

NO. 31980-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

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

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE TRIAL COURT IMPROPERLY REFUSED TO CONSIDER GROUNDS FOR DISMISSING THE CASE CONTRARY TO THE SUPREME COURT'S ORDER AND ERRONEOUSLY DENIED THE CrR 8.3 RULING MOTION TO DISMISS

a. The Supreme Court ordered the trial court to consider Stein's claims of governmental misconduct. The Court of Appeals decision was not the final judgment on the issues Stein raised as grounds for dismissing the charges. The Washington Supreme Court had granted both parties' requests for review of the Court of Appeals decision and, in remanding the case, it ruled, "We . . . leave to the sound discretion of the trial court whether further relief is appropriate under CrR 8.3, or other theories raised in Stein's cross-appeal." State v. Stein, 144 Wn.2d 236, 248, 27 P.3d 184 (2001).

The prosecution now claims that the Supreme Court declined to review Stein's CrR 8.3 issues and other complaints, thus making the Court of Appeals decision the final determination. Resp. Brf. at 28. The State cites to Justice Sanders' dissenting opinion for this proposition. Id., citing 144 Wn.2d at 249 (Sanders, J., dissenting). Justice Sanders criticized the majority for not

dismissing the charges against Stein due to the government's role in denying Stein his right to a timely appeal, but also stated that the majority opinion required the trial judge to review Stein's claim of unjust governmental delay that violated his right to a speedy trial. 144 Wn.2d at 251 (Sanders, J. dissenting) ("I disagree with the majority's decision to leave this remedy to the discretion of the trial court on remand."). Thus, the State's position that the Supreme Court addressed and denied Stein's arguments that the charges should be dismissed due to governmental misconduct and delay is illogical and unsupported by both the majority and dissenting opinions from the Washington Supreme Court.

Moreover, a dissenting opinion's discussion of what the majority decided is not a binding determination of the meaning of a majority's decision. See State v. Smith, 150 Wn.2d 135, 147-48, 75 P.3d 934 (2003) (error to view argument in dissenting opinion as one majority rejected, as "the majority may base its holding on a completely separate analysis and may not even consider those arguments addressed by the dissent"), cert. denied, 124 S.Ct. 1616 (2004); Roberts v. Dudley, 140 Wn.2d 58, 75 n.13, 993 P.2d 901

(2000) (“the precedent which binds the court here is that spoken by the majority. . . .”).

In the case at bar, the Supreme Court did not rule upon the issues raised in Stein’s cross-petition for review. Instead, it remanded the case to the trial court, directing the trial court to decide “whether further relief is appropriate under CrR 8.3, or other theories raised in Stein’s cross-petition.” 144 Wn.2d at 248. Accordingly, the trial court erred in refusing to consider those issues in Stein’s CrR 8.3 motion and instead relying upon rulings issued by the Court of Appeals, when that decision had been superceded by the Supreme Court.

The State further contends the Supreme Court must not have meant what they said when they remanded the case for the trial court to consider the issues of governmental misconduct and other relief, as the earlier Court of Appeals decision settled the facts surrounding those matters. Resp. Brf. at 29. Yet the Supreme Court plainly sent the case back to the trial court for it to resolve these claims. 144 Wn.2d at 248. The State could have moved for reconsideration of this directive, but failed to do so. A motion for reconsideration is the procedure used to argue that an

appellate court has overlooked or misapprehended the facts or the law in a decision. RAP 12.4(c). Thus, the State is precluded from challenging the Supreme Court's remand order in this appeal. See State v. Sherwood, 71 Wn.App. 481, 488, 860 P.2d 407 (1993) (issues final when not appealed).

The trial court improperly refused to entertain argument or allow presentation of evidence regarding Stein's claim of governmental misconduct and denial of speedy trial for inexcusably delaying his right to appeal. This error requires Stein be given a new hearing, unless this Court determines that his charges should be dismissed based upon the arguments raised in his Opening Brief and Statement of Additional Grounds for Review.

b. The record shows reversal is required based on the violation of Stein's right to receive justice in a timely fashion.

The Washington Constitution guarantees the rights to due process of law, to appeal in all cases, and to receive justice that is "administered openly and without unnecessary delay." Wash. Const. art. I, sections 10 and 22. The federal constitution does not have a counterpart for these expressly guaranteed rights, other than the right to due process of law. Federal Judge Bryan ruled

that the State violated Stein's right to due process of law in denying him his right to appeal. (decision attached as Appendix A to Appellant's Opening Brief). Accordingly, the federal court opinion finding the State unjustly denied Stein his right to appeal and remanding the case for a new appeal is not the final word on the remedy to which Stein is entitled for the extreme and unfair appellate delay.

The State also claims that dismissal is not a legitimate remedy for appellate delay, citing as authority New York v. Smith, 486 N.Y.S.2d 216 (N.Y. App. 1985). Resp. Brf. at 22-23. This appellate court decision consists of seven sentences. It involves a somewhat incomprehensible factual scenario where a trial judge had dismissed charges, the prosecution appealed but failed to perfect the appeal, the defendant again moved to dismiss the charges based on the lack of perfection of appeal, and the appellate court believed the defendant set forth grounds to dismiss the charges in its moving papers although it did not agree that the delay in perfecting the appeal would be an adequate basis for dismissal in the interest of justice. 486 N.Y.S.2d at 216. No New York court or other state court appears to have ever cited this case

for any authority. The Smith decision contains no citation to other case law. It simply cannot be relied upon as persuasive authority by this court given its brevity and lack of explanatory reasoning.

The State neglects any analysis of the Washington Constitution's right to the timely administration of justice, a right that does not appear in New York's constitution. The extreme delay, caused in significant part by the State's efforts in seeking the dismissal of Stein's appeal, is a constitutional evil for which Stein is entitled to meaningful relief. See Appellant's Opening Brief, p. 14-19.

c. Judicial misconduct also requires reversal. The State contends, "there is nothing in the record to suggest Judge Bennett used his office to influence Richard Bailey." Resp. Brf. at 25. This assertion is fundamentally misrepresents the record. Law professor John Strait, an expert on judicial ethics, testified that Judge Bennett acted improperly by meeting with Bailey on several occasions before the trial, especially when his purpose was to get Bailey "on board" with the prosecution. 5RP 854; 9RP 1344-46, 1365-67. Judge Bennett plainly intended to "influence Bailey" as he wanted Bailey to testify and knew Bailey felt trust in him. 5RP

685, 705-06. This “influence” does not require explicit pressure to testify in a certain way. 9RP 1366-67.

Moreover, the cause for concern that motivated the meeting between Bailey, Judge Bennett, and the prosecution was that Bailey had changed his testimony in a civil trial that occurred after the prior criminal trial, and had denied Stein committed any criminal conduct. 5RP 699-7011, 764. Thus, getting Bailey “back on board” meant impressing upon him the importance of testifying as he had done in the earlier criminal case. Former prosecutor Dennis Hunter admitted Judge Bennett’s role in meeting with Bailey and the prosecution was in part to rely upon Judge Bennett’s knowledge of Bailey’s testimony from the first trial and to be alert to any changes he might make in his story. 6RP 1009.

Judge Bennett accepted this role as an overseer of Bailey’s testimony in the second trial having built a relationship with Bailey such that Bailey saw Judge Bennett as an authority figure who could aid him. 5RP 705. Bailey had solicited Judge Bennett for several favors. While a prosecutor, Judge Bennett had stretched, or broken, rules to help Bailey, going so far as to provide him with several conjugal visits in the prosecutor’s office, something he had

never done for anyone and only did for Bailey and Bailey's brother. 5RP 694-96. Accordingly, Bailey had a reason to expect favors from Judge Bennett and to be swayed by his influence.

Professor Strait informed the trial court that Judge Bennett's contact with Bailey, knowing he was a judge and having solicited the judge for favors on several occasions, was improper and violated the Code of Judicial Conduct. Judge Bennett used his status as a judge to convince Bailey to testify, to "get him back on board" after Bailey was uncooperative upon finishing his prison sentence, which violated Code of Judicial Conduct Canon 2(b).

Professor Strait also believed the prosecution violated Code of Judicial Conduct Canon 8(f), by encouraging Judge Bennett to use his status as a judge and his influential position to persuade Bailey to testify.

The court based its decision on the notion there was no evidence Judge Bennett encouraged Bailey to testify untruthfully or that he actually threatened Bailey. Yet the ethical rules do not require such misconduct. The perception of impropriety is a violation of the Code of Judicial Conduct. Consequently, the trial court did not properly analyze the misconduct, as it required

deliberate wrongdoing. Further examination demonstrates the court's CrR 8.3 ruling was improperly narrow and erroneous based upon the evidence of misconduct and undue delay presented.

2. THE IMPROPER ADMISSION OF AN EXTRAORDINARY RANGE OF ALLEGATIONS OF UNCHARGED MISCONDUCT OF WHICH STEIN HAD BEEN PREVIOUSLY ACQUITTED VIOLATED THE PRINCIPLES OF COLLATERAL ESTOPPEL AND FUNDAMENTAL FAIRNESS.

a. The State incorrectly claims the prior jury did not acquit Stein of being an accomplice to Lund's murder. The prosecution asserts that since no special verdict form was used in Stein's earlier trial, the jury's basis for acquitting Stein cannot be known, and thus it cannot be said that the jury necessarily decided Stein was not involved in Thelma Lund's murder. Resp. Brf. at 32. But by acquitting Stein of three counts alleging his involvement in Lund's murder, the jury necessarily decided the State did not prove his involvement in those crimes.

In the 1989 trial, Stein was charged with conspiracy to commit first degree murder; first degree murder as an accomplice; and aggravated first degree murder based on aggravating factors of solicitation and murder committed in the course of a burglary. State v. Stein, 94 Wn.App. 616, 619, 972 P.2d 505 (1999) (partially

published), aff'd, 144 Wn.2d 236, 27 P.3d 184 (2001). The trial court's instructions permitted the jury to convict Stein as a conspirator even if he did not know of the crimes perpetrated by other conspirators. 144 Wn.2d at 245. Stein was acquitted of all charges involving Lund.

The State now claims that it cannot say whether Stein was acquitted as a conspirator or as an accomplice. Resp. Brf. at 31. But the jury was offered both of these choices and rejected them. Thus, the State's description of the unsettled nature of the jury's verdict in the prior case is simply wrong.

The State further contends that the State was not required to prove Stein was guilty of Lund's murder in order for the jury to convict Stein of attempting to murder Hall, citing State v. Eggleston, 129 Wn.App. 418, 118 P.3d 959 (2005).

In Eggleston, a prior jury found Eggleston not guilty of intentional murder. This first jury had also answered a special verdict form that it was not supposed to answer under the instructions it was given, and in that verdict form stated the State did not prove Eggleston knew the man he shot was a police officer. 129 Wn.App. at 431. At the second trial, the defense wanted to bar

the State from introducing evidence that the defendant knew the man he killed was a police officer.

The Eggleston Court found that collateral estoppel only applies where the issue was necessarily decided by the earlier jury. Id. at 434 n.12. Whether Eggleston knew the victim was a police officer was not an element of the charge of which he was acquitted, and since the jury's response to the special verdict form was "gratuitous," it was not a decision on an ultimate fact. Id. at 433-34.

In the case at bar, a jury unambiguously and necessarily decided Stein was not involved in Lund's murder as a conspirator or as an accomplice. Stein, 144 Wn.2d at 238, 241. Yet in the 2004 trial, the prosecution relied on allegations Stein knew about, solicited, and paid or promised to pay the perpetrators of Lund's death. The State theorized that these acts were part of a single scheme, involving the same parties and same intents. Since the 1989 jury found Stein not guilty knowingly participating in Lund's death, it necessarily decided this issue. For these reasons as well as the reasons detailed in Appellant's Opening Brief, the court erroneously admitted evidence accusing Stein of involvement in Lund's murder.

b. Principles of fundamental fairness should have barred the introduction of extensive evidence of Lund's murder in light of Stein's acquittal. The requirement of fundamental fairness further restricts the prosecution from relying on evidence of which a person has been acquitted as a basis for convicting him or her of another charge. United States v. Dowling, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). In Dowling, the prosecution used evidence the defendant had previously entered a person's house carrying a small handgun to show he was the person who committed another crime with a similar handgun, even though the defendant had been acquitted of the burglary charged in the earlier crime. Although the trial court admitted evidence of the acts alleged despite the acquittal, the court told the jurors immediately after the witness testified and during final jury instructions that Dowling, "had been acquitted of robbing Henry [the complainant in the burglary incident], and emphasized the limited purpose for which Henry's testimony was being offered." Id. at 346.

Dowling demonstrates the necessity of analyzing the fundamental fairness of admitted criminal allegations when a person has been acquitted. The evidence admitted in the case at

bar was not the somewhat prejudicial accusation that the defendant knew the person he shot was a police officer, as in Eggleston, but instead involved an entirely separate and brutal murder of a sympathetic and helpless elderly lady.

c. The pre-trial limiting instruction does not cure the error. The court gave the jury an instruction before the trial began, stating:

During the course of this trial, testimony and/or evidence may be presented referring to previous trials or proceedings in this matter. You are not to speculate as to or concern yourselves with the outcome of any prior proceedings related to this Defendant.

5/25/04RP 28.<sup>1</sup> When discussing this limiting instruction before trial, the court promised to repeat this warning at the close of the case as the court believed the jury would need to be reminded that is may not speculate about other proceedings. 5/17/04RP 12 (“they need to, after three weeks, be reminded they’re not to speculate as to the outcome of any other proceedings.”). Yet the court did not repeat this instruction despite professing the importance of doing so. 6/10/05RP 31-45.

Moreover, this instruction in no way obviates the plain prejudice of presenting serious and inflammatory allegations of criminal conduct to the jury absent any indication Stein was previously acquitted of those offenses. See Dowling, 493 U.S. at 346 (court instructs jury defendant was previously acquitted and evidence of other offense offered for a specific limited purpose).

The State may allege Stein acceded to the admission of this testimony by agreeing that caselaw did not permit discussion of an acquittal to the extent it causes improper jury speculation.

5/17/04RP 11.<sup>2</sup> However, this remark was made after the court ruled the Lund evidence admissible and at a time when counsel acknowledged that the court's ruling would not be altered.

5/17/04RP 12. The defense in no way agreed Stein was not impermissibly prejudiced by the admission of this evidence; it

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<sup>1</sup> Based on the State's motion to supplement the record, Mr. Stein provided additional reports of proceedings from May 17, May 24, May 25, and June 10, 2004, which will be referred to by date of proceeding.

<sup>2</sup> Of course, the prosecution repeatedly and strenuously argued that no mention of the acquittal could be made even though it planned on introducing the evidence underlying the acquitted charges as ER 404(b). See e.g., 14RP 2269; 5/17/04RP 8. The defense objected to the ER 404(b) rationale as well as to the bar in mentioning the acquittal but the court overruled these objections although it suggested the possibility of offering evidence of the acquittal as well as the conviction in the RICO matter. 14RP 2271, 2280, 2291.

merely could not think of a way to mitigate the prejudice. Id. at 11-12.

d. The overwhelmingly prejudicial nature of Lund's brutal death irreparably prejudiced Stein's right to a fair trial. The jury was introduced to Lund by her daughter, who described a fiercely hard working and devoted farmer with loving children. 17RP 2735-41. The jury heard awful details about her brutal death at the hands of Stein's step-son and Richard Bailey, who strangled an old lady in her home and then pretended they had robbed her. Her deliberate killing was described by one of the participants, as well as an eyewitness who discovered her missing, a forensic pathologist, a police officer, and crime scene photographs. 20RP 3419-23; 21RP 3548; 23RP 3862-65; Exs. 151-58.

The overwhelmingly prejudicial nature of this testimony cannot be underestimated. Lund was a sympathetic figure who met a brutal death. Yet the details of her decent way of living and brutal death were not material to the charges involving Hall. The court did not even remind the jury, as it had said it would do, that it could not speculate about the outcome of other proceedings. Under these circumstances, the overwhelming prejudice caused by

the substantial evidence presented alleging Stein was involved in a murder of which he had been acquitted requires reversal.

3. THE NUMEROUS EVIDENTIARY ERRORS  
REQUIRE REVERSAL INDIVIDUALLY AND WHEN  
TAKEN CUMULATIVELY

a. The court improperly admitted uncharged

allegations relating to threats against others people and places.

The court admitted evidence Stein threatened to kill Judge Lodge and solicited Bailey to blow up the Clark County courthouse. 15RP 2409-10; 23RP 3909. The prosecution mounts little defense of this highly prejudicial evidence, instead focusing its argument on the uncharged allegations regarding Lund. Its citation to the record where the trial court purportedly thoroughly balanced the probative value of this evidence against its undue prejudice relates to Lund's murder, not these other uncharged allegations. 14RP 2280; Resp. Brf. at 36. These accusations of threats to kill a judge and blow up the courthouse were not admissible to show Stein was not "inadvertently" associated with these enterprises, as the allegedly threatened acts were never carried out nor were they "inseparable" from the charged offenses. Resp. Brf. at 40, 42. These extraneous allegations were elicited to cast aspersions on Stein, to

paint a picture of him as person with a propensity for soliciting dangerous acts that would impact all members of the community. These inflammatory allegations lacked probative value, were used for the improper purpose of propensity, and were improperly admitted. See e.g., State v. Freeburg, 105 Wn.App. 492, 502, 20 P.3d 984 (2001) (improperly admitted evidence that portrays defendant as dangerous person requires reversal).

b. The court erroneously allowed Judge Lodge to testify about other court proceedings in which he was involved. The prosecution asserts Stein did not object to Judge Lodge's testimony and thus waived any objection on appeal. Resp. Brf. at 49.

The State apparently believes that no objection is raised unless it comes during the testimony, rather than before trial. Resp. Brf. at 49. However, the purpose of a motion in limine is to allow a party to avoid objecting during trial. State v. Powell. 126 Wn.2d 244, 256, 893 P.2d 695 (1995). An objection made to a court's pretrial ruling grants a party a standing objection that preserves the issue for appeal. Id.

Contrary to the State's assertion, Stein did not make a mere blanket statement without reference to Lodge or otherwise fail to inform the court of the basis of his objection. Stein directly called the court's attention to the impropriety found by this Court in permitting Judge Lodge's testimony during the first trial and the legal requirement that such testimony be demonstrably necessary, where no other means for offering such testimony existed. 15RP 2438.

Consequently, Stein anticipated and appropriately objected to Judge Lodge's testimony, the trial court warned the prosecution about the risks of using Judge Lodge as a witness, and the State still insisted upon calling Judge Lodge to testify, eliciting improper testimony as detailed in Appellant's Opening Brief, at 42-46. Stein properly objected and the court ruled on this objection without requiring further exceptions. Powell, 126 Wn.2d at 256.

c. The co-conspirators' statements before the conspiracy existed are inadmissible. The prosecution ignores the substance of Stein's assignment of error to the co-conspirator's statements. Resp. Brf. at 50-51. While the court did indeed find that a conspiracy existed, it did not specify when such a conspiracy

began. The prosecution took advantage of this lapse in specificity, introducing hearsay evidence under the guise of co-conspirators' statements when there was no evidence any conspiracy existed at that time. App. Brf. at 48-49.

A conspirator's statements made before the conspiracy do not fall within the co-conspirator hearsay exception. United States v. Leroux, 738 F.2d 943, 949 (8<sup>th</sup> Cir. 1984). The prosecution must offer independent evidence establishing the existence of the conspiracy. Id. The evidence did not establish an illegal plan existed in the early 1980s beyond Michael Norberg's personal ramblings, as Ed Denny, Robert Lemire, and Kevin Arbour testified they either ignored Norberg's talk about wanting to someone killed or told him they would not help him. 21RP 3672, 3675; 22RP 3718, 3724-25, 3728, 3750-51, 3757. There was no evidence establishing a conspiracy the time of the hearsay statements describing Norberg's solicitations in the early 1980s and these statements were improperly admitted. See Leroux, 738 F.2d at 949.

d. The prosecution misrepresents the harmless error test. Undoubtedly in an effort to minimize the relief required from

the numerous errors committed by the trial court as discussed herein and in Appellant's Opening Brief, the prosecution weighs each individual error against the trial testimony. However, these errors must be viewed cumulatively. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). There is a substantial likelihood that the court's series of errors, when taken together, affected the jurors' verdict. The evidence against Stein was minimal at best, he had little if any contact with the admitted desperate drug addicts and murderers who described conversations which they claimed to have remembered precisely despite heavy narcotic use and lengthy records of violating the criminal laws. The evidentiary errors when viewed individually and taken together cannot be viewed as harmless.

4. THE COURT IMPROPERLY FAILED TO CLARIFY THE STATE'S BURDEN OF PROOF IN ANSWERING THE JURY'S INQUIRY.

The prosecution claims the trial court has discretion whether to give further instructions to the deliberating jury in response to a jury inquiry. Resp. Brf. at 59. While that principle may be true, the court "has the responsibility to eliminate confusion when a jury asks

for clarification of a particular issue.” United States v. Southwell, 432 F.3d 1050, 1053 (9<sup>th</sup> Cir. 2005).

In the case at bar, the jury demonstrated confusion over the burden of proof in general, referring to it as “preponderance of the evidence,” and the amount of evidence required to acquit Stein. Rather than reinforcing the high burden of proof, the court answered only one aspect of the jury’s confusion, informing the jury that “preponderance of the evidence is not the applicable burden of proof in a criminal trial.” CP 1355.

Yet the court did not address the remainder of the jury’s confusion, whether, “a single piece of evidence in favor of conviction take[s] precedence over evidence in favor of acquittal?” Id.

The court referred the jury to instructions it had already given them. But the court did not make clear to the jury that no special quantum of evidence was required to find Stein not guilty. The jury had formed this misimpression by reading the court’s definitions. Since those instructions had already misled the jury, the court was obligated to clarify the prosecution’s burden of proof in clearer terms and to inform the jury that no amount of evidence

was necessary for an acquittal. By failing to clarify the ambiguity perceived by the jury in the court's instructions, the court abused its discretion and failed in its obligation to ensure the jury correctly understands the applicable law. Southwell, 432 F.3d at 1053.

5. THE FACTUAL DETERMINATION UNDERLYING SEPARATE AND DISTINCT CRIMINAL CONDUCT REQUIRES A JURY FINDING.

Stein received an enhanced sentence based upon the trial court's factual determination that the three offenses met the criteria of "separate and distinct" serious violent offenses as defined in RCW 9.94A.030. See RCW 9.94A.589(1)(b) (requiring consecutive sentences for "separate and distinct" criminal conduct). In State v. Cubias, 155 Wn.2d 549, 120 P.3d 129 (2005), the court rejected an argument that the Sixth Amendment rights as explained in Apprendi and its progeny -- that the right to a jury determination of any fact which increases punishment beyond the presumptive range requires a jury finding and proof beyond a reasonable doubt -- applies to consecutive sentences imposed for "separate and distinct" serious violent felonies.

Stein asks this Court to reconsider the underlying reasoning of *Cubias* and determine whether Stein's Sixth Amendment right to a jury trial was violated by the sentence imposed in the case at bar.

As summarized in *Ring v. Arizona*, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002):

if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.

*Ring* is predicated upon the oft-repeated refrain from *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added).

This principle was further refined in *Blakely*:

the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

124 S.Ct. at 2537 (emphasis in original; citing *Ring*, 536 U.S. at 602).

Washington presumes sentences for current offenses will be imposed concurrently, with limited exceptions that do not apply to the instant case. RCW 9.94A.589(1)(a). Aside from the specific exceptions provided for in the sentencing scheme, the Legislature grants a court has authority to impose consecutive sentences only where the sentencing court finds aggravating factors that constitute substantial and compelling reasons to justify an exceptional sentence. Former RCW 9.94A.535 (2003);<sup>3</sup> see also State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986) (sentencing authority derives strictly from statute); State v. Hughes, 154 Wn.2d 118, 126, 110 P.2d 192 (2005).

In Cubias, the court concluded Apprendi and Blakely did not intend to include facts underlying consecutive sentences as those which must be found by a jury and proven beyond a reasonable doubt under the Sixth Amendment. 155 Wn.2d at 553-55. This analysis not only misconstrues but subverts those precedents.

Cubias ignores the critical concern first expressed in Apprendi:

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<sup>3</sup> RCW 9.94A.535 was amended by Laws of 2005, ch. 68, section 3.

Despite what appears to us the clear “elemental” nature of the factor here, the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?

Apprendi, 530 U.S. at 494 (2000) (emphasis added). The Apprendi

Court, citing principles more than 100 years old, explained:

“Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. . . . If, then, “upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only.” Id. at 188.

Apprendi, 530 U.S. at 480-81(internal citations omitted).

Consequently, when the “particular circumstances” are not proven, the defendant must be punished for the lesser degree of punishment permitted by the jury’s findings, i.e., concurrent sentencing. Id.

Cubias cited a portion of the Apprendi decision that noted the possibility of imposing consecutive sentences was irrelevant to the ultimate decision. Cubias, 155 Wn.2d at 554 (quoting Apprendi,

530 U.S. at 474). In Apprendi, the question raised was whether the judge exceeded the statutory maximum punishment permitted by the jury's verdict for a single count. 530 U.S. at 474. The question of consecutive sentences was never presented to the Apprendi Court and thus had no bearing on the ultimate decision, hence the Court's note that the potential for consecutive sentences was simply irrelevant to the decision. Id.

Cubias rests its analysis on the notion that it would be improper to "extend Apprendi's holding beyond the narrow grounds upon which it rested." Cubias, 155 Wn.2d at 554. Stein respectfully submits that such an interpretation of Apprendi is fundamentally incorrect. The principles of Apprendi have far-reaching application. See Ring, supra; Blakely, supra; United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, 642 (2005). The court's claim that Apprendi offers no authority beyond the particular narrow facts of that case is simply untrue.

Cubias similarly attempted to restrict Blakely to the narrow issue of whether a court may increase a sentence for a single count, relying on the fact that the Blakely Court did not take issue with the concurrent sentence Blakely received for an assault conviction.

155 Wn.2d at 554. Yet the concurrent assault conviction not part of the appeal in Blakely for the precise reason that the court lacked authority to enter the sentence in the case at bar – the concurrent assault sentence did not involve the imposition of an exceptional sentence based on additional factual findings.

Apprendi and later decisions by the Supreme Court protect the accused's right to jury trial and due process of law. Where punishment exceeds that otherwise authorized by the jury's verdict, the defendant's constitutional rights are violated. Because the SRA predicates the imposition of additional punishment, to wit, consecutive sentences, upon discrete factual findings, where those findings are made by a judge by a preponderance of the evidence, the accused's right to jury trial and due process of law are violated. Apprendi, 530 U.S. at 490; Blakely, 124 S.Ct. at 2537; Ring, 536 U.S. at 602.

The Cubias majority enumerates multiple cases from other jurisdictions to support its conclusion that Apprendi, et al., are inapplicable to consecutive sentences. 155 Wn.2d at 555-56. Yet as Justice Madsen points out in the concurrence/dissent, the majority does not examine the sentencing schemes from those

other jurisdictions, many of which are not like Washington and do not mandate concurrent sentences unless there are additional factual findings. 155 Wn.2d at 561; see e.g., Smylie v. Indiana, 823 N.E.2d 679, 686 (2005) (broad judicial discretion to impose consecutive sentences). Several of the decisions relied upon by this Court are based on sentencing schemes which provide the sentencing court full discretion to impose consecutive or concurrent sentences.<sup>4</sup>

In Washington, it is only where particular factual findings are made that sentences may be imposed consecutively. RCW 9.94A.589 (1)(a). The principles underlying the proof beyond a reasonable doubt and jury trial provisions in the Constitution apply equally to consecutive sentence cases as single offense cases. The protections extend not only to procedures that determine a defendant's guilt or innocence, but also to those that merely determine the length of sentence. Apprendi, 530 U.S. at 484.

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<sup>4</sup> See State v. Bramlett, 41 P.3d 796, 797 (Kan. 2002) (sentencing court discretion for concurrent or consecutive); State v. Senske, 692 N.W.2d 743 (Minn. Ct. App. 2005) (same); State v. Wagener, 752 N.E.2d 430 (Ill. 2001) (court's discretion to decide if nature of offense and offender's history merits consecutive sentence); State v. Jacobs, 644 N.W.2d 695 (Iowa 2001) (court may impose consecutive sentences); Cowens v. State, 817 N.E.2d 255 (Ind. Ct. App. 2004)(same).

Since the court imposed consecutive sentences only based upon its additional factual findings, the sentence violates the Sixth Amendment.

6. THE COURT VINDICTIVELY INCREASED STEIN'S SENTENCE AFTER A SUCCESSFUL APPEAL.

The prosecution asserts the sentence could not have been vindictive as it was not as long as the prosecution requested after both of Stein's prior trials. Resp. Brf. at 64. The fact that the court could have imposed an even harsher sentence does not answer the question of whether the court acted vindictively in increasing Stein's sentence by 120 months, or 10 years, from that which was imposed after the first trial.

While it is true that different judges imposed sentence on Stein after the first and second trial, there is no good reason for the second trial judge to have so harshly inflated Stein's sentence. Fewer witnesses testified at the second trial, and those who did cast less blame on Stein than in the first trial. While the deeds done by Bailey, who could not even remember the name of the woman in whose murder he aided, and Michael Norberg, an apparent rampant drug addict and serial thief, appear both egregious and shocking, there was no evidence Stein knew of or

participated in their numerous bad acts. Stein had been acquitted of killing Lund, he had to wait over 10 years to even have his appeal resolved after the government improperly denied him his right to appeal, and he suffered numerous health problems throughout the course of the case.

The court did not acknowledge the much harsher sentence it imposed. The court offered reasons for his sentence, castigating Stein for lacking remorse and seeming out of touch with the harm he caused, it did not explain why these same actions merited ten additional years of imprisonment after Stein's successful appeal. Imposing a 55-year sentence on a 66-year old man who suffers from serious health problems, when a prior trial judge had heard more inculpatory evidence and yet had imposed a 45-year term, may be presumed vindictive. Alabama v. Smith, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

**7. THE STATE PROPERLY CONCEDES AND CORRECTS THE SENTENCING ERROR.**

Without notice to appellate counsel, the Department of Corrections asked the court to correct the sentencing error in Stein's Judgment and Sentence, which erroneously added 36 months to the total term of imprisonment. The trial court has now

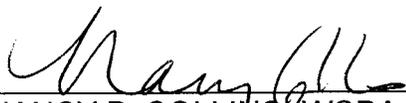
corrected this error and entered an order revising the Judgment and Sentence to state that Stein was sentenced to 660 months of incarceration. Resp. Brf., App. B.

B. CONCLUSION.

For the foregoing reasons and those presented in Appellant's Opening Brief, Mr. Stein asks this Court to reverse his convictions and sentence.

DATED this 3<sup>rd</sup> day of April 2006.

Respectfully submitted,

  
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