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STATE OF WASHINGTON  
BY 

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

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

SEAN SCHWAB,

Petitioner.

NO. 34093-3

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

A. ISSUES PERTAINING TO DEFENDANT'S PERSONAL RESTRAINT  
PETITION:

1. Should this court dismiss the petition as time-barred under RCW 10.73.090?
2. Should this court dismiss the petition because petitioner failed to provide the verbatim report of proceedings to support his claim that his plea was not knowing and voluntary?
3. Should this court dismiss the petition because petitioner has failed to establish that any error occurred below?

1 B. STATUS OF PETITIONER:

2 Petitioner, SEAN SCHWAB, is restrained pursuant to Findings of Insanity,  
3 Judgment of Acquittal, and Order of Conditional Release entered in Pierce County  
4 Superior Court on May 4, 2004, cause number 03-1-00787-2. Appendix A (Findings of  
5 Insanity, Judgment of Acquittal, and Order of Conditional Release). Petitioner was  
6 charged with first degree assault, domestic violence, and a deadly weapon enhancement  
7 for an incident that took place on February 14, 2003. Id. at 2. The victim of the stabbing,  
8 petitioner's mother, suffered a laceration to her cheek, tongue, and neck. Id.  
9

10 Petitioner had three separate mental health evaluations that were considered by the  
11 trial court. Id. at 1. Petitioner was diagnosed with a major mental illness, Schizophrenia,  
12 and at the time of the offense against his mother, petitioner was unable to perceive the  
13 nature and quality of the act with which he was charged. Id. at 2. On May 4, 2004,  
14 petitioner entered a written plea of not guilty by reason of insanity, acknowledging that at  
15 the time of the offense he was legally insane, but that a subsequent commitment at  
16 Western State Hospital rendered him competent to stand trial. Appendix B. On the same  
17 day, petitioner's attorney filed a motion and affidavit for acquittal by reason of insanity.  
18 Appendix C.

19 In its written findings of fact, the trial court found that petitioner understood the  
20 nature of the proceedings against him, that he was able to assist in his own defense, and  
21 that he understood the length of his commitment. Appendix A at 3.  
22

23 The trial court entered a judgment of acquittal by reason of insanity. Id. The  
24 court ordered that petitioner be committed to the custody of the Department of Social and  
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1 Health Services (DSHS), who was ordered to refrain from discharging petitioner without  
2 further order of the court. Id. at 3-4.

3 Petitioner did not file a direct appeal.

4  
5 C. ARGUMENT:

6 1. PETITIONER'S CLAIM SHOULD BE DISMISSED BECAUSE  
7 IT IS TIME-BARRED.

8 RCW 10.73.090(1) provides that "[n]o petition or motion for collateral attack on a  
9 judgment and sentence in a criminal case may be filed more than one year after the  
10 judgment becomes final if the judgment and sentence is valid on its face and was rendered  
11 by a court of competent jurisdiction." RCW 10.73.090(1). When there has been no  
12 appeal, judgment becomes final on "the date it is filed with the clerk of the court." RCW  
13 10.73.090(3)(a). Petitioner's case became final on May 4, 2005. This petition was filed  
14 on September 28, 2005, well outside the one-year time limit.

15 In addition to the exceptions listed within the statute, there are other  
16 specific exceptions to the one-year time limit for collateral attack:

17 The time limit specified in RCW 10.73.090 does not apply to a petition or motion  
18 that is based solely on one or more of the following grounds:

19 (1) Newly discovered evidence, if the defendant acted with reasonable  
20 diligence in discovering the evidence and filing the petition or motion;

21 (2) The statute that the defendant was convicted of violating was  
22 unconstitutional on its face or as applied to the defendant's conduct;

23 (3) The conviction was barred by double jeopardy under Amendment V of  
24 the United States Constitution or Article I, section 9 of the State Constitution;

25 (4) The defendant pled not guilty and the evidence introduced at trial was  
insufficient to support the conviction;

1 (5) The sentence imposed was in excess of the court's jurisdiction; or

2 (6) There has been a significant change in the law, whether substantive or  
3 procedural, which is material to the conviction, sentence, or other order entered in  
4 a criminal or civil proceeding instituted by the state or local government, and  
5 either the legislature has expressly provided that the change in the law is to be  
6 applied retroactively, or a court, in interpreting a change in the law that lacks  
7 express legislative intent regarding retroactive application, determines that  
8 sufficient reasons exist to require retroactive application of the changed legal  
9 standard.

10 RCW 10.73.100.

11 In the instant case, petitioner's judgment became final on May 4, 2004, the day the  
12 judgment of acquittal was filed with the clerk. RCW 10.73.090(3)(a). A timely petition  
13 had to be filed by May 4, 2005. Petitioner filed this collateral attack on September 28,  
14 2005, over four months too late.

15 The petitioner bears the burden of proving that his petition falls within an  
16 exception to the one-year time limit. Shumway v. Payne, 136 Wn.2d 383, 399-400, 964  
17 P.2d 349 (1998); see RCW 10.73.100 (listing six exceptions). To meet that burden of  
18 proof, the petitioner must state the applicable exception within the petition. In re  
19 Stoudmire, 145 Wn.2d 258, 36 P.2d 1005 (2001)("Stoudmire II").

20 Here, petitioner was not provided written notice advising him of the time bar on  
21 collateral attack pursuant to RCW 10.73.110. Petitioner cannot demonstrate that he was  
22 not verbally advised of the time bar by the court as he has failed to provide a transcript of  
23 the proceedings. In any event, petitioner demonstrates that he had actual notice of the  
24 time limit in his PRP. Petitioner states, "I want a change of plea bargain and have **one**  
25 **year** to change my plea bargain **that's the law and what I was told.**" PRP at 2. This  
demonstrates that defendant was aware of the one year time bar. This petition should be  
dismissed as time-barred under RCW 10.73.090(1).

1  
2 2. THE PETITION MUST BE DISMISSED BECAUSE  
3 PETITIONER HAS FAILED TO PROVIDED A TRANSCRIPT  
4 FOR THE PLEA AS REQUIRED BY WILLIAMS AND  
CONNICK.

5 A petition must include a statement of the facts upon which the claim of unlawful  
6 restraint is based **and** the evidence available to support the factual allegations. RAP  
7 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the  
8 petitioner fails to provide sufficient evidence to support his challenge, the petition must  
9 be dismissed. Williams, at 364. Affidavits, transcripts and clerk's papers are readily  
10 available forms of evidence that a petitioner may employ to support his claims. Id. at  
11 364-365. A reference hearing is not a substitute for the petitioner's failure to provide  
12 evidence to support his claims. As the Supreme Court stated, "the purpose of a reference  
13 hearing is to resolve genuine factual disputes, not to determine whether the petitioner  
14 actually has evidence to support his allegations." In re Rice, 118 Wn.2d 876, 886, 828  
15 P.2d 1086 (1992). "Bald assertions and conclusory allegations will not support the  
16 holding of a hearing," but the dismissal of the petition. Rice, at 886, Williams, at 364-  
17 365.

18 The evidence presented to an appellate court to support a claim in a personal  
19 restraint petition must also be in proper form. On this subject, the Washington Supreme  
20 Court has stated:

21 It is beyond question that all parties appearing before the courts of this  
22 State are required to follow the statutes and rules relating to authentication  
of documents. This court will in future cases accept no less.

23 In re Connick, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). That rule applies to pro se  
24 defendants as well:

1 Although functioning pro se through most of these proceedings, Petitioner  
2 – not a member of the bar – is nevertheless held to the same responsibility  
as a lawyer and is required to follow applicable statutes and rules.

3 Connick, 144 Wn.2d at 455. If the petitioner fails to provide sufficient competent  
4 evidence to support his challenge, the petition must be dismissed. Williams at 364.

5 Here, petitioner alleges that he did not understand the plea and was “conned” into  
6 doing it. Personal Restraint Petition (PRP) 4 and 6.

7 As noted above, bald assertions as to the facts are insufficient. Under the rule of  
8 Williams, this court should dismiss the petition for a lack of evidence.

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10 3. THIS COURT SHOULD DISMISS THE PETITION BECAUSE  
11 PETITIONER HAS FAILED TO ESTABLISH THAT ANY  
12 ERROR OCCURRED BELOW.

13 Reviewing courts have three options in evaluating personal restraint petitions:

- 14 1. If a petitioner fails to meet the threshold burden of showing actual  
15 prejudice arising from constitutional error or a fundamental defect  
resulting in a miscarriage of justice, the petition must be  
dismissed;
- 16 2. If a petitioner makes at least a prima facie showing of actual  
17 prejudice, but the merits of the contentions cannot be determined  
18 solely on the record, the court should remand the petition for a full  
hearing on the merits or for a reference hearing pursuant to RAP  
16.11(a) and RAP 16.12;
- 19 3. If the court is convinced a petitioner has proven actual prejudicial  
20 error, the court should grant the personal restraint petition without  
21 remanding the cause for further hearing.

22 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

23 Petitioner claims that he “did not no [sic] what he was doing” and that “the  
24 lawyers conned me into it.” PRP 4 and 6. Essentially, he is claiming that his plea was  
25 not knowingly and voluntarily made.

1 A plea of not guilty by reason of insanity is valid only if voluntarily given. State  
2 v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983). The plea is not voluntary if the person  
3 who made it was unaware of the consequences. State v. Brasel, 28 Wn. App. 303, 313,  
4 623 P.2d 696 (1981). An involuntary plea may be withdrawn. Jones, 99 Wn.2d at 747.

5 Here, the document petitioner provides in support of his claim, findings of  
6 insanity, supports *dismissal* of the petition. Appendix A. Petitioner claims, "I didn't no  
7 [sic] what I was doing and the lawyers conned me." PRP at 6. However, the trial court's  
8 findings of fact clearly state that petitioner understood the nature of the proceedings  
9 against him, the elements of the crime with which he was charged, and that he waived his  
10 right to a trial. Id. at 3. The petition must be dismissed.

11  
12 D. CONCLUSION

13 This court should dismiss the petition as time barred, factually unsupported, and  
14 because defendant has failed to demonstrate that he is entitled to relief.

15 DATED: January 10, 2006.

16 GERALD A. HORNE  
17 Pierce County  
18 Prosecuting Attorney

19 P. GRACE KINGMAN  
20 Deputy Prosecuting Attorney  
21 WSB #16717

22 Certificate of Service:

23 The undersigned certifies that on this day she delivered by U.S. mail or  
24 ABC-LMI delivery to the attorney of record for the appellant and appellant  
25 c/o his or her attorney or to the attorney of record for the respondent and  
respondent c/o his or her attorney true and correct copies of the document to  
which this certificate is attached. This statement is certified to be true and  
correct under penalty of perjury of the laws of the State of Washington. Signed  
at Tacoma, Washington, on the date below.

25 1/10/06 [Signature]  
Date Signature

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BY [Signature]

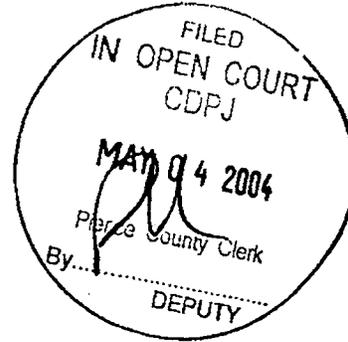
## **APPENDIX “A”**

*Findings of Insanity, Judgment of Acquittal and Order of Conditional Release*

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03-1-00787-2 20944080 JDARI 05-05-04



MAY 05 2004

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-00787-2

vs.

SEAN PAUL SCHWAB,

FINDINGS OF INSANITY, JUDGMENT OF ACQUITTAL, AND ORDER OF CONDITIONAL RELEASE

Defendant.

THIS MATTER having come before the court on 4th day of May, 2004, for hearing on the defendant's motion for Judgment of Acquittal by Reason of Insanity pursuant to RCW 10.77.080, the defendant being present with his attorney, MICHAEL R. KAWAMURA, the State appearing by KEVIN A. MCCANN, Deputy Prosecuting Attorney. Upon stipulation of the parties, the court considered the following mental health evaluations of the defendant:

1. The March 3, 2003 evaluation by Dr. Margaret D. Dean, M.D. and Linda J. Thomas, Psy.D.
2. The June 18, 2003 evaluation by Dr. Brian Waiblinger, M.D. and Linda J. Thomas, Psy.D.
3. The November 13, 2003 evaluation by Dr. C. Tartalia, M.D. and Linda J. Thomas, Psy.D.

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The court also having reviewed the records and files herein, and being in this matter fully advised, enters the following findings of facts by a preponderance of the evidence and conclusions of law regarding the defendant's motion:

FINDINGS OF FACT

I.

1. The defendant was charged by Information with the crime of Assault in the First Degree-Domestic Violence, with a deadly weapon sentence enhancement. The incident took place in Tacoma Washington on or about the 14<sup>th</sup> day of February 2003. The victim was the defendant's mother, Julie Scomadeau.

2. The defendant committed the crime as follows:

Victim Julie Scomadeau is the mother of the defendant. On February 14, 2003, Julie Scomadeau and the defendant were walking on 6<sup>th</sup> Avenue, near Proctor Street, in Tacoma Washington. The defendant stated that he needed some money and Julie told him that she would give him \$20.00, but he would be required to pay her back.

Suddenly, the defendant brandished a serrated knife with a 4 inch blade and came at Julie in a stabbing motion. Julie fell into the street and the defendant continued to attack her. The responding officer observed a 6 inch laceration to her left cheek, a 1 inch laceration to her tongue and a 1 inch laceration to the right side of her neck.

Several civilian witnesses stopped their cars. The defendant fled and was chased by several civilians. A group of civilians detained the defendant until the police arrived. A witness got the knife away from the defendant and gave it to the officers.

The defendant stated that he was stabbing his mother because she was being raped by a guy named "Tom."

3. The defendant has been diagnosed with a major illness, Schizophrenia, and that at the time of the commission of the crime, as a result of mental disease or defect, his mind was affected to such an extent that he was unable to perceive the nature and quality of the act with which he is charged.

03-1-00787-2

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4. The Defendant presently understands the nature of the proceedings against him and is able to assist his attorney in his own defense. The defendant also understands the elements of the crime with which he is charged. He has waived his right to a trial and is aware and understands that if acquitted he could be committed to a state hospital for the criminally insane for a term up to the maximum possible penal sentence for the offense charged. The maximum possible penal sentence for the crime of Assault in the First Degree is life imprisonment.

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5. The defendant is a substantial danger to himself or other persons unless kept under further control by the court or other persons or institution.

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6. The defendant presents a substantial likelihood of committing felonious acts jeopardizing public safety or security unless kept under further control by the court or other persons or institution.

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It is not in the best interest of the defendant and others that the defendant is placed in the treatment that is less restrictive than detention in a state mental hospital.

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JUDGMENT OF ACQUITTAL

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In view of the Foregoing findings of fact the court hereby enters a Judgment of Acquittal of SEAN PAUL SCHWAB by reason of insanity as defined by RCW 9A.12.010 is therefore entered.

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ORDER OF CONDITIONAL RELEASE

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It is Now, Therefore,

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ORDERED that the defendant, SEAN PAUL SCHWAB, be committed to the custody of the Secretary of the Department of Social and Health Services, under the provisions of RCW 10.77.120. The Secretary shall forthwith provide adequate care and treatment at such facility as

03-1-00787-2

he may direct. The Secretary shall provide reports of periodic examination as required under RCW 10.77.40 and shall not discharge the defendant except upon further order of the court.

DONE IN OPEN COURT this 4<sup>th</sup> day of May, 2004.

*Stephanie Alford*  
JUDGE

Presented by:

*[Signature]*  
KEVIN A. MCCANN  
Deputy Prosecuting Attorney  
WSB#25182

Approved as to Form:

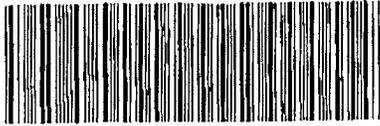
*[Signature]*  
MICHAEL R. KAWAMURA  
Attorney for Defendant  
WSB#17202

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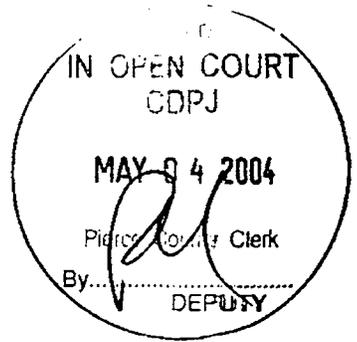
## **APPENDIX "B"**

*Plea of Not Guilty by Reason of Insanity*



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, )  
Plaintiff, )  
vs. )  
SEAN SCHWAB, )  
Defendant. )

NO. 03-1-00787-2  
PLEA OF NOT GUILTY  
BY REASON OF INSANITY

MAY 05 2004

I, SEAN SCHWAB, hereby enter a written plea of NOT GUILTY BY REASON OF INSANITY to the offense of Assault in the First Degree, *firearm enhancement*, as charged in the information.

It is my belief that at the time of committing these offenses I was legally insane.

It is further my belief that since being committed to Western State Hospital subsequent to being arrested on these charges, I am now competent to stand trial and to appreciate the quality of my acts although I am still suffering from Schizophrenia.

DATED this 4 day of MAY, 2004.

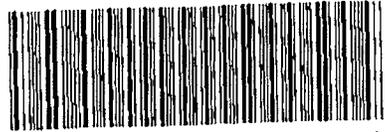
*Sean Schwab*  
SEAN SCHWAB, Defendant

*Michael R. Kawamura*  
MICHAEL R. KAWAMURA, WSBA #17202  
Attorney for Defendant

## **APPENDIX “C”**

*Motion and Affidavit for Acquittal by Reason of Insanity*

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03-1-00787-2 20944093 MT 05-05-04



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SEAN SCHWAB, )  
 )  
 Defendant. )

NO. 03-1-00787-2

MAY 05 2004

MOTION AND AFFIDAVIT FOR ACQUITTAL BY REASON OF INSANITY

COMES NOW the defendant, SEAN SCHWAB, by and through his attorney, Michael R. Kawamura, and moves this court for the acquittal by reason of insanity.

This motion is based upon RCW 10.77.080,110, and upon the subjoined affidavit of counsel.

DATED this 4 day of May, 2004.

MICHAEL R. KAWAMURA, WSBA #17202  
 Attorney for Defendant

STATE OF WASHINGTON )  
 ) ss  
 County of Pierce )

MICHAEL R. KAWAMURA, being first duly sworn, on oath, deposes and says:

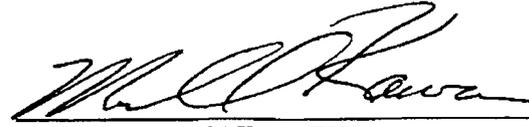
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I am the attorney appointed to represent the defendant in this action.

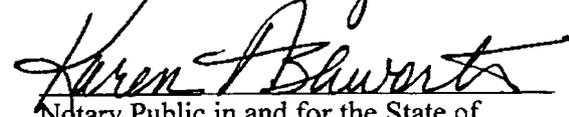
A written plea of not guilty by reason of insanity has been filed in this cause.

The defendant has been examined by a sanity commission at Western State Hospital and have declared a belief that the defendant was legally insane at the time he committed the act.

Further affiant sayeth naught.

  
MICHAEL R. KAWAMURA

SUBSCRIBED and SWORN to before me this 4<sup>th</sup> day of May, 2004.

  
Notary Public in and for the State of  
Washington, residing at Tacoma  
My commission expires: 11/3/06