALLING – NO ANS (Note: Extended time twice in one day)
07/15/03	10:24 AM – 1:57 PM	3 ½ HRS	N: ATTEMPTED CALLING – NO ANS
07/16/03	2:38 PM – 7:15 PM	4 ¾ HRS	N: ATTEMPTED CALLING – NO ANS
07/17/03	10:02 AM – 11:56 PM	2 HRS	N
	6:10 PM – 7:22 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/18/03	1:54 PM – 3:41 PM	1 ¾ HRS	N

	3:47 PM – 5:23 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/19/03	5:07 PM – 9:11 PM	4 HRS	N: ATTEMPTED CALLING – NO ANS
07/20/03	11:45 AM – 1:55 PM	2 HRS	N: ATTEMPTED CALLING – NO ANS
07/22/03	10:59 AM – 2:54 PM	4 HRS	N: ATTEMPTED CALLING – NO ANS
	3:16 PM – 5:23 PM	2 HRS	N (Note: Extended time twice in one day)
07/23/03	10:52 AM – 4:22 PM	5 ½ HRS	N: ATTEMPTED CALLING – NO ANS
	6:53 – 8:19 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/24/03	3:07 PM – 5:39 PM	2 ½ HRS	N
07/25/03	NO PROBLEMS		
07/26/03	12:18 PM – 4:41 PM	4 ½ HRS	N ATTEMPTED CALLING – NO ANS
	7:04 PM – 9:40 PM	2 ½ HOURS	N (Note: Extended time twice in one day)
07/27/03	NO PROBLEMS		
07/28/03	10:42 AM – 12:24 PM	1 ½ HRS	N
07/29	9:50 AM – 12:21 PM	2 ½ HRS	N
	2:38 PPM – 4:56 PM	2 ½ HRS	N: ATTEMPTED CALLING – NO ANS //(Note: Extended time twice in one day)
07/30/03	9:11 AM – 11:18 AM	2 HRS	N
	7:21 PM – 8:45 PM	1 ½ HRS	N (Note: Extended time twice in one day)
07/31/03	4:39 PM – 6:36 PM	2 HRS	N

NOTES: This writer is only recording the times that were outside the hour and a half. Times like 1 hr 15 minutes were not recorded. Mr. Stein goes in and out quite a bit. Even on the days where it is indicated "NO PROBLEM" there were still a lot of ins and outs.

**RULES:**

Mr. Stein can be in and out of his residence – **ON HIS PROPERTY** – for an hour at a time without calling in. He is to return to the house for a few minutes each hour to register with the equipment that he is present.

Mr. Stein is allowed 1 ½ hours per day -- off premises. However, he must call in with the location of where he is going – Name of business/address.

Clearly Mr. Stein is stretching these limits by being not checking in on an hourly basis. If he is going off premises, he is failing to call in where he is going including location. Mr. Stein also refuses to answer either of the phones when I call.

Appendix G

Opinion February 26, 1999, Court of Appeals, Division II, No. 20813-0-II;  
State v. Stein, 94 Wn. App. 616, 972 P.2d 505 (1999).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN KENNETH STEIN aka JACK STEIN,

Appellant.

In re the Personal Restraint Petition of:

JACK K. STEIN,

Petitioner.

No. 20813-0-II  
(consolidated)

PART PUBLISHED OPINION

No. 21767-8-II

Filed: FEB 26 1999

SEINFELD, P.J. – Jack Stein appeals his convictions of three counts of attempted murder and one count of burglary. We conclude that the court’s instructions erroneously allowed the jury to convict Stein on the basis of vicarious liability without finding that he was legally accountable as an accomplice.<sup>1</sup> Because this is prejudicial error, we reverse.

FACTS

Jack Stein believed that a group of people, including his father’s appointed guardian, Ned Hall, and his father’s long-term companion, Thelma Lund, were conspiring to control and

<sup>1</sup> Stein raises numerous other issues in his appeal and in his Petition for Habeas Relief, which we have consolidated with his direct appeal.

deprive him of the substantial assets in his father's estate. As a result, in 1983, he asked his stepson, Michael Norberg, if he could find someone who "could arrange an accident for these people that were involved." Stein said that he would pay \$10,000 for each person eliminated.

The relationship between Stein and attorney Hall continued to deteriorate and in the spring of 1987, Stein gave Norberg "flash cash" to use in enticing one of his friends to help. After Norberg "flashed" a large amount of cash, Richard Bailey agreed to do a "job."

Stein provided Norberg a key to Lund's home and in April 1987, Lund was severely beaten and strangled to death in her home. Norberg later testified that Bailey went into Lund's trailer to threaten her, but killed her instead. But Bailey said that Norberg killed Lund in her trailer while he hid in the bushes.

After Lund's murder, Stein took Norberg to Hall's hunting cabin in Oregon and discussed it as a potential spot for an isolated confrontation. Norberg said that he gave Bailey the "exclusive rights" for the "hit" of Hall to satisfy Bailey's demands for payment for the Lund killing.

In June 1987, Bailey, Norberg, and others participated in three separate unsuccessful attempts to kill or intimidate Hall. The first involved Bailey, Norberg, Gordon Smith, and Steve Conley. The foursome went to Hall's house armed with bottles filled with a Naptha soap-gasoline mixture. They intended to "scare Ned Hall" by igniting the bottles. Bailey testified that he and Smith carried the bottles to the edge of Hall's back yard, but then ran away leaving the bottles behind.

The second attempt was three to five days later. Bailey testified that he and Smith went to Hall's house after Norberg provided them each with a handgun and promised to pay Bailey if he killed Hall. Hall said a man rang his doorbell at 4:30 a.m. and asked to use the telephone;

Hall did not open the door. Later, another man rang Hall's doorbell. Hall spoke to the man briefly through an open window. Norberg testified that he was unaware of this second occurrence until after it happened.

The third attempt on Hall occurred on June 14, 1987, when Smith, Norberg, Bailey, and Bailey's brother went to Hall's house armed with weapons. Norberg remained at the corner of the yard to watch the road while Smith climbed into the house through the bathroom window. When Hall started to enter the bathroom, Smith fired a shot through the door, dove out the window and ran with the Baileys, leaving Norberg behind.

Norberg testified that he had told the others before leaving that night that "they weren't to do any more activity over at Ned Hall's house." He also claimed that "[t]hey weren't attempting to kill Ned Hall, they were attempting to persuade him[]" and that he had gone along to observe the "persuasion" and verify that it was completed. After this third attempt, Ned Hall resigned as Nicholas Stein's limited guardian.

Later in the summer, Stein expressed his satisfaction to Norberg and Bailey that the attempts on Hall's life had led to Hall's resignation. According to Bailey, Stein told him that payment for his services would soon be forthcoming, but that first he wanted Bailey to blow up the Clark County Courthouse and kill a judge. Stein also indicated that "he still wanted Ned Hall done in."

Following an investigation, the State charged Stein with the following criminal counts:

- I. conspiracy with Michael Norberg, Gordon Smith, and Richard Bailey to commit first degree murder, RCW 9A.28.040(1) and (3)(a);
- II. felony first degree murder of Thelma Lund, RCW 9A.32.030(1)(c);
- III. aggravated first degree murder of Thelma Lund, RCW 9A.32.030(1)(a), based upon the aggravating factors of solicitation, RCW 10.95.020(5), and commission of the murder during the course of burglary, former RCW 10.95.020(9)(c) (1981);

- IV.-VI. criminal attempts to commit the first degree murder of Charles (Ned) Hall on June 1, 1987, between June 2 and June 13, 1987, and June 14, 1987, RCW 9A.28.020(1) and (3)(a);
- VII. burglary in the first degree, RCW 9A.52.020.

Ultimately, the State based Counts II through VII upon vicarious liability. RCW 9A.08.020.

The jury acquitted Stein of Counts I through III but convicted him of Counts IV through VII, the three attempts to murder Ned Hall and the burglary. The trial court sentenced Stein to 180 months for each count of attempted first degree murder and ordered that he serve the sentences consecutively.

In this appeal,<sup>2</sup> Stein claims that the trial court erred in (1) instructing the jury on vicarious liability; (2) denying his motion to remove trial counsel and trial counsels' motion to withdraw; and (3) allowing another judge to testify about earlier civil proceedings involving Stein. Stein also claims that (4) the prosecuting attorney's pre-charging bias violated the appearance of fairness doctrine; (5) the State knowingly presented perjured testimony; (6) cumulative evidentiary errors denied him a fair trial; and (7) the State's evidence was insufficient as a matter of law to prove accomplice liability. (8) Stein also appeals his consecutive sentences for the three attempted murder counts, contending that they should be concurrent.

Pro se, Stein argues that: (1) the court violated his speedy trial rights; (2) recantation affidavits by key State witnesses require reversal or a new trial; (3) professional misconduct by various officials violated due process; (4) the trial court improperly denied Stein's request for appointed counsel on appeal; and (5) appellate counsel's deficient performance on his first

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<sup>2</sup> Stein first filed his appeal in 1989, but due to his failure to perfect the record, this court finally dismissed it. Stein then brought a Writ of Habeas Corpus. The federal district court, in May 1996, ordered the appeal reinstated.

appeal resulted in unconstitutional delay of his direct appeal. Stein raises identical issues in his Petition for Habeas Relief, which we have consolidated with his direct appeal.<sup>3</sup>

## DISCUSSION

### I. VICARIOUS LIABILITY INSTRUCTIONS

The trial court gave the following vicarious liability instructions:

#### Instruction 16

A person is legally accountable for the conduct of another person when the defendant is an accomplice of such other person in the commission of the crime.

A defendant who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A defendant is an accomplice in the commission of a crime, if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) solicits, encourages, or requests another person to commit the crime[;]
- or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence.

#### Instruction 17

A person is guilty of a crime if it is committed by the conduct of an accomplice for which he is legally accountable.

A person legally accountable for the conduct of an accomplice may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime.

#### Instruction 18

A person is also legally accountable for the conduct of another person when the defendant is a co-conspirator of such other person, and the acts or conduct of the other person are a reasonably foreseeable consequence of the unlawful agreement.

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<sup>3</sup> We converted Stein's Petition for Habeas Relief to a Personal Restraint Petition pursuant to RAP 16.3.

Instruction 19

When a defendant, with intent that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct, he becomes a member of a conspiracy, and continues to be a member of such conspiracy, and is responsible for all the acts of all members of the conspiracy regardless of whether or not he met or conversed with all the other members of the conspiracy, and regardless of whether or not he had knowledge of the commission of such acts by other members of the conspiracy, so long as the acts of the other members of the conspiracy were reasonably foreseeable as acts done in furtherance of the agreement.

We refer to instructions 16 and 17 as the “accomplice liability” instructions and instructions 18 and 19 as the “*Pinkerton*” instructions. *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). The trial court also instructed the jury, in instruction 8, that:

A separate crime is charged in each count. You should decide each count separately as if it were a separate trial. Your verdict on one count should not control your verdict on any other count.

Stein argues that it was reversible error to give the *Pinkerton* instructions because the *Pinkerton* doctrine is not the law in Washington and the *Pinkerton* instructions improperly allowed the jury to hold him vicariously liable without finding him guilty of all the elements of accomplice liability. He argues, alternatively, that even if the *Pinkerton* doctrine was the law in this State, the trial court’s instructions are defective because they do not include all the necessary elements. Finally, Stein contends that defense counsel’s failure to object to the court’s instructions constitutes ineffective assistance of counsel.

The State contends that by failing to object below, Stein waived appellate review; that the *Pinkerton* doctrine is consistent with Washington law; and that any instructional error was harmless because the jury acquitted Stein of conspiracy and, thus, necessarily based its guilty verdicts on the accomplice liability instructions, not the *Pinkerton* instructions.

A. Preservation of Issue on Appeal

The *Pinkerton* instructions immediately followed the accomplice liability instructions; together they provided two alternative theories of vicarious liability – one based upon the accomplice liability statute, RCW 9A.08.020, and the other based loosely upon the federal *Pinkerton* doctrine. Using the *Pinkerton* instruction, the jury could have found Stein guilty of murder and burglary without finding proof of each element of accomplice liability.

Jury instructions that omit an element of the charged crime present an error of constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds in State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985)). The error alleged here was tantamount to omitting an essential element of the charged crime. Because a failure to object to such an error below does not preclude appellate review, we consider Stein's claimed error. *Scott*, 110 Wn.2d at 685 n.5, 690; *Johnson*, 100 Wn.2d at 623.

B. *Pinkerton* Liability in Washington

Under the federal *Pinkerton* doctrine, a defendant may be liable for the substantive acts of others upon proof that (1) the defendant was guilty of conspiracy, (2) a co-conspirator committed the substantive crime pursuant to and as a reasonably foreseeable consequence of the conspiracy, and (3) the defendant was a member of the conspiracy at the time the crimes were committed. *Pinkerton*, 328 U.S. at 645-47; *United States v. Aramony*, 88 F.3d 1369, 1379 (4<sup>th</sup> Cir. 1996); *United States v. Campione*, 942 F.2d 429, 438 (7<sup>th</sup> Cir. 1991); *United States v. Alvarez*, 755 F.2d 830, 847 (11<sup>th</sup> Cir. 1985). Thus, under the *Pinkerton* doctrine, a defendant who is acquitted of conspiracy or whose conspiracy conviction is reversed on appeal cannot be liable for the substantive crimes committed by another. *United States v. Rosas-Fuentes*, 970

F.2d 1379, 1383 (5<sup>th</sup> Cir. 1992) (substantive conviction based on *Pinkerton* fails when conspiracy conviction reversed); *United States v. Nusraty*, 867 F.2d 759, 765 (2<sup>nd</sup> Cir. 1989) (insufficient evidence or acquittal of conspiracy precludes *Pinkerton* liability); *but see United States v. Gallo-Chamorro*, 48 F.3d 502, 505 (11<sup>th</sup> Cir. 1995) (conviction of substantive charge upheld although defendant acquitted of conspiracy where verdicts could be read as consistent because jury could have found that defendant was involved in more than one conspiracy).

We find no Washington cases citing *Pinkerton* as the basis for vicarious criminal liability. Further, none of the cases that the State cites hold a defendant liable for the substantive acts of a co-conspirator without also satisfying the requirements of statutory accomplice liability.<sup>4</sup> The State also cites RCW 9A.04.060, which provides: “[t]he provisions of the common law relating to the commission of crime, insofar as not inconsistent with the . . . statutes of this state, shall supplement all penal statutes.” Under this statute, the *Pinkerton* doctrine arguably could be applicable in Washington. But because the *Pinkerton* instructions that the trial court gave here

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<sup>4</sup> *State v. Toomey*, 38 Wn. App. 831, 839-40, 690 P.2d 1175 (1984) (defendant held guilty of felony murder under RCW 9A.32.030(1)(c) based on accomplice liability for the underlying robbery); *State v. Dudley*, 30 Wn. App. 447, 454-55, 635 P.2d 750 (1981) (defendant liable for felony murder based on accomplice liability for underlying burglary); *State v. Cooper*, 26 Wn.2d 405, 413, 174 P.2d 545 (1946) (defendant may be liable under an aiding and abetting instruction even when charged as a principal); *State v. Dault*, 25 Wn. App. 568, 573, 608 P.2d 270, 9 A.L.R.4<sup>th</sup> 965 (1980) (an accessory may be convicted even though the principal has not been tried, or has been tried and acquitted, or tried and convicted of a lower degree of the crime); *State v. Berry*, 200 Wash. 495, 521, 93 P.2d 782 (1939) (each of four defendants admitted their individual participation in the charged criminal conduct but asserted different defense theories); *State v. McNeil*, 161 Wash. 221, 225, 296 P. 555 (1931) (in dicta only, the court stated that “[t]o show that [the defendant] counseled, aided, and abetted, it was competent to prove that he entered into a conspiracy with the others to commit the crime, and that its commission was the result of such conspiracy”); *State v. Baker*, 150 Wash. 82, 94-96, 272 P. 80 (1928) (one co-defendant’s first degree premeditated murder conviction reversed because of insufficient evidence of his premeditated intent to kill; other co-defendant’s conviction affirmed, even though not present at scene of shooting, because evidence pointed to a common purpose to kill any officer attempting to enforce laws against unlawful manufacture of liquor).

were fatally defective, we leave for another day the question of the doctrine's applicability in this jurisdiction.

The court's *Pinkerton* instructions were defective because they failed to advise the jury that it could not hold Stein liable for the substantive acts of co-conspirators unless it also found Stein guilty of conspiracy. Thus, even assuming the applicability of the doctrine, the instructions were defective because they failed to include all the doctrine's essential elements. See *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997); *State v. Eastmond*, 129 Wn.2d 497, 502-03, 919 P.2d 577 (1996).

### C. Harmless Error

The State suggests that accomplice liability and *Pinkerton* liability are virtually the same. Based upon this premise, it contends that the erroneous *Pinkerton* instructions were harmless. We disagree.

We presume that an instructional error is prejudicial unless the State satisfies its burden of affirmatively showing harmless error. *Smith*, 131 Wn.2d at 263-64. Failure to instruct on an element of offense is reversible error. *Smith*, 131 Wn.2d at 265; *Eastmond*, 129 Wn.2d at 503 (omission of an element of the crime is fatal error because it relieves the State of its burden of proving every essential element beyond a reasonable doubt); *State v. Garcia*, 65 Wn. App. 681, 691, 829 P.2d 241 (1992) (reversal required even if there were valid instructions if jury might have convicted relying upon other instructions for which conviction was impermissible).

The *Pinkerton* instructions in this case provided for substantially broader liability than did the accomplice liability instructions. A comparison of the elements of each is illustrative:

**Elements of Accomplice Liability  
Instructions 16 and 17**

- (1) D solicits, encourages or requests another to commit the charged crime; OR
- (2) D aids or agrees to aid another in planning or committing the charged criminal conducts;  
AND
- (3) D had knowledge his conduct would promote or facilitate commission of charged crime;  
AND
- (4) Another person committed the charged crime.

**Elements of *Pinkerton* Liability  
Instructions 18 and 19**

- (1) D has intent that criminal conduct be performed AND
- (2) D agrees with another to
  - (a) engage in such conduct ; OR
  - (b) cause the performance of such conduct AND
- (3) Charged crime is reasonably foreseeable consequence of the unlawful agreement. AND
- (4) A co-conspirator committed charged crime;

Thus, under the court's *Pinkerton* instructions, the jury could have found Stein **liable** for the attempts to murder Ned Hall if it found that (1) Stein intended the commission of *any* criminal conduct, such as assault, and (2) Stein agreed with one of the co-conspirators to cause the performance of such conduct, and (3) the murder attempts were a reasonably foreseeable consequence of the agreement to commit the lesser crime. Under the *Pinkerton* instructions, it was not necessary to prove that Stein had any involvement in or even knew about the murder attempts; he could be found guilty of the murders and burglary based upon a finding that he and Norberg agreed to assault Hall if the murder attempts were a reasonably foreseeable consequence of that agreement.

But these facts would not have supported an attempted murder conviction **under** the accomplice liability instructions unless the jury further found that Stein actually had knowledge that his conduct would promote or facilitate the commission of the murder attempts. Thus, a jury could have found Stein guilty under the court's *Pinkerton* instructions on evidence that would not have persuaded it to find him guilty of accomplice liability.

Further, contrary to the State's argument, the jury's acquittal on the conspiracy charge does not necessarily indicate that the jury did not rely upon the *Pinkerton* instructions. The trial court did not instruct the jurors to ignore the *Pinkerton* instructions if they acquitted on the conspiracy charge. Rather, it specifically instructed the jury that its "verdict on one count should not control" its verdict on any other count.

In addition, the State focused on a conspiracy theory of liability and did not discuss accomplice liability during closing argument. The prosecutor quoted in full instruction 19, and then argued that Stein was liable for Lund's murder based upon a conspiracy theory. The prosecutor then continued:

[Stein]'s guilty of all the acts of all the other conspirators even if he didn't know they were being committed at the time. That liability flows from the law which says once you get into a conspiracy you're stuck. You're liable for what everybody else does.

The law does not treat conspirators lightly. In terms of their liability for the acts of others.

Later in the argument, the prosecutor further stated:

In a conspiracy case, ladies and gentlemen, there are a lot of pieces and a lot of parts of the puzzle, and you have to look at all of them and put them together and use your ability to do that. To draw reasonable inferences. Bailey did agree to kill Ned Hall in May of 1987, and Bailey went out and recruited still another member of this conspiracy, another member who once he enters the conspiracy Jack Stein becomes liable for his conduct if Jack Stein was a member of the conspiracy already, and that was Mr. Gordon Smith.

The accomplice liability and *Pinkerton* instructions contain significant differences and there is no basis to conclude that the jury relied on the correct accomplice liability instructions in reaching its verdicts. By permitting the jury to convict Stein under an improper theory, the court relieved the State of its burden of proving beyond a reasonable doubt every essential element of

accomplice liability. Accordingly, the instructional error was of constitutional magnitude and it was not harmless; we must reverse the convictions. *Smith*, 131 Wn.2d at 264.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Although we reverse, we next consider the challenge to the sufficiency of the evidence to determine if the State may retry Stein. We also consider various other assignments of error to aid the trial court and the parties in the event of a retrial.

## II. SUFFICIENCY OF THE EVIDENCE

Stein contends that the evidence, viewed in the light most favorable to the State, does not support the inference that Norberg committed the acts charged in Counts IV, V, VI, or VII. Accordingly, he contends that he cannot be liable as an accomplice.

Accomplice liability is established with proof that the defendant, with knowledge that it will promote or facilitate commission of the crime, either (1) "solicits, commands, encourages, or requests [another] person to commit it," or (2) "aids or agrees to aid such other person in planning or committing it." *State v. Modest*, 88 Wn. App. 239, 250, 944 P.2d 417, review denied, 134 Wn.2d 1017 (1997) (quoting RCW 9A.08.020(3)(a)(i), (ii)). The test for sufficiency of the evidence is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Fussell*, 84 Wn. App. 126, 128, 925 P.2d 642 (1996).

Here, the evidence viewed in the light most favorable to the State supports the conclusion that Stein was an accomplice because he solicited another person to kill Hall with knowledge that his conduct would facilitate the killing. See *Modest*, 88 Wn. App. at 250. Further, the

evidence supports the conclusion that the attempted murders and burglary were committed pursuant to his solicitation. Thus, there was sufficient evidence to hold Stein accountable as an accomplice.

Stein asserts that the reference to “such other person” in RCW 9A.08.020(3)(a)(i) is limited to the wrongdoer in RCW 9A.08.020(1).<sup>5</sup> In other words, Stein contends that he cannot be liable as an accomplice unless the person he solicited (Norberg) is the person who actually committed the acts for which he is held legally accountable.

This construction of RCW 9A.08.020 would allow sophisticated criminals to avoid accomplice liability by engaging in a multiple-tiered arrangement: soliciting person # 1 to solicit person # 2 to commit the criminal act. This would be an absurd result. *See State v. Riles*, 135 Wn.2d 326, 340, 957 P.2d 655 (1998) (courts must construe statutes to avoid strained or absurd interpretations). We conclude that the Legislature did not intend this interpretation.

Nor are we persuaded by Stein’s argument that our interpretation of RCW 9A.08.020 somehow renders the criminal solicitation statute a nullity. Criminal solicitation requires “intent”; whereas accomplice liability requires only “knowledge.” *Cf.* RCW 9A.28.030 and RCW 9A.08.020. In any event, Stein’s argument incorrectly assumes that the Legislature is

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<sup>5</sup> RCW 9A.08.020 provides in pertinent part:

“(1) A person is guilty of a crime if *it is committed by the conduct of another person* for which he is legally accountable.

“(2) A person is legally accountable for the conduct of another person when:

“ . . . .

“(c) He is an accomplice of such other person in the commission of the crime.

“(3) A person is an accomplice of another person in the commission of a crime if:

“(a) With knowledge that it will promote or facilitate the commission of the crime, he

“(i) solicits, commands, encourages, or requests *such other person* to commit it; or

“(ii) aids or agrees to aid *such other person* in planning or committing it;”

(Emphasis added.)

precluded from adopting a statutory offense composed of elements that all are included in a greater offense.

### III. RIGHT TO COUNSEL OF CHOICE

Stein contends that the trial court violated his right either to self-representation or representation of his own choice by denying his motion to remove his counsel and by denying counsel's motion to withdraw. He claims that third parties retained and paid his attorneys without his consent, violating his right to counsel free from conflict of interest. He also asserts that the record does not support the court's findings of fact and conclusions of law.

Two attorneys entered an appearance on Stein's behalf, representing themselves as Stein's retained counsel. But during a telephone conference call about four months later, in late April 1989, Stein stated: "I want it very clear on the record that I haven't selected counsel for this case." He said that he was interviewing potential replacement counsel, but did not indicate any conflict of interest.

After the attorneys moved for partial distribution of Stein's father's estate in the civil case, Stein filed a motion and affidavit to remove defense counsel in his criminal case. He alleged that third persons whose interests were adverse to his were paying the attorneys' fees; that the attorneys had been retained without his knowledge and consent; and that he did not wish to be represented by them.

At some point around this time, defense counsel raised the issue Stein's competency to stand trial.<sup>6</sup> Stein's conflict of interest claims and his competency dominated several proceedings in May and June.

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<sup>6</sup> The parties refer to a May 8 and May 24 hearing but have not provided a record of either hearing.

Stein testified that the prosecuting attorney was conspiring with the persons **who** were paying his defense counsel. Defense counsel denied this allegation, claiming that Stein's cousin, who had paid the defense fees, had "consistently done what he could to help **Mr.** Stein notwithstanding Jack's total delusional and paranoid conclusions." Further, mental health professionals testified that Stein was suffering from an organic delusional disorder that led to his fears of a conspiracy. One of the examining doctors opined that Stein would likely have problems with any counsel.

The trial court denied Stein's motion to remove defense counsel and defense counsel's later motion to withdraw. It also refused to consider allowing Stein to proceed pro se.

A. Adequacy of the Record

The State contends that the record is inadequate to review the trial court's factual findings. Although we do not have the record for the hearings that allegedly occurred on May 8 and May 24, the record we do have contains substantial evidence to support the court's factual findings. Thus, we review the trial court's conclusions of law de novo. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998) (factual findings reviewed for substantial evidence, conclusions of law reviewed de novo); *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995) (effective assistance of counsel challenge reviewed de novo).

B. Actual Conflict of Interest

The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. *White*, 80 Wn. App. at 410 (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). An attorney's conflict of interest creates reversible error without a showing of prejudice if (1) the defendant shows an actual conflict adversely affecting his lawyer's performance; or (2) the trial court knows or reasonably

should know of a potential conflict into which it fails to inquire. *White*, 80 Wn. App. at 411 (citing *In re Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983)). Because Stein has not demonstrated prejudice, we limit our inquiry to the above situations.

As to the first situation, we engage in a two-part inquiry: (1) was there an actual conflict of interest; and (2) if so, did the conflict adversely affect the performance of defendant's attorney? *White*, 80 Wn. App. at 411. An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. *White*, 80 Wn. App. at 411 (citing *State v. Byrd*, 30 Wn. App. 794, 798, 638 P.2d 601 (1981); RPC 1.7(b)).

Here, nothing in the record indicates an actual conflict, i.e., that defense counsel represented the interests of Stein's cousin, that the cousin's interests were adverse, or that the cousin was privy to any confidential information.<sup>7</sup> Nor does the record indicate that the alleged conflict adversely affected trial counsel's defense of Stein. *White*, 80 Wn. App. at 411.

Nor does the record support Stein's contention that the trial court failed to conduct proper inquiry once it became aware of a potential conflict. The court considered the conflict issue during at least three hearings on the record. It interrogated defense counsel in closed proceedings; reviewed the memoranda filed in connection with Stein's motion; heard the testimony of witnesses, including Stein; and heard argument of counsel.

### C. Right to Self-Representation

Stein contends that he requested permission to proceed pro se, but that this request was excised from the record. The State responds that Stein never requested permission to proceed pro se.

The assertion of the right to proceed pro se must be unequivocal. *State v. Luvene*, 127 Wn.2d 690, 698, 903 P.2d 960 (1995); *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). Although the record indicates that Stein mentioned attempting to act as co-counsel, there is no evidence of an unequivocal assertion of the right to proceed pro se. Thus, we find no denial of the right to self-representation.

#### D. Right to Counsel of Choice

The Sixth Amendment right to counsel includes “the right to a reasonable opportunity to select and be represented by chosen counsel.” *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994) (quoting *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5<sup>th</sup> Cir. 1978)). But this right is not absolute. *Roth*, 75 Wn. App. at 824. The public’s interest in prompt and efficient judicial administration may require limitations. *DeWeese*, 117 Wn.2d at 375 (citing *United States v. Wheat*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

A trial court has discretion to decide whether a defendant’s dissatisfaction with his counsel is meritorious. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), *cert. denied*, 118 S. Ct. 1193 (1998). In making this determination, the court may consider (1) whether defendant has a legitimate cause for dissatisfaction; (2) whether substitute counsel is available and prepared for trial; (3) whether the substitution of counsel will substantially prejudice the defendant’s case; and (4) whether the substitution of counsel will unduly delay scheduled proceedings. *Stenson*, 132 Wn.2d at 734; *Roth*, 75 Wn. App. at 824.

Here, Stein did not demonstrate an actual conflict of interest or show that replacement counsel was immediately or prospectively available. In addition, (1) defense counsel did not

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<sup>7</sup> Stein’s unsupported allegation that his cousin conspired with the prosecutor to falsely convict him as part of a larger scheme to exploit the Stein estate is insufficient to establish an adverse

separately move to withdraw until after the jury was impaneled; (2) defense counsel had requested and obtained three previous continuances; (3) the recusal of the entire Clark County bench had necessitated the special appointment of a trial judge; (4) Stein's relationship with counsel remained cooperative and cordial; and (5) counsel's performance was highly competent and, thus, withdrawal would have prejudiced Stein.

Stein's general loss of confidence or trust in his counsel was insufficient to warrant the appointment of new counsel under the circumstances here. *Stenson*, 132 Wn.2d at 734. The trial court properly exercised its discretion in denying Stein's motion.

#### IV. PROSECUTORIAL BIAS

Sometime before the trial at issue here, the Clark County Prosecutor, an alumnus of Lewis and Clark Law School, had become aware that Stein was enrolled in the law school as a first year student. In his official capacity, the prosecutor advised the school that Stein had a criminal record and he urged reconsideration of its admission decision. Relying on these facts, about one month before trial Stein moved to disqualify the Clark County Prosecuting Attorney based upon "unprofessional bias." The court denied the motion and Stein appeals. Stein also claims bias related to contacts Hall had with the prosecutor in the course of obtaining a protective order for Nicholas Stein.

Stein's contention that the prosecutor's conduct demonstrates potential bias and entitles him to reversal lacks merit. A prosecutor is a quasi-judicial officer and, therefore, must act impartially. But a prosecutor's participation in non-adjudicatory proceedings, such as a coroner's inquest, does not violate the appearance of fairness doctrine. *Carrick v. Locke*, 125 Wn.2d 129, 143 n.8, 882 P.2d 173 (1994). Further, A judicial proceeding is valid under the  
interest.

appearance of fairness doctrine “if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing.” *State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992).

The Clark County Prosecutor never acted as a judge, arbitrator, mediator, or other adjudicative officer in relation to Stein. *See* RPC 1.12(a). The events Stein cites bear no relationship to the criminal trial and do not establish potential bias or indicate partiality. Thus, the trial court properly denied Stein’s motion to disqualify the Clark County Prosecuting Attorney’s office.

#### V. USE OF PERJURED TESTIMONY

Stein contends that the State knowingly used perjured testimony and thereby violated his right to due process. Specifically, he asserts that Norberg or Bailey or both committed perjury because they “each testified that he waited outside the trailer while the other killed Thelma Lund.” The State acknowledges that one of these statements necessarily is untrue.

As the State concedes, a “conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the [allegedly] false testimony could have affected the judgment of the jury.” *In re Personal Restraint of Benn*, 134 Wn.2d 868, 936-37, 952 P.2d 116 (1998) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). Thus, we need not decide whether a witness gave perjured testimony or whether the State knew of its truth or falsity, unless there is a reasonable likelihood that the allegedly false aspects of such testimony could have affected the judgment of the jury. *Benn*, 134 Wn.2d at 397 (citing *Agurs*, 427 U.S. at 103).

Here, there is no such likelihood. Norberg testified that Stein recruited him to kill Thelma Lund, Ned Hall, and others. Bailey testified that Norberg recruited him to become

involved in killing Hall. Bailey's and Norberg's testimony concerning the attempts on Hall's life were consistent.

The discrepancy in the testimony of Norberg and Bailey, who blamed each other for actually killing Lund, did not affect evidence that Stein was involved in the attempted murder of Hall and in the burglary. Thus, we see no reasonable likelihood that the obvious falsehood on the part of either Norberg or Bailey could have affected the jury's verdicts. Under the facts here, the State's knowing use of perjured testimony does not require reversal. *See Benn*, 134 Wn.2d at 937.

#### VI. TESTIMONY OF JUDGE LODGE

The State introduced the testimony of Clark County Superior Court Judge Thomas Lodge to prove Stein's motive in seeking the death of Hall – that Hall was part of a “good ol’ boy system” in Clark County aimed at depriving Stein of control of his father's assets. Judge Lodge testified that Stein had appeared before him at least 50 times in various civil cases and had made inappropriate ex parte contacts by confronting him in a belligerent manner in chambers, in the hallway, and outside the courthouse. Judge Lodge stated that Stein “went bananas” in his courtroom, that Stein was the only person he had ever thrown in jail for contempt, and that others had told him that Stein had conspired to kill him. Judge Lodge also described a finding he had made to the effect that Stein had forced Nicholas Stein, who had suffered a stroke, to assign him a real estate contract without consideration.

Stein argues that Judge Lodge's testimony violated his due process rights because it improperly “lent the prestige of the judiciary to the State's case,” and because it was not limited to brief factual matters. Stein further contends that much of Judge Lodge's testimony should have been excluded under ER 403 and 404(b).

The State claims that this case presents one of those “rare circumstances” when a judge may give evidence as to matters upon which he has acted in a judicial capacity. The State further notes that Judge Lodge testified without objection.

We find no absolute rule prohibiting judges from testifying in criminal proceedings regarding collateral matters over which they have presided.<sup>8</sup> See *United States v. Frankenthal*, 582 F.2d 1102, 1108 (7<sup>th</sup> Cir. 1978). But some courts, as well as the Code of Judicial Conduct, have expressed the concern that a jury might misunderstand a judge’s testimony under these circumstances as an official testimonial and, thus, the testimony would unfairly advance the interests of a party. See *Frankenthal*, 582 F.2d at 1108; Canon 2 of the Code of Judicial Conduct.<sup>9</sup>

To avoid this misunderstanding, a judge should testify as to matters upon which he or she has acted in a judicial capacity only when there is no other reasonably available way to prove the facts sought to be established. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 20, 482 P.2d 775 (1975); *Frankenthal*, 582 F.2d at 1108. When it is necessary for a judge to testify, the trial court should strictly limit the testimony to factual matters of which the judge has personal knowledge; a judge should not testify as to his own assessment of another witness’s credibility. *Schultz v. Thomas*, 832 F.2d 108, 110 (7<sup>th</sup> Cir. 1987); *Frankenthal*, 582 F.2d at 1108.

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<sup>8</sup> ER 605 provides: “The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.” The comment to ER 605 states: “The rule does not prevent the judge from testifying in collateral proceedings as to what occurred in an earlier trial. A judge is barred from testifying only at a trial over which he is presiding.”

<sup>9</sup> Canon 2 of the Code of Judicial Conduct states, in pertinent part: “Judges should not testify voluntarily as character witnesses.” The comment to Canon 2 states: “The testimony of judges as character witnesses injects the prestige of their office into the proceeding in which they testify and may be misunderstood to be an official testimonial. This canon, however, does not afford judges a privilege against testifying in response to a subpoena.”

Here, the State deferentially questioned Judge Lodge, who was allowed to provide detailed explanations of his decisions and various points of law. Further, the record of Stein's previous legal proceedings, as well as the testimony of other witnesses, established much of the substance of Judge Lodge's testimony. Thus, much of Judge Lodge's testimony was not strictly necessary and it had the potential to unfairly influence the jury. *See Carroll*, 79 Wn.2d at 20; *Frankenthal*, 582 F.2d at 1108.

But Stein waived any error by failing to object either before or during trial. *In re Dependency of Penelope B.*, 104 Wn.2d 643, 659, 709 P.2d 1185 (1985) (a jury can properly consider testimony admitted without objection); *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967) (testimony admitted without objection is not reviewable on appeal); ER 103(a)(1). Further, Stein himself called Judge James Ladley as a defense witness. Nonetheless, we caution the State and trial court on remand to consider carefully the need for and appropriate limits of such testimony.

## VII. CUMULATIVE EVIDENTIARY ERRORS

Stein contends that cumulative evidentiary errors denied him a fair trial. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994) (cumulative effect of trial court errors may require reversal even if each error on its own is harmless). Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *Russell*, 125 Wn.2d at 94. But a constitutional error requires reversal unless we are satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *Russell*, 125 Wn.2d at 94.

A. Evidence of Prior Bad Acts

Before trial, Stein made 49 different motions in limine seeking to exclude: (1) references to his father's guardianship; (2) evidence of an alleged plot to blow up the Clark County Courthouse and/or to kidnap and murder a judge; (3) any affidavits or statements made by his father before his death; (4) references to Stein's violation of a restraining order or the fact that his father was taken into protective custody; (5) Lund's former testimony; and (6) references to Stein's involvement in uncharged criminal acts. Stein claimed inadmissibility based on ER 402, 403, 404, and/or 804(b)(1).

The trial court denied the motions but reserved its final ruling for trial when Stein could make more specific objections. We review a trial court's decision to admit or exclude evidence for an abuse of discretion, which is discretion that is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), *cert. denied*, 118 S. Ct. 1193 (1998).

1. Guardianship proceedings

Stein contends that the cumulative testimony about the guardianship proceedings was "unnecessary and prejudicial." The State responds that Stein failed to renew his objections during trial and, thus, did not preserve this issue for appeal. It also argues that "the evidence, relating to [Stein's] efforts to control his father's financial affairs, bore directly on his motive."

A trial court properly admits evidence that is relevant and necessary for purposes other than proving character or propensity even though the evidence might be inadmissible merely to show prior bad acts. *Stenson*, 132 Wn.2d at 708. The evidence here that Stein took advantage of

his helpless father was admitted to show Stein's motive for seeking help in murdering Lund and Hall. Thus, the trial court did not err in admitting it under ER 404(b).<sup>10</sup>

2. Plot to blow up courthouse and kill judges

Both Judge Lodge and Richard Bailey testified about an alleged plot to blow up the courthouse and kill judges. Stein contends that this testimony was "overwhelmingly prejudicial and inflammatory" because the alleged acts were so similar to the charged conduct. The State contends that this testimony was "not within the purview of ER 404(b)" because it "related to conversations between charged co-conspirators during the life of the conspiracy."

We agree with the State. The evidence was probative of Stein's involvement in the charged conspiracy to commit murder and, thus, its admission does not violate ER 404(b). *See United States v. Aranda*, 963 F.2d 211, 213-15 (8<sup>th</sup> Cir. 1992). Although the evidence was prejudicial, the danger of unfair prejudice did not substantially outweigh its significant probative value. ER 403.<sup>11</sup> Thus, the trial court did not abuse its discretion. *Stenson*, 132 Wn.2d at 709.

3. Former testimony of Nicholas Stein and Thelma Lund

In August 1983, Hall brought a civil action against Stein seeking to set aside an assignment of a real estate contract between Stein and his father. Nicholas Stein testified that he had assigned a real estate contract to his son, but immediately afterwards had second thoughts and asked his son to voluntarily rescind it. Lund testified that when Nicholas made the

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<sup>10</sup> ER 404(b) states: "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."

<sup>11</sup> ER 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

assignment he was on four different medications, his physical condition was not good, and he was having trouble with seizures. The trial court admitted Lund's and Nicholas Stein's former testimony during Stein's criminal trial.

Without pointing to any specific testimony, Stein asserts that Nicholas Stein's and Lund's former testimony was not relevant to prove the criminal charges and was unfairly prejudicial. We disagree. The testimony was relevant to explain why there was a limited guardianship for Nicholas Stein and to show the relationship between the guardianship conflicts and Stein's motive to have Hall murdered. Thus, the trial court did not err in ruling that the testimony's significant probative value was not substantially outweighed by the danger of unfair prejudice.

Stein also contends that Lund's and Nicholas Stein's former testimony was inadmissible under ER 804(b)(1) because it occurred during an unrelated civil case and, thus, he did not have an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." ER 804(b)(1). Stein further contends that this erroneously admitted testimony "necessarily violated his right to confrontation."<sup>12</sup>

Under ER 804(b)(1), a witness's former testimony is not excluded by the hearsay rule if such person is unavailable to testify and "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." ER 804(b)(1); *State v. Whisler*, 61 Wn. App. 126, 132-34, 810 P.2d 540 (1991). The motive to cross-examine need only be "similar" not identical. *Murray v. Toyota Motor Distrib., Inc.*, 664 F.2d 1377, 1379 (9<sup>th</sup> Cir. 1982). The focus is upon the motive underlying the

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the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>12</sup> Because Stein does not provide argument or cite authority supporting a constitutional challenge, we review his argument as an evidentiary issue only.

cross-examination rather than the actual exchange that took place. *United States v. McClellan*, 868 F.2d 210, 215 (7<sup>th</sup> Cir. 1989).

Here, there is no question that Lund and Nicholas Stein were unavailable or that Stein had the *opportunity* to cross-examine them in the civil suit. *See Ohio v. Roberts*, 448 U.S. 56, 57, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (change of defense attorney between preliminary hearing and trial did not create situation in which admission of witness's former testimony at trial violated defendant's right to confrontation). Thus, the critical issue is whether Stein had a sufficiently similar motive.

In the civil case, Stein's right to property valued at over one million dollars was at stake. The testimony of Lund and Nicholas Stein undermined Stein's presumed defense that Nicholas was competent to sign the deed and assignment and that he did so voluntarily and without undue influence. Given the adversarial nature of the civil suit, Stein had sufficiently similar motive to cross-examine Lund and Nicholas Stein. *See McClellan*, 868 F.2d at 215 (criminal defendant charged with fraudulent transfer of assets had similar motive during bankruptcy proceedings to cross-examine his subsequently disabled ex-wife where several million dollars of debt were at issue and her testimony undermined his credibility). Thus, the trial court did not abuse its discretion. *Stenson*, 132 Wn.2d at 709.

#### 4. Domestic Violence Protective Order

Judge Ladley testified regarding the issuance of a domestic violence protective order against Jack Stein on behalf of Nicholas Stein. Ned Hall testified that he sought and obtained such an order and that, pursuant to the order, he coordinated the transportation of Nicholas Stein from Portland to Vancouver. Neither Judge Ladley nor Hall testified that Stein violated the

protective order or that Nicholas Stein was taken into protective custody. Thus, their testimony did not fall within the scope of Stein's motions in limine.

Further, Judge Ladley was called as a *defense* witness, and the challenged portion of Hall's testimony that Stein challenges occurred during defense counsel's cross-examination. Thus, Stein cannot now complain that this testimony was unfairly prejudicial. *See State v. Marks*, 90 Wn. App. 980, 986, 955 P.2d 406 (no party can complain of an error it induced the court to make), *review denied*, 136 Wn.2d 1024 (1998).

#### B. Improper Vouching for a Witness During Closing Argument

In closing, the prosecutor made the following argument:

Let's talk about the big lie in this case, and you were subjected to a great big lie. That is, both Norberg and Bailey say the other killed Thelma Lund. One of those persons and maybe both of them are giving you a big lie about who killed Thelma Lund. It can't be both ways. Norberg can't be telling the truth and Bailey telling the truth about who killed her. . . . Neither one of them will admit to being the coward that strangled that elderly grandmother. What we have here . . . from your common sense and experience you're free to conclude is the instruction of self preservation popping [sic] up. Eddie Denny, who was in prison, contacted the police. Unusual occurrence there, you might conclude, when he heard about how Mrs. Lund had died. He heard it through a family member. Mike Norberg testified he expected to be killed in prison. I'd suggest to you that you *could find* very reasonably that Mike Norberg and Richard Bailey are each denying that they personally killed Thelma Lund because of fear that they might get just what she got when they go to prison. And that's a powerful motive there.

(Emphasis added.) Defense counsel did not object during closing argument. Now Stein contends that this argument constituted prejudicial prosecutorial misconduct because it was premised on facts not in evidence.

Failure to object to a prosecutor's allegedly improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.

*State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 118 S. Ct. 1192 (1998). We review a prosecutor's allegedly improper argument in the context of the whole argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *Brown*, 132 Wn.2d at 561. "In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

Here, the prosecutor's argument was a reasonable inference from the evidence. *Gentry*, 125 Wn.2d at 641. Colleagues of Norberg and Bailey came forward from prison to provide additional information after they heard what Norberg and Bailey did to Thelma Lund. Norberg testified that he expected to be killed in prison. Based on this evidence, it was reasonable to "suggest" to the jury that they reasonably "could find" that Norberg and/or Bailey lied about their direct involvement in Lund's death out of fear of the consequences in prison. Thus, Stein has waived his claim that the argument constituted prejudicial prosecutorial misconduct. *Brown*, 132 Wn.2d at 561.

#### C. State's Comment in Front of Jury

Stein contends that the trial court abused its discretion by denying his motion for a mistrial based upon prosecutorial misconduct. His complaint arises out of the State's redirect examination of a witness. The prosecutor asked: "Do you know yourself whether or not people from the First Independent Bank were told by Jack Stein that he needed \$300,000 to buy a \$150,000 house?" Defense counsel objected and there was an exchange of comments by counsel, including a statement by the prosecutor: "I object to [defense counsel] telling the jury what I know. If [defense counsel] –".

Outside the presence of the jury, defense counsel sought a mistrial, alleging that the prosecutor had implied to the jury that “if the jury knew what he knew we wouldn’t even need a trial.” Defense counsel also sought permission to call the prosecutor to testify as to exactly what he did say. The court denied defense counsel’s motions but admonished the attorneys “not to assume facts and not to ask improper questions.” In addition, the court gave the following curative instruction to the jury:

Ladies and gentlemen of the jury, when we started a couple weeks ago, I read you an instruction. I’ll reread that part of the instruction. And the lawyers[’] remarks, statements, and arguments are intended to help you understand the evidence and apply the evidence. They are not evidence, however, and you should disregard any remarks, statements, or arguments which are not supported by the evidence or by the law as I give you. I stated before the evidence is what the witnesses say and what exhibits are admitted.

The next day the defense filed a newspaper article that quoted the State as saying, “[w]ell, your honor, . . . if I’m allowed to tell the jury what I *know* . . . .” The court admitted the newspaper article as an exhibit to show what was said, but stated: “[a]s far as I’m concerned, it doesn’t matter.”

If the prosecutor made the comment reported in the newspaper article, it was improper. See *State v. Alexander*, 64 Wn. App. 147, 155, 822 P.2d 1250 (1992) (improper to leave the jury with impression that a witness knows information favorable to the State which, but for the court’s rulings, would have been revealed). But we assume that the jury followed the court’s curative instruction. *State v. Krause*, 82 Wn. App. 688, 697, 919 P.2d 123 (1996). Thus, we conclude that this alleged error, within reasonable probabilities, did not materially affect the trial’s outcome. *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

VIII. SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES

Because we reverse and remand, we need not address Stein's contention that the trial court improperly imposed consecutive sentences. Nonetheless, we briefly note that we agree with the State's interpretation of the "separate and distinct criminal conduct" language in RCW 9.94A.400(1)(b). The court properly looked to the conduct of the principals rather than to Stein's acts. *State v. Graham*, 68 Wn. App. 878, 881, 846 P.2d 578 (1993). The liability of an accomplice to a crime is the same as that of the principal.

IX. SPEEDY TRIAL RIGHTS

The trial date in this case was rescheduled six times. The relevant dates and reasons for each continuance are set forth below:

TRIAL DATE	REASON FOR DELAY	CrR 3.3(d) Extension	CrR 3.3(g) Excl. Period	Tolling Date	Days Elapsed Between Tolling Date & Next Scheduled Trial Date
10/3/88	Disqualification of entire Clark Co. bench on Stein's motion for recusal	30 days		9/27/88	27 days*
10/24/88	Disqualification of Judge Quinn on Stein's affidavit of prejudice; Appt. of Judge Heavey; Stein "conditionally" waives speedy trial**	30 days	2 days	10/6/88	32 days*
11/7/88	Stein's mot. for continuance and waiver of speedy trial		14 days	11/7/88	14 days
11/21/88	MISTRIAL	60 days		12/15/88	60 days
2/13/89	Stein's mot. for continuance and waiver of speedy trial		84 days	2/13/88	84 days
5/8/89	Defense counsel's motion for continuance over Stein's objection		28 days	5/8/89	28 days*
6/5/89	Trial begins and continues to completion.				

\*Indicates delay that Stein contends was a violation of his speedy trial rights.

\*\*The following language was added to Stein's waiver of speedy trial rights, signed on October 26, 1988: "Note: However, that if the Prosecutor is deceiving me and the Court again, as he as done on SEVERAL previous occasions, this waiver to November 7, 1988 is VOID." Signed: Jack Stein

A. Continuance of the October 3, 1988 Trial Date

Stein contends that the prosecutor sought to delay his October 3 trial date to obtain additional time to extort a confession from Norberg and Bailey and to rehearse the false testimony of witnesses. Because of the prosecutor's alleged misconduct, Stein contends that CrR 3.3(d)(6)<sup>13</sup> should not have been applied to extend the time for trial.

Pro se litigants are bound by the same rules of procedures and substantive law as attorneys. *State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985). RAP 10.3(a)(4) provides that "[r]eference to the record must be included for each factual statement." We find no reference to the record for Stein's allegation about the prosecutor. Thus, we do not address it.

B. Continuance of the October 24, 1988 Trial Date

Similarly, Stein fails to support his contentions that defense counsel pressured him to sign an affidavit of prejudice against a judge without advising him that such motion would further delay trial and that the prosecutor and the court coerced him to sign a conditional waiver. Thus, we do not address this contention.

C. Continuance of the May 8, 1989 Trial Date

Stein contends that his defense counsel's motion for a continuance was not valid because (1) Stein had not retained that individual as defense counsel, and (2) Stein did not consent to waiving his speedy trial rights. The State contends that the trial court properly exercised its

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<sup>13</sup> CrR 3.3 provides:

"(d) **Extensions of Time for Trial.** The following extensions of time limits apply notwithstanding the provisions of section (c):

".....  
"(6) *Disqualification.* If the prosecuting attorney or judge becomes disqualified from participating in the case, the defendant shall be brought to trial as prescribed by this rule or not later than 30 days following the disqualification, whichever is later."

authority to continue the trial date beyond the constraints of CrR 3.3 because doing so served Stein's constitutional right to an adequately prepared defense.

Trial in the time allotted by CrR 3.3 is not constitutionally required and, thus, the trial court has the discretion to grant continuances. *State v. Cauthron*, 120 Wn.2d 879, 910, 846 P.2d 502 (1993). Allowing defense counsel the opportunity to prepare for trial, even over the express objections of a defendant, is a proper exercise of the court's discretion. *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). In reviewing this claim, we consider the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *In re Personal Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

The continuance here was for 28 days and was for the purpose of protecting Stein's right to effective assistance of counsel. Stein has not demonstrated any prejudice resulting from the delay and Stein did not file a motion to remove defense counsel until after the filing of the motion for continuance. Thus, we find no violation of his speedy trial rights.

#### X. RECANTATION EVIDENCE

Following Stein's conviction, Lund's estate and the State of Washington brought a wrongful death and criminal profiteering action against Stein and others. Apparently in conjunction with this civil lawsuit, Stein submitted two recantation affidavits of Bailey signed in 1991 and a purported affidavit of Norberg signed in 1990. The latter is actually Stein's affidavit, followed by Norberg's statement that Stein's affidavit "accurately reflects [their] conversations."

Stein claims that he “filed” these affidavits in his criminal case and asked his criminal appellate attorney to present them in a motion for new trial, but that his attorney refused.<sup>14</sup> Stein further claims that this recantation evidence constitutes grounds for a new trial or reversal.

The State contends that the Norberg affidavit is legally insufficient to support a relief from personal restraint. It also argues that because a civil jury rejected Bailey’s and Norberg’s recantation testimony, Stein cannot prove that the recanting affidavits will “probably change the result of a new criminal trial.”<sup>15</sup>

Stein cannot obtain review on direct appeal because he did not file a timely motion for new trial based on newly discovered evidence pursuant to CrR 7.8(b)(2).<sup>16</sup> But as Stein raises the identical issue in his Petition for Habeas Relief, in the interests of justice, we consider this issue pursuant to RAP 16.4(c)(3);<sup>17</sup> *State v. Landon*, 69 Wn. App. 83, 89-90, 848 P.2d 724 (1993).

If a defendant is convicted solely on the basis of a now recanting witness’s testimony, and the trial court determines such recantation is reliable, the trial court must grant the defendant’s motion for new trial. *State v. Macon*, 128 Wn.2d 784, 804, 911 P.2d 1004 (1996) (citing *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *overruled on other grounds*,

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<sup>14</sup> Although Stein attached these recantation affidavits to his pro se supplemental brief, they are not included in the record on appeal and apparently were not filed below.

<sup>15</sup> This argument fails to take into account the higher burden of proof in a criminal trial.

<sup>16</sup> Under CrR 7.8(b), a defendant must move the trial court for a new trial within one year of the final judgment.

<sup>17</sup> RAP 16.4(a) provides that an “appellate court will grant appropriate relief to a petitioner if the petitioner is under a ‘restraint’ . . . and the petitioner’s restraint is unlawful.” Restraint is unlawful if “[m]aterial facts exist which have not been previously presented and heard, which in

*Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975)); *State v. Smith*, 80 Wn. App. 462, 470, 909 P.2d 1335 (1996), *rev'd on other grounds*, 131 Wn.2d 258, 930 P.2d 917 (1997). But where independent evidence corroborates the recanting witness's original testimony, the ruling on the motion for a new trial lies within the sound discretion of the trial court. *Smith*, 80 Wn. App. at 470.

In making its ruling, the trial court must first determine whether the recantation is reliable in light of all the circumstances, including the witness's possible reasons for recanting; relevant facts at the time of recantation; and the passage of time between the original testimony and the recantation. *Macon*, 128 Wn.2d at 802-04. If the court finds the recantation evidence to be reliable, the defendant must then prove that the evidence (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. If any one of these factors is absent, the court may deny a new trial. *Macon*, 128 Wn.2d at 803-04.

It is unlikely that a trial court would find Norberg's and Bailey's affidavits to be reliable, given all the circumstances. Norberg claims that during his incarceration, he was secretly being given the drug Vistaril, which causes a loss of memory and distorted reality and that, consequently, "his mind accepted" police suggestions. He now contends that "Bailey and Smith were simply burglars with a drug habit." Bailey claims that "[a]ll [he] was doing out at any night was looking for a [sic] easy place to steal some things from, for my drug habit." Further, the affidavits are inconsistent with the evidence of the Naptha soap-gasoline bottles that Hall found

---

the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." RAP 16.4(c)(3).

in his yard; three visits by Bailey and his associates to Hall's home in one month, without stealing anything; and the encounters with Hall on two of the alleged burglary attempts.

In addition, there was substantial independent evidence corroborating Norberg's and Bailey's original trial testimony. Because there is no basis to conclude that the recantation evidence would probably change the result of the trial, a new trial is not warranted. See *Macon*, 128 Wn.2d at 802-04.

#### XI. DENIAL OF APPOINTED COUNSEL ON APPEAL

Stein alleges that the trial court err in failing to find him indigent and appoint counsel for his initial appeal and, thus, denied his constitutional right to counsel. But because he fails to demonstrate the relevance of the court's failure to find him indigent and appoint counsel in 1989 and because the court did find him indigent and appoint counsel for this appeal, this claim is frivolous.

#### XII. REINSTATEMENT OF DIRECT APPEAL

Stein contends that the ineffective assistance of his appellate counsel in his 1989 appeal and the resulting delay between his initial appeal and this appeal violates his due process rights and warrants reversal of his convictions. The State contends that Stein is collaterally estopped from raising these issues because a federal district court, reviewing the dismissal of the first appeal, determined that reinstatement of Stein's appeal was the appropriate remedy for these violations. We agree.

The doctrine of collateral estoppel applies when the party asserting it proves: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication; and (4) the

application of the doctrine does not work an injustice. *Nielson v. Spanaway General Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998).

This court dismissed Stein's initial appeal for failure to perfect the record. A federal district court reviewing Stein's Writ of Habeas Corpus decided two of his claims, namely, ineffective assistance of appellate counsel, and a violation of due process arising from a delay in appellate review. The federal court held that the appropriate remedy was reinstatement of the appeal.

The effective assistance of counsel issue and the due process issue presented to the federal district court were identical to Stein's claims here. Stein, against whom the collateral estoppel doctrine is asserted, was a party to the prior adjudication. The action in federal district court ended with a final judgment ordering reinstatement of the direct appeal. *See United States v. Antoine*, 906 F.2d 1379, 1383 (9<sup>th</sup> Cir. 1990) (ordering acquittal is not the only remedy for a due process violation resulting from unreasonable delay of an appeal); *Coe v. Thurman*, 922 F.2d 528, 532-33 (9<sup>th</sup> Cir. 1990) (remedy for numerous delays attributed to government was directive to court to hear appeal within certain time). And application of the doctrine does not work an injustice. Thus, the elements of collateral estoppel are satisfied, and we do not consider the claims arising from the 1989 appeal.

#### XIV. PROFESSIONAL MISCONDUCT OF ATTORNEYS, JUDGES, AND COURT OFFICIALS

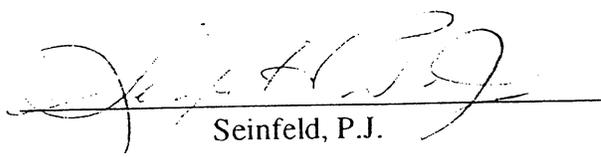
Stein makes numerous allegations of misconduct against his own attorneys, the prosecutor, judges, and court officials. But he provides no citations to the record or competent, admissible evidence to establish the facts he alleges.

Factual allegations unsupported by the record are not reviewable on direct appeal. See RAP 10.3(a)(4). When a petitioner raises constitutional issues in a personal restraint petition, this court may: (1) dismiss the petition if petitioner fails to meet the threshold burden of showing actual prejudice; (2) remand the petition for a full hearing on the merits or for a reference hearing if petitioner makes a prima facie showing of actual prejudice, but the court cannot determine the merits of the contentions solely on the record; or (3) grant the petition without further hearing if there is proof of prejudicial error. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992).

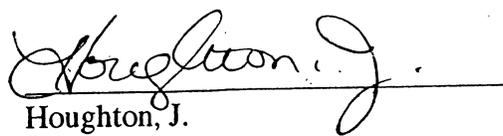
A petitioner seeking a reference hearing must state with particularity the facts underlying the claim of lawful restraint *and the evidence available to support the factual allegations*. *Rice*, 118 Wn.2d at 885-86; RAP 16.7(a)(2)(i). “Bald assertions and conclusory allegations will not support the holding of a hearing.” *Rice*, 118 Wn.2d at 886.

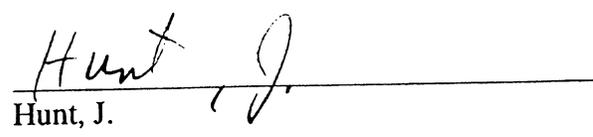
Allegations of misconduct arising in Stein’s previous trial, his initial direct appeal, or collateral proceedings do not show prejudice in the trial on review or in this appeal. Stein’s allegations of misconduct related to the trial on appeal, with the exception of the issues we addressed above, lack factual support; Stein relies on speculation and conjecture. Thus, he has not met his threshold burden of showing actual prejudice. *Rice*, 118 Wn.2d at 885.

We reverse and remand for a new trial.

  
Seinfeld, P.J.

We concur:

  
Houghton, J.

  
Hunt, J.

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Prosecuting Attorney  
Civil Division

Appendix H

Judgment and Sentence and Warrant of Commitment to State of Washington  
Department of Corrections (August 16, 2004) and  
Order Modifying Judgment and Sentence (December 3, 2004).

2 (11)  
S. Clark

FILED

AUG 16 2004

JoAnne McBride, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON  
COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

JOHN KENNETH STEIN, aka  
JACK STEIN,  
Defendant.

SID:  
If no SID, use DOB: 7-6-39

No. 88-1-00788-8

**JUDGMENT AND SENTENCE (JS)**

- Prison  RCW 9.94A.712 Prison Confinement
- Jail One Year or Less  RCW 9.94A.712 Prison Confinement
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Clerk's Action Required, para 4.15.2, 5.3, 5.6 and 5.8

**I. HEARING**

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

**II. FINDINGS**

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

2.1 CURRENT OFFENSE(S): The defendant was found guilty on June 16, 2004 (Date)  
by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
I	Attempted Murder In The First Degree	9A.28.020, 9A.32.030	June 1, 1987
II	Attempted Murder In The First Degree	9A.28.020, 9A.32.030	Between June 2, 1987 and June 13, 1987
III	Attempted Murder In The First Degree	9A.28.020, 9A.32.030	June 14, 1987

as charged in the (Third Amended) Information.

Additional current offenses are attached in Appendix 2.1

The court finds that the defendant is subject to sentencing under **RCW 9.94A.712**.

A special verdict/finding for use of **firearm** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.602, (Ch 290 L 2002 § 11, effective 7/1/03 Ch. 379 L 2003 § 10).

A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.602, (Ch 290 L 2002 § 11, effective 7/1/03 Ch. 379 L 2003 § 10).

- A special verdict/finding of **sexual motivation** was returned on Count(s) \_\_\_\_\_ RCW 9.94A. 835.
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) \_\_\_\_\_, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) \_\_\_\_\_ involve(s) **domestic violence**.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):  
Counts III and IV encompass the same criminal conduct and count as one crime in determining the offender score.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1 no felonies					
2					
3					
4					
5					

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XV	180-240 months	0	180-240 months	Life
II	0	XV	180-240 months	0	180-240 months	Life
III	0	XV	180-240 months	0	180-240 months	Life

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

[X ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] within [ ] below the standard range for Count(s) \_\_\_\_\_. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

Restitution was not requested by the victim.

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: \_\_\_\_\_.

**III. JUDGMENT**

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The court DISMISSES Counts \_\_\_\_\_ [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_.

**IV. SENTENCE AND ORDER**

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

RTN/RJN

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's Office)

PCV \$ ~~100~~ 70 Victim assessment RCW 7.68.035  
CRC \$ \_\_\_\_\_ Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 70 FRC  
Witness costs \$ \_\_\_\_\_ WFR  
Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/WRF  
Jury demand fee \$ \_\_\_\_\_ JFR  
Extradition costs \$ \_\_\_\_\_ EXT  
Other \$ \_\_\_\_\_

① { PUB \* \$ \_\_\_\_\_ Fees for court appointed attorney ~~as determined by the clerk~~ RCW 9.94A.760

WFR \* \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/FCD \$ \_\_\_\_\_ Drug enforcement fund of \_\_\_\_\_ RCW 9.94A.760  
NTF/SAD/SDI

CLF \$ \_\_\_\_\_ Crime lab fee [ ] suspended due to indigency RCW 43.43.690

\$ \_\_\_\_\_ Felony DNA collection fee [ ] not imposed due to hardship RCW 43.43.7541

RTN/RJN \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ \_\_\_\_\_ Other costs for: \_\_\_\_\_  
\$ \_\_\_\_\_ TOTAL RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

[ ] is scheduled for \_\_\_\_\_

[ ] RESTITUTION. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:

① To be determined by further order.  
NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)

RJN \_\_\_\_\_

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_  
RCW 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760.

The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190 and RCW 9.94A.780(5).

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 The defendant shall not have contact with Ned Hall (DOB: 04/04/1915) \_\_\_\_\_ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order or Antiharassment No-Contact Order is filed with this Judgment and Sentence.

4.4 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

- (a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

220 months on Count I 36 months on Count IV
220 months on Count II
220 months on Count III

Actual number of months of total confinement ordered is: 696
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Counts I, II, and III shall run consecutive to each other. Count IV shall run concurrently with Count III.

The sentence herein shall run consecutively with the sentence in cause number(s)

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here:

- (b) CONFINEMENT. RCW 9.94A.712: The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count minimum term maximum term
Count minimum term maximum term

- (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6 [ ] COMMUNITY PLACEMENT is ordered as follows: Count for months; Count for months; Count for months; [ ] COMMUNITY CUSTODY for count(s), sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence. [ ] COMMUNITY CUSTODY is ordered as follows: Count for a range from to months; Count for a range from to months; Count for a range from to months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced

Handwritten note: Defendant shall receive credit for time served on electronic home monitor in pending trial.

under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: \_\_\_\_\_

Defendant shall remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_

The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

The defendant shall undergo an evaluation for treatment for  domestic violence  substance abuse  
 mental health  anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions: \_\_\_\_\_

For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7 working days.

4.7  **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: \_\_\_\_\_

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_.
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

**Cross off if not applicable:**

~~5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.~~

~~If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.~~

~~If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least~~

14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours excluding weekends and holidays after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

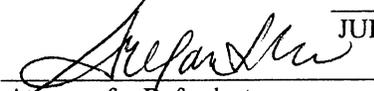
If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of you residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

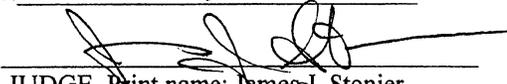
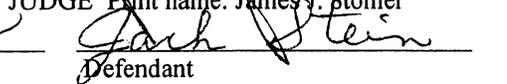
5.8  The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 8-16-04.

  
Assistant Attorney General  
WSBA #21393  
Print name:Lana Weinmann

  
Attorney for Defendant  
WSBA # 17476  
Print name:Suzan Clark

  
JUDGE Print name: James J. Stonier  
  
Defendant  
Print name:John Kenneth Stein, aka Jack Stein

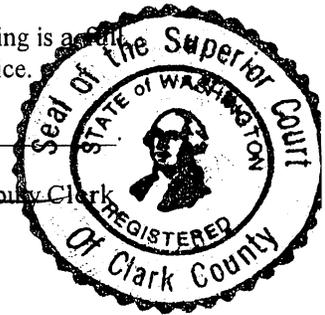
Interpreter signature/Print name: \_\_\_\_\_  
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case: 88-1-00788-8

[Signature], Clerk of this Court, certify that the foregoing is a true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: 8/17/04

Clerk of the Court of said County and State, by: [Signature], Deputy Clerk



**IDENTIFICATION OF DEFENDANT**

SID No. 11726331 Date of Birth 07-06-1939  
(If no SID take fingerprint card for State Patrol)

FBI No. 531 308H Local ID No. \_\_\_\_\_

PCN No. \_\_\_\_\_ Other \_\_\_\_\_

Alias name, SSN, DOB: Jack Stein, DOB 07-06-1939

**Race:**  Asian/Pacific Islander  Black/African-American  Caucasian  Other: \_\_\_\_\_  
**Ethnicity:**  Hispanic  Non-Hispanic  
**Sex:**  Male  Female

**FINGERPRINTS:** I attest that I saw the same defendant who appeared in court on this document and affixed his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk [Signature] Dated: 8/17/04

DEFENDANT'S SIGNATURE: Jack Stein



Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

SUPERIOR COURT OF WASHINGTON  
 COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

No. 88-1-00788-8

v.  
 JOHN KENNETH STEIN, aka JACK STEIN,  
 Defendant.

**ADDITIONAL CURRENT OFFENSES, CRIMINAL  
 HISTORY AND CURRENT OFFENSE SENTENCING  
 DATA (APPENDIX 2.1, 2.2 and 2.3, JUDGMENT  
 AND SENTENCE) (APX)**

2.1 The additional current offenses of defendant are as follows:

COUNT	CRIME	RCW	DATE OF CRIME
IV	Burglary In The First Degree	9A.52.020	June 14, 1987

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100):

#	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME

2.3 The additional current offense sentencing data is as follows:

COUNT NO.	OFFENDER SCORE	SERIOUS-NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
IV	4	VII	36-48 months	0	36-48 months	Life

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom. See RCW 46.61.520 (JP) Juvenile Present

[ ] See additional sheets for more current offenses, criminal history and current offense sentencing data.

SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff

v.

JOHN KENNETH STEIN aka JACK STEIN,

Defendant.

SID: 11726331

DOB: 07/06/39

NO. 88-1-00788-8

**WARRANT OF COMMITMENT TO STATE  
OF WASHINGTON DEPARTMENT OF  
CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

**GREETING:**

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
I	Attempted Murder in the First Degree	9A.28.020 and 9A.32.030	June 1, 1987
II	Attempted Murder in the First Degree	9A.28.020 and 9A.32.030	Between June 2, 1987 and June 13, 1987
III	Attempted Murder in the First Degree	9A.28.020 and 9A.32.030	June 14, 1987
IV	Burglary in the First Degree	9A.52.020	June 14, 1987

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
I	Attempted Murder in the First Degree	220 months
II	Attempted Murder in the First Degree	220 months
III	Attempted Murder in the First Degree	220 months

IV	Burglary in the First Degree	36 months
----	------------------------------	-----------

These terms shall be served as specified herein:

Counts I, II, and III shall run consecutive to each other. Count IV shall run concurrently with Count III.

The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. The time served shall be computed by the Department of Corrections. Defendant shall receive credit for time served on electronic home monitoring pending trial.

And these presents shall be authority for the same.

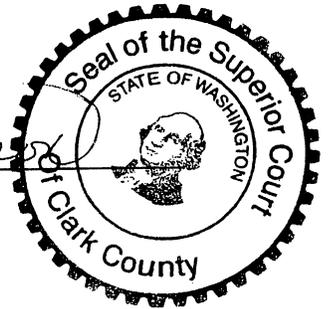
HEREIN FAIL NOT.

WITNESS, HONORABLE JAMES J. STONIER, JUDGE OF THE SUPERIOR COURT

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 8/16/04

JOANNE McBRIDE, Clerk of the  
Clark County Superior Court

By: Sharon Terquest  
Deputy



CMJ  
12-9-04  
152

**RECEIVED**

DEC 09 2004

CRIMINAL JUSTICE DIVISION  
ATTORNEY GENERAL'S OFFICE

**FILED**

DEC 07 2004

JoAnne McBride, Clerk, Clark Co.

**STATE OF WASHINGTON  
CLARK COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

NO. 88-1-00788-8

Plaintiff,

ORDER MODIFYING  
JUDGEMENT AND SENTENCE

v.

JOHN KENNETH STEIN, aka  
JACK STEIN,

Defendant.

**ORDER**

THIS MATTER having come on before the undersigned Judge of the above-entitled court upon the court's own motion, and having considered the request of the Department of Corrections to clarify the total confinement time ordered in Section 4.5(a), page 6 of the Judgment and Sentence entered August 16, 2004, and having conferred with counsel for the state, Lana Weinmann, and counsel for the defendant, Suzan Clark, therefore,

IT IS ORDERED that Section 4.5(a), page 6 of the Judgment and Sentenced entered August 16, 2004 is modified in part to read as follows:

"Actual number of months of total confinement ordered is: 660."

IT IS FURTHER ORDERED that the Clerk of the court shall transmit a copy of this order to the Department of Corrections and to:



Appendix I

Order Dismissing Petition (November 17, 2004, Court of Appeals, Division II, No. 31993-4-II).

Los Angeles  
11/18/04  
2004

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

**RECEIVED**  
NOV 18 2004  
CRIMINAL JUSTICE DIVISION  
ATTORNEY GENERAL'S OFFICE

STATE OF WASHINGTON  
BY [Signature]  
04 NOV 17 PM 2:15  
COURT OF APPEALS

In re the  
Personal Restraint Petition of  
  
JOHN KENNETH STEIN,  
  
Petitioner.

No. 31993-4-II  
  
ORDER DISMISSING PETITION

John Kenneth Stein seeks relief from personal restraint. When he filed this petition, he was awaiting trial on charges of attempted first-degree murder (3 counts) and first-degree burglary (1 count), which followed the reversal of his convictions in *State v. Stein*, 94 Wn. App. 616, 972 P.2d 505 (1999), *affirmed*, 144 Wn.2d 236, 27 P.3d 184 (2001). He has since been convicted of these charges and review of that trial is before this court in cause No. 31980-2-II.

In this petition, Stein makes four challenges: (1) he challenges the denial of his right to a speedy trial; (2) he claims a violation of due process because of excessive appellate delay; (3) he claims a violation of his right to retain counsel of his own choice in the earlier trial proceedings, a right to proceed pro se and a right to a hearing on that

claim; and (4) he claims that prosecutorial misconduct violated his 5th and 14th Amendment rights.

As to (1), his speedy trial claim, petitioner may not raise that claim in a personal restraint petition as he has other remedies available. *See* RAP 16.4(d) (only remedy available). Petitioner could have challenged the timeliness of his last trial either by seeking discretionary review under RAP 2.3(a) or, now, he may present it as part of his direct appeal from that trial. RAP 2.2(1); 2.4(a).

As to (2), his claim of excessive appellate delay, again petitioner seeks to bypass the appeal process. Before the latest trial, the superior court held an extensive hearing on Stein's CrR 8.3 motion, in which he claimed that he could not be retried because of excessive appellate delay. The superior court rejected that claim and Stein, presumably, will raise it in his direct appeal. As Stein has a proper and available remedy, this court will not address it here. RAP 16.4(d).

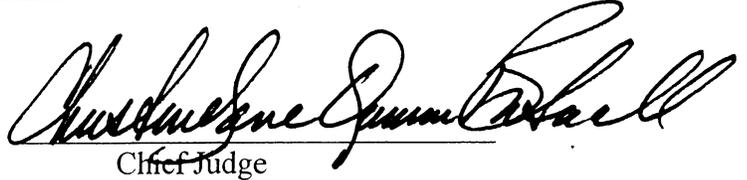
As to (3), the denial of his right to retained counsel of choice, this court previously considered and rejected this claim. *See State v. Stein*, slip opinion at 14-18. This court refuses to reconsider this claim as petitioner fails to give any legitimate reason for this court to reconsider its earlier decision. *See In re Gentry*, 137 Wn.2d 379, 388, 972 P.2d 1250 (1999) (petitioner must demonstrate that redetermining the grounds asserted on appeal would serve the ends of justice).

As to (4), his claim of prosecutorial misconduct, this court previously considered and rejected this and related claims. *State v. Stein*, slip opinion at 18 (prosecutorial bias), 19-20 (use of perjured testimony), 27-29 (vouching), and 36-37 (conspiracy of misconduct). Again, petitioner fails to show that this court should reconsider this claim.

None of petitioner's claims is properly before this court. As such, this petition must be dismissed. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 17 day of November, 2004.

  
Christine J. Quinn  
Chief Judge

cc: John Kenneth Stein  
Clark County Clerk  
County Cause No(s). 88-1-00788-8  
Lana S. Weinmann, AAG

Appendix J

Ruling Denying Review (January 27, 2005, Supreme Ct. No. 76387-9).

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint  
Petition of

JOHN KENNETH STEIN  
(AKA JACK STEIN),

Petitioner.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2005 JAN 27 11:35  
BY C. MERRITT  
CLERK

NO. 76387-95

RULING DENYING REVIEW

Jack Stein was convicted in 1989 of three counts of attempted first degree murder and one count of first degree burglary. On direct appeal, Division Two of the Court of Appeals reversed the convictions, holding that the trial court's instructions erroneously allowed the jury to convict Mr. Stein based on vicarious liability for the acts of a coconspirator without finding that he was guilty of the underlying conspiracy. *State v. Stein*, 94 Wn. App. 616, 972 P.2d 505 (1999). This court affirmed the Court of Appeals, but on the ground that the instructions improperly allowed the jury to convict Mr. Stein without finding all of the elements of accomplice liability. *State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001).

While still awaiting retrial, in April 2004, Mr. Stein filed a personal restraint petition directly in this court, arguing that his speedy trial rights had been violated, that excessive appellate delay had deprived him of due process, that his rights to counsel of his own choosing and to proceed pro se had been denied, that the prosecutor had committed misconduct, and that he had been victimized by other acts of official misconduct. I transferred the petition to the Court of Appeals. Meanwhile,

469/47

Mr. Stein was again convicted, and he appealed to the Court of Appeals, where that matter remains pending.

On November 17, 2004, the Chief Judge of the Court of Appeals dismissed the personal restraint petition. Mr. Stein then filed a motion for reconsideration, which, along with a 125-page "Amended Memorandum in Support of Personal Restraint Petition," was forwarded to this court for treatment as a motion for discretionary review. RAP 16.14(c); RAP 13.5.

The Chief Judge dismissed the personal restraint petition because Mr. Stein failed to show that, as to some issues, his direct appeal would not provide an adequate remedy, and because other issues were decided against him in his first appeal. Mr. Stein demonstrates no obvious or probable error meriting this court's review.

Accordingly, the motion for discretionary review is denied.

  
COMMISSIONER

January 27, 2005

Appendix K

Order Denying Petitioner's Motion to Modify Commissioner's Ruling  
(March 29, 2005, Supreme Court No. 76387-9).



Appendix L

Certificate of Finality (April 5, 2004, Court of Appeals, Division II, No. 31993-4-II).

CMJ  
4-18-05  
W

RECEIVED  
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CRIMINAL JUSTICE DIVISION  
ATTORNEY GENERAL'S OFFICE

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

In re the Personal Restraint Petition of:  
  
JOHN KENNETH STEIN aka JACK STEIN,  
  
Petitioner.

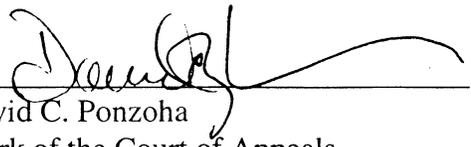
No. 31993-4-II  
  
CERTIFICATE OF FINALITY  
  
Clark County  
  
Superior Court No. 88-1-00788-8

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and  
for Clark County.

This is to certify that the decision of the Court of Appeals of the State of Washington,  
Division II, filed on November 17, 2004, became final on March 29, 2005.



**IN TESTIMONY WHEREOF**, I have hereunto set my  
hand and affixed the seal of said Court at Tacoma, this  
15 day of April, 2005.

  
\_\_\_\_\_  
David C. Ponzoha  
Clerk of the Court of Appeals,  
State of Washington, Division II

CERTIFICATE OF FINALITY

31993-4-II

Page 2 of 2

Lana Sue Weinmann  
Ofc of the Atty General  
900 4th Ave  
Seattle, WA 98164-1008

John Kenneth Stein  
#955827  
Monroe Corr Complex  
PO Box 777  
Monroe, WA 98272-0777

Appendix M

Ruling Denying Review in Court of Appeals, Division II No. 30600-0-II

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OFFICE OF ATTORNEY GENERAL  
TACOMA GENERAL SERVICES UNIT

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN KENNETH STEIN,

Petitioner.

No. 30600-0-II

RULING DENYING REVIEW

FILED  
COURT OF APPEALS  
DIVISION II  
03 SEP -5 AM 10:38  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

In *State v. Stein*, 144 Wn.2d 236, 248 (2001), the Washington Supreme Court reversed John Kenneth Stein's convictions and remanded to the superior court for further proceedings. Stein moved under CrR 8.3 to dismiss the charges against him. On April 1, 2003, the superior court denied Stein's motion. Stein intends to seek discretionary review of the denial of his CrR 8.3 motion, and so made an ex parte motion for an order appointing James Lobsenz as his counsel for purposes of bringing a motion for discretionary review of the denial of his CrR 8.3 motion. On June 3, 2003, the superior court entered the following order:

For purposes of Defendant's request for the appointment of Mr. James Lobsenz as Appellant Counsel, Defendant John Kenneth Stein is indigent.

The request to appoint Mr. Lobsenz for purposes of an interlocutory appeal is denied. RAP 15.2 does not require or authorize appointment of

appellate counsel solely for the purposes of an interlocutory appeal seeking discretionary review.

Br. of Resp., Appendix A. Stein seeks discretionary review of this order.

Stein argues that once the superior court found him indigent, RAP 15.2(b)(2)(a) required the court to appoint counsel for Stein. In that he is correct. Stein then argues that the court committed obvious or probable error in denying his motion to appoint Lobsenz as his counsel to move for discretionary review of the denial of his CrR 8.3 motion. But the court had already appointed counsel to represent Stein. On September 19, 2002, the court appointed William McCool to represent Stein. The court declined to appoint Lobsenz on grounds of cost. On May 13, 2003, the court permitted Stein to represent himself with standby counsel, but ordered that McCool continue to represent Stein on the CrR 8.3 motion. On June 23, 2003, at Stein's request, the court appointed Suzan Clark to represent him and allowed McCool to withdraw.

Stein has had appointed counsel, except when he wanted to represent himself, throughout the superior court proceeding. What he requested, and what the superior court denied, was to have additional counsel, Lobsenz, appointed to handle the motion for discretionary review of the denial of his CrR 8.3 motion. Stein fails to demonstrate that his current appointed counsel, Clark, cannot handle the motion for discretionary review. In his reply brief, Stein submits a declaration from Clark stating that the superior court "did not authorize, nor would I accept appointment on any appellant [sic] matters involving Mr. Stein." Reply to Mot. for Disc. Rev, Appendix B at 1. Clark declares that it is her "understanding when I was appointed to this case is that the trial court had denied Mr.

Stein court-appointed counsel for any appeal of the CrR 8.3 motion to dismiss.” Reply to Mot. for Disc. Rev, Appendix B at 2. But the order appointing Clark contains no such limitation. It provides that “[t]he court hereby appoints Suzan L. Clark, Attorney at Law[,] to serve as lead counsel for Mr. Stein at public expense.” Reply to Mot. for Disc. Rev, Appendix A at 1.

Stein fails to demonstrate that the court committed obvious or probable error in refusing to appoint Lobsenz as additional appointed counsel, and so fails to demonstrate that discretionary review is appropriate under RAP 2.3(b)(1) or (2). Accordingly, it is hereby

ORDERED that Stein’s motion for discretionary review is denied. If the superior court enters an order prohibiting Clark or her appointed co-counsel, Linda Staples, from moving, at public expense, for discretionary review of the denial of Stein’s CrR 8.3 motion, Stein may renew his motion for discretionary review to include such an order.

DATED this 5<sup>th</sup> day of September, 2003.

*Eric B. Schmidt*

Eric B. Schmidt  
Court Commissioner

cc: James E. Lobsenz  
Suzan L. Clark  
Barbara N. Bailey  
Hon. James J. Stonier (visiting judge)  
Clark County Superior Court  
Cause number: 88-1-00788-8  
John Kenneth Stein

**CERTIFICATE OF SERVICE**

I certify that I arranged for service of a copy of RESPONSE TO PERSONAL RESTRAINT PETITION on all parties or their counsel of record on the 11 day of May, 2005 as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery

TO:

JOHN KENNETH STEIN  
#955827  
Monroe Corr Complex  
PO Box 777  
Monroe, WA 98272-0777

DAVID DONNAN  
NANCY P. COLLINS  
Washington Appellate Project  
1511 3<sup>rd</sup> Ave., Ste 701  
Seattle, WA 98101-3635

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

EXECUTED this 11 day of May, 2005 at Seattle, WA.

Vicky Woods  
VICKY WOODS

**In re Jack Stein**  
**Court of Appeals No. 31980-2-II**

FILED  
COURT OF APPEALS  
US MAIL  
STATE OF WASHINGTON  
BY: [Signature]  
MAY 12 PM 12:42

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2005 MAY 11 AM 11:02